



Navigating the “No Affiliation” Requirement to Bona Fide Prospective Purchaser CERCLA Liability Protection

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Written by [Gary Pasheilich](#) on March 13, 2018

An important consideration for purchasers of US commercial property is establishing Bona Fide Prospective Purchaser (“BFPP”) liability protection to mitigate the risk of liability under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. § 9601 et. seq. Because the current owner of a property where a release of hazardous substances has occurred may be liable under CERCLA for the costs of responding to the release simply by virtue of having acquired title to the property (even if the owner was not aware of the release), obtaining status as a BFPP is a valuable safeguard against CERCLA liability since the protection can apply even if the purchaser had knowledge of existing contamination at the time of acquisition.

Although there are several requirements that must be met to achieve BFPP status, one of the less-discussed BFPP requirements is having “no affiliation” with a liable party.[\[1\]](#) While this may seem a fairly straightforward concept, purchasers can create unnecessary risks by failing to give this requirement due consideration.

More specifically, purchasers seeking to avail themselves of the BFPP liability protection must meet the following requirement:

NO AFFILIATION—The person is not—(i) potentially liable, or *affiliated with any other person that is potentially liable*, for response costs at a facility through— (I) any direct or indirect familial relationship; or (II) any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by the instruments by which title to the facility is conveyed or financed or by a contract for the sale of goods or services); or (ii) the result of a reorganization of a business entity that was potentially liable.

CERCLA § 101(40)(H)(emphasis added).

The multiple scenarios provided for in the requirement can apply in unique, fact-intensive ways and may focus on diverse aspects such as corporate formation and structure of the entities to a deal to transaction-based relationships established prior to a particular deal.

Caselaw construing the requirement is very limited. However, a pair of recent cases have addressed the requirement and arrived at different conclusions regarding the applicability of the BFPP liability protection based upon the non-affiliation requirement.

In *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, 791 F. Supp. 2d 431, 502 (D. S.C. 2011), the court held that a current owner of a parcel formerly containing a fertilizer plant was potentially liable as a result of its contractual relationship whereby the owner at the time of acquisition had released the potentially liable prior owners from

environmental liability for contamination at the Site. Although EPA had initiated a cleanup action, the owner attempted to persuade EPA not to take enforcement action to recover for any harm at the Site caused by the potentially liable parties from which the site was acquired. However, the court held that the owner took the risk that these parties might be liable for response costs and that the effort to discourage EPA from recovering response costs from the parties “reveals just the sort of affiliation Congress intended to discourage.”

More recently, in *SPS L.P. LLLP v. Sparrows Point, LLC*, 2017 U.S. Dist. LEXIS 144740 (D. Maryland, 9/6/2017), the Plaintiff owners of a shipyard sued the owners of a former steel mill on an adjacent property under CERCLA for recovery of costs relating to the operation and maintenance of a benzene treatment system. The system addressed contaminated groundwater that is pulled from the coke oven area of the steel mill onto the shipyard property during operation of a “graving dock” (where ships arrive in the dock area after which the river waters are pumped out, leaving the ship accessible for repairs). The purchaser of the steel mill argued that it should be afforded BFPP status. In contrast, the Plaintiffs argued that the Defendant was affiliated with liable parties “through a web of corporate partnerships” with the prior steel mill owners to “scrub the environmental liabilities from the Steel Mill Property.” The Court, however, rejected the argument despite the ownership interest of a common parent company, noting the ownership interest is limited (15% stake) and the parent’s interest was limited to certain above-grade assets.

As these cases illustrate, the inquiry can be quite fact-specific. In an attempt to provide a framework for assessing the requirement, in 2011, US EPA issued [enforcement guidance](#) regarding the non-affiliation language that outlined scenarios where EPA would consider an affiliation established or not established. In doing so, US EPA observes that the non-affiliation requirement was intended by Congress to prevent a potentially responsible party from contracting away its CERCLA liability through a transaction to a family member or related corporate entity. In accordance with that objective, US EPA identified certain specific relationships that do not appear to be disqualifying, including:

1. Relationships at Other Properties: Relationships that occur between an entity seeking BFPP with a PRP for properties other than the one impacted by the contamination or the source property.
2. Post-Acquisition Relationships: Relationships between the purchaser and a PRP that arose after the purchase and sale of the property.
3. Relationships Created During Title Transfer: Contractual or financial documents or relationships that are often executed or created at the time that title to the property is transferred.
4. Tenants Seeking to Purchase Property They Lease: Relationships established between a tenant and an owner during the leasing process.

EPA concluded that these relationships are generally not created to avoid CERCLA liability and therefore EPA generally intends not to treat them as prohibited affiliations that would prevent a purchaser from possessing BFPP liability protection. On the other hand, even with these defined categories and examples, the guidance does not come close to covering the full universe of potentially problematic relationships that may arise.

Because the burden of proof for establishing that all BFPP requirements are met is placed upon the person seeking the liability protection, it is important to understand that whether a party may successfully rely upon the BFPP liability protection is an issue that is only tested once a CERCLA claim is raised in court, which may be many years after acquiring a site. Accordingly, thoughtful consideration of the non-affiliation requirement should be considered prior to site acquisition. The engagement of competent environmental counsel as part of the real estate due diligence team can help navigate through these requirements and ensure that all BFPP requirements are sufficiently addressed or planned for in advance of the transaction, which can avoid headaches later on.

Footnotes:

[\[1\]](#) The full set of requirements for having BFPP status are: (1) The disposal of hazardous substances occurred before acquisition of the property; (2) the purchaser must have undertaken “all appropriate inquiries” into the previous ownership and uses of the property; (3) all legally required notices are provided; (4) the purchaser exercises “appropriate care” by taking reasonable steps to stop continuing releases, prevent any threatened future release, and prevent or limit exposure to any previously released hazardous substance; (5) the purchaser fully cooperates with and allows access to the site for ongoing response action by others; (6) the

purchaser complies with any land use restrictions and does not impede any institutional controls; (7) the purchaser complies with requests for information and/or subpoenas; and (8) the purchaser is not potentially liable and has *no affiliation* with any potentially liable parties. 42 U.S.C. § 9601(40).

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