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EPA EXPANDS ITS ENFORCEMENT DISCRETION REGARDING TENANT LIABILITY FOR PRE-EXISTING CONTAMINATION

Under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 USC § 9601, et seq., and corresponding state statutes, the current "owner" or "operator" of a contaminated property may be liable to the government (the EPA or the state environmental agency) for cleanup costs even if the contamination was caused by another party and occurred prior to its acquisition or operation of the property (42 USC § 9607(a)). However, a new owner may qualify for certain limitations to such liability, such as the "innocent landowner" or the "bona fide prospective purchaser" liability limitations.

To qualify for either such liability limitation, the new owner must conduct "all appropriate inquiries" ("AAI") into the environmental condition of the property before it acquires title to the property (42 U.S.C. § 9601(35)(B)). The "innocent landowner" liability limitation applies if, after conducting AAI, the new owner had no reason to know of the existing contamination (42 U.S.C. § 9601(35) and §9607(b)(3)). The "bona fide prospective purchaser" liability limitation allows a party to avoid liability for contamination that is identified during its AAI, if it conducted the AAI prior to acquiring the title and takes "reasonable steps" (as described in the statute) with respect to the contamination after acquiring the title (42 U.S.C. §§ 9601(40) and 9607(r)). To satisfy the AAI requirement, an environmental site assessment must be conducted prior to the acquisition that complies with either the standards set out in the EPA regulations (40 CFR Part 312) or the ASTM International Standard E1527-05 titled, "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process" (ASTM) (40 C.F.R. § 312.11). The standards in the EPA regulations and the ASTM standard are very similar.

The dilemma faced by a tenant, however, is that it may be liable as an "operator" for cleanup of contamination on the leased premises that was caused by others before it took possession, and it may not benefit from the "innocent landowner" and "bona fide prospective purchaser" liability limitations which, on their face, only apply to an "owner" or "purchaser," but not a tenant.

The EPA has addressed this problem, at least in part, by its adoption of a new guidance on December 5, 2012. In the guidance, the EPA states that it will exercise its enforcement discretion to also give a tenant the benefit of the "bona fide prospective purchaser" liability protection. Therefore, a tenant that conducts an environmental site assessment of the leased premises that meets the requirements of the EPA regulations or the ASTM standard, prior to taking possession of the premises, and takes "reasonable steps" with respect to any contamination identified in the assessment, should be protected from liability to the government for cleanup of the existing contamination. Logically, if no contamination is identified in the assessment, the tenant should be protected from liability to the government for cleanup of any existing contamination as an "innocent tenant" (similar to an "innocent landowner"). The new guidance only applies to the EPA and is not applicable to or binding on state environmental agencies, but the state agencies may follow suit and exercise similar enforcement discretion with respect to tenants.

The new EPA guidance is titled, ["Revised Enforcement Guidance Regarding the Treatment of Tenants Under the CERCLA Bona Fide Prospective Purchaser Provision."](#)

– [Boyd A. Bryan](#)



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Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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