



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

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OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Enforcement Discretion Guidance Regarding the Affiliation Language of CERCLA's Bona Fide Prospective Purchaser and Contiguous Property Owner Liability Protections

FROM: Elliott J. Gilberg, Director
Office of Site Remediation Enforcement

A handwritten signature in blue ink that reads "Elliott J. Gilberg".

TO: Regional Counsel, Regions I-X
Superfund National Policy Managers, Regions I-X

I. Introduction

Sections 101(40) and 107(q) of the Small Business Liability Relief and Brownfields Revitalization Act¹ (the Brownfields Amendments) provide certain parties, bona fide prospective purchasers and contiguous property owners, respectively, protection from liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, commonly referred to as "Superfund"), 42 U.S.C. §§ 9601(40), 9607(q), so long as these parties meet certain statutory requirements. One requirement is that a party who wishes to be treated as exempt from CERCLA liability cannot be "affiliated with" another party who is potentially liable under CERCLA at a facility. As discussed below, EPA recognizes the uncertainty regarding the potential liability of certain parties under CERCLA, and offers some general guidance to be considered by EPA in exercising its enforcement discretion.

This memorandum is intended to assist EPA personnel in, on a site-specific basis, exercising the Agency's enforcement discretion regarding the affiliation language. It is not a regulation and does not create new legal obligations or limit or expand obligations under any federal, state, tribal or local law. It does not create any substantive rights for any persons. In addition, this guidance does not alter EPA's policy of not providing no action assurances outside the framework of a legal settlement.

¹ Pub. L. No. 107-118 (2002).

This memorandum discusses how EPA generally intends to exercise its enforcement discretion in certain circumstances. Specifically, this memorandum focuses on parties who meet each of the requirements of the bona fide prospective purchaser or contiguous property owner provisions except for the requirement prohibiting parties from being “affiliated with any other person that is potentially liable.” EPA generally intends to apply the guidance only to the extent appropriate based on the facts. EPA recognizes that each affiliation situation is fact specific, and EPA may deviate from this guidance as necessary or appropriate based on the facts of each case. EPA may update this guidance in the future and provide additional examples discussing possible scenarios.

II. Background

A. Affiliation Language in the Bona Fide Prospective Purchaser Provision

The Brownfields Amendments established the bona fide prospective purchaser (BFPP) provision, which for the first time provided statutory protection from CERCLA liability for entities that purchase a contaminated facility after January 11, 2002 with knowledge of the contamination.² To be a BFPP, a purchaser must satisfy a number of statutory requirements, including that the purchaser not be affiliated with a person that is potentially liable at the facility.³ Specifically, a purchaser cannot be:

- (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.⁴

B. Affiliation Language in the Contiguous Property Owner Provision

In addition, the Brownfields Amendments established the Contiguous Property Owner (CPO) liability protection, which states that:

A person that owns real property that is contiguous to or otherwise similarly situated with respect to, and that is or may be contaminated by a release or threatened release of a hazardous substance from, real property that is not owned by that person shall not be considered to be an owner or operator of a vessel or facility under [§ 107(a)] solely by reason of the contamination if –

- (i) the person did not cause, contribute, or consent to the release or threatened release;

² See CERCLA §§ 101(40), 107(r).

³ For additional information on the BFPP requirements, see CERCLA § 101(40) and EPA’s *Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability (Common Elements)* (Bromm, 3/6/2003) (available at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf>) (hereinafter “Common Elements Guidance”).

⁴ CERCLA § 101(40)(H).

- (ii) the person is not –
 - (I) potentially liable, or affiliated with any other person that is potentially liable, for response costs at a facility through any direct or indirect familial relationship or any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created 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....⁵

The CPO affiliation language differs from the BFPP affiliation language in that there is no exception that excludes “relationship[s] ... created by the instruments by which title to the facility is conveyed or financed” from the types of relationships that constitute an affiliation as there is for the BFPP liability protection.⁶ Except for this difference, the affiliation language in the BFPP and CPO provisions is virtually identical.

C. Burden of Proof for Both the BFPP and CPO Liability Protections

The burden of proof for establishing all elements of the BFPP and CPO provisions, including the affiliation language, falls on the person seeking the liability protection.⁷ A person seeking protection under the BFPP and CPO provisions can assert protection from liability without EPA involvement. Ultimately, if the issue is disputed, the courts will determine whether parties in specific cases have satisfied the affiliation language in the BFPP and CPO provisions in order to protect themselves from liability.

CERCLA expressly confers upon EPA the ability to provide certain assurances to CPOs if they have met the above burden of proof.⁸ In certain circumstances, a CPO may be eligible for: (1) an assurance letter from EPA that states that EPA will not take an enforcement action against the CPO, commonly known as a “no action assurance letter” or (2) a CPO settlement that will provide the CPO protection against cost recovery or contribution action.⁹ There is no equivalent BFPP assurance provision, but there are limited circumstances when EPA may consider using site-specific tools to provide clarification on EPA’s enforcement intentions for BFPPs. These tools include comfort/status letters, BFPP-doing-work-agreements, or prospective purchaser agreements.¹⁰

⁵ CERCLA § 107(q)(1)(A).

⁶ CERCLA § 101(40)(H)(i)(II).

⁷ CERCLA §§ 101(40) & 107(q)(1)(B).

⁸ CERCLA § 107(q)(3). See also *Interim Enforcement Discretion Guidance Regarding Contiguous Property Owners*, (Bromm 1/13/04) (available at: <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/contig-prop.pdf>).

⁹ *Id.*

¹⁰ As stated in previous guidance, EPA believes that the Brownfields Amendments make PPAs from the Federal government unnecessary in most cases because CERCLA §§ 101(40) and 107(r) allow parties to purchase property with knowledge of contamination and not acquire liability under CERCLA. See *Bona Fide Prospective Purchasers and the New Amendments to CERCLA*, (Bromm 5/31/02) (available at: <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/bonf-pp-cercla-mem.pdf>). The Agency recognizes, however, that there may be some limited circumstances where EPA could serve the public interest by agreeing to provide a PPA. For example, a PPA may be appropriate for a party that does not meet the criteria in CERCLA § 101(40) because it may have an affiliation with a PRP, but it is nevertheless in the public interest for EPA to facilitate the transaction by addressing the prospective purchaser’s liability concerns (*e.g.*, through a PPA that provides a covenant not to sue and contribution protection).

III. Discussion

A. Initial Considerations

The affiliation language in both the BFPP and CPO provisions focuses on relationships between the property owner and any entities that are potentially liable under CERCLA for response costs at the facility (either the property owned by the person seeking BFPP status or the property contiguous to a source property). However, before analyzing whether there is a prohibited affiliation, EPA personnel should consider four preliminary issues.

First, the affiliation language in CERCLA §§ 101(40)(H) and 107(q)(1)(A)(ii) requires that a person seeking liability protection under the BFPP or CPO provisions not be potentially liable for response costs at a facility. Therefore, when analyzing the potential BFPP or CPO status of a person, EPA personnel should first consider whether the person is *otherwise* a Potentially Responsible Party (PRP) at the facility under CERCLA § 107(a) (*e.g.*, as an owner/operator at the time of disposal, a transporter, or an arranger for the disposal of hazardous substances). If so, the person cannot qualify as a BFPP or a CPO and an affiliation analysis would be unnecessary.

Example # 1: Company A wants to buy a contaminated property and has complied with the other requirements of the BFPP liability protection. Ten years prior, Company A had operated a refinery on the contaminated property, during which operation the property was contaminated with hazardous substances. Assuming Company A is a PRP at the property as an operator at the time of disposal, Company A would not qualify as a BFPP.

If Company A bought the property adjacent to the contaminated property on which it had previously operated a refinery, and from which the property purchased by Company A was contaminated, Company A would not qualify as a CPO assuming it is a PRP at the adjacent property.

Second, as in all cases where EPA is analyzing a person's potential BFPP or CPO status for purposes of deciding whether to exercise its enforcement authority, EPA should consider whether the entity is in fact the same entity as a PRP or is potentially liable under other principles of corporate law, such as successor liability. For example, a division of a corporation, a company that has continued in business under a changed name, or a corporate successor, such as the survivor of a statutory merger, may appear to be a different entity, but may nevertheless still be liable under principles of corporate law. After careful analysis, the relationship between the PRP and the entity in question may lead EPA to decide not to treat that entity as a BFPP or CPO. This in-depth analysis may also be applicable to questions regarding relationships between governmental and quasi-governmental entities. States and cities often create divisions that address certain aspects of governmental services, *e.g.* waste, roads, or parks. Depending on state law and how the divisions were created, they may in fact be the same entity as the state or city. In some cases, this may be readily apparent from examining the document that created the entity. Analyzing the potential BFPP or CPO status of other governmental or quasi-governmental entities may require more extensive research.

Example # 2: State A's Department of Parks wishes to acquire a contaminated property and has complied with the other requirements of the BFPP provision. State A's Department of Waste had previously operated a landfill on the property, during which time the property became contaminated and State A became a PRP. Assuming the Department of Parks and the Department of Waste are both divisions of the same entity, State A, that is a PRP, State A's Department of Parks would not qualify as a BFPP.

If State A's Department of Parks had bought property adjacent to a contaminated property on which the Department of Waste had previously operated a landfill, the operation of which caused the contamination, State A's Department of Parks would not qualify as a CPO assuming the State itself is a PRP at the property.

Third, EPA personnel should analyze whether a business entity asserting BFPP or CPO status is the result of a reorganization of a liable party through bankruptcy or other corporate restructuring. In such a case, the entity may not be eligible for BFPP or CPO status because it is "the result of a reorganization of a business entity that was potentially liable."¹¹

Example # 3: Company A owns a contaminated site on which it had disposed of hazardous waste. During corporate reorganization, Company A forms Company B to acquire the contaminated site. Assuming Company B is the result of a reorganization of the PRP, Company B would not qualify as a BFPP or a CPO.

Fourth, EPA personnel should consider whether the party with whom a person may have an affiliation is actually a PRP at the facility. Pursuant to CERCLA §§ 101(40)(H) and 107(q)(1)(A)(ii), a person cannot qualify as a BFPP or CPO if he or she is affiliated with a *potentially liable party* (as opposed to a non-liable party). If the party with whom the potential BFPP or CPO has a relationship is not a PRP, then an affiliation with that party would not disqualify the person from BFPP or CPO status. For example, the entity with whom a potential BFPP or CPO is affiliated could have owned the property at one point in the past, but not at the time of disposal. Under this scenario, the entity would likely not be liable under CERCLA § 107(a)(1) or (2), and the relationship would likely not be a prohibited affiliation.

Example # 4: Mr. X wishes to buy property that was previously owned by his sister. Mr. X's sister is not a PRP at the property, because the property did not become contaminated until the person who bought the property from her, Mr. Y, began a mining operation there. Assuming Mr. X meets the other requirements of the BFPP or CPO provisions, EPA would treat Mr. X as a BFPP or CPO.

¹¹ CERCLA §§ 101(40)(H)(ii) and 107(q)(1)(A)(ii)(II). This may require a review of the documents through which the restructuring was accomplished, e.g., an approved bankruptcy plan or reorganization or asset purchase agreement.

B. Statutory Exceptions to the “No Affiliations” Requirement

Certain types of affiliations between the purchaser of property or owner and other entities do not disqualify the purchaser of property or owner from BFPP or CPO liability protection under the language of CERCLA §§ 101(40)(H) or 107(q)(1)(A)(ii). The first of these exceptions to the “no affiliations” requirement is only for BFPPs, while the second is for both BFPPs and CPOs.

1. *Instruments by Which Title to the Facility is Conveyed or Financed*

CERCLA § 101(40)(H)(i)(II) provides an important exception to the general requirement that prospective purchasers may not have an affiliation with a PRP in order to qualify for the BFPP provision. There is not a similar exception for CPOs. This exception allows contractual, corporate, or financial relationships that are “created by the instruments by which title to the facility is conveyed or financed.”

In analyzing a party’s potential BFPP status for the purposes of exercising its enforcement authority, EPA generally intends to consider deeds or agreements that make transfer of title possible, such as agreements with a title insurance company or a third-party lender, to be within the scope of that language.

Example # 5: Company A wishes to purchase a contaminated property and has complied with the other requirements of the BFPP provision. Company B, the PRP owner of the property, is willing to sell it, but Company A has concerns about defects to the title for the property. Company A would like to acquire title insurance through a third party, which will require Company B to assert certain facts in a signed document. Although this title insurance agreement is a contractual or financial relationship between Company A and the PRP at the property, under the exception for relationships created by the instruments by which title to the facility is conveyed or financed in the affiliation language contained in CERCLA § 101(40)(H)(i)(II), EPA generally intends to exercise its enforcement discretion to treat Company A as if it were a BFPP so long as it meets the other requirements in the BFPP provision.

2. *Contracts for the Sale of Goods or Services*

The affiliation language in CERCLA §§ 101(40)(H) and 107(q)(1)(A)(ii) includes an exemption that provides that “a contractual, corporate, or financial relationship that is created ... by a contract for the sale of goods or services” is not an affiliation that defeats potential liability protection under the BFPP or CPO provisions.

In analyzing potential BFPP or CPO status for the purpose of exercising its enforcement authority, EPA generally will adopt a plain language definition of “goods and services” when

applying the affiliation language. For example, “goods” are defined as “commodities; wares; portable personal property.”¹² “Services” are defined as “employment in duties or work for another.”¹³ Note that, as with all of these examples, the statute requires that the entity asserting BFPP or CPO status must not otherwise be liable at the facility.

Example # 6: Company A plans to purchase a parcel of property contaminated with hazardous substances. The current owner is a municipality that is considered to be a PRP at the property. Company A has performed all appropriate inquiries before purchasing the property and otherwise plans to comply with the requirements of the BFPP provision. In the past, Company A paid the municipality snow removal fees for a different property than the one it plans to purchase. EPA generally intends to exercise its enforcement discretion to treat Company A as if it were a BFPP because a contract for the snow removal is a contract for a service.

EPA may reach a similar result if Company A were asserting CPO status in purchasing property adjacent to the municipality-owned parcel above, assuming the other elements of the CPO provision are met.

C. Special Considerations in Applying the Affiliation Language

The affiliation language in the BFPP and CPO provisions is broad and could potentially encompass many, if not all, familial relationships, and many corporate or other relationships, thus having the potential consequence of reducing the number of entities that qualify for these liability protections. As stated in EPA’s Common Elements Guidance, “It appears that Congress intended the affiliation language to prevent a potentially responsible party from contracting away its CERCLA liability through a transaction to a family member or related corporate entity.”¹⁴ With this consideration in mind, EPA has identified certain relationships which, in the exercise of its enforcement discretion, it generally intends *not* to treat as disqualifying affiliations. They include:

1. Relationships at Other Properties: relationships that occur between an entity seeking BFPP or CPO status 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.

These relationships are generally not created to avoid CERCLA liability and, therefore, in exercising its enforcement discretion on a site-specific basis, EPA generally intends not to treat

¹² AMERICAN HERITAGE DICTIONARY 756 (4th ed. 2006).

¹³ *Id.* at 1591.

¹⁴ Common Elements Guidance at 5.

them as prohibited affiliations that would prevent a purchaser from being a BFPP or CPO. EPA will analyze all facts and circumstances surrounding the above relationships in evaluating whether the relationships were created to avoid CERCLA liability. Examples illustrating these relationships are provided below.

1. Relationships at Other Properties

If a purchaser has existing relationships with a PRP at other properties unrelated to the property to be purchased, or that do not impact the property itself or the source property, EPA generally intends to exercise its enforcement discretion and treat the purchaser as a BFPP or CPO, as appropriate. EPA will analyze such relationships on a case-by-case basis, guided by the general principles set forth in this document. If the parcel that the person plans to purchase is part of a larger property, EPA generally intends to focus on just those affiliations that may be related to that parcel.

Example # 7: Company A wishes to purchase contaminated property from Company B, who is a PRP owner of the property. Company A and Company B have existing lease agreements at other properties, on which Company B is not a PRP. The existing lease agreements at other properties may be considered “contractual . . . relationship[s]” under the affiliation language, but they are not related to the contaminated property at which Company B is a PRP. If Company A has complied with the other requirements of the BFPP provisions, EPA generally intends to exercise its enforcement discretion to treat Company A as if it were a BFPP.

Company A is a potential CPO that purchased contaminated property and had existing lease agreements at other properties owned by Company C, the owner of the neighboring property, which is the source of the contamination on Company A’s property. EPA generally intends to exercise its enforcement discretion to treat Company A as if it were a CPO so long as Company A complied with the other requirements of the CPO provision.

Example # 8: A city has met the other requirements of the BFPP liability protection and plans to purchase property from a county that is a PRP at the property. The city has many existing leases with the county on other parcels of property, but does not have any such relationships with the county pertaining to the property the city wants to purchase. EPA generally intends to exercise its enforcement discretion to treat the city as if it were a BFPP so long as the city’s existing contracts with the county, who is a PRP with respect to the property, do not relate to the property.

Similarly, if the city purchased property adjacent to the county-owned property above, EPA generally intends to exercise its enforcement discretion to treat the city as if it were a CPO, assuming the other elements of the CPO provision are met.

Example # 9: The owner of an office building learns that there was a release of a hazardous substance on the property next door that has contaminated his property by migrating through groundwater under his property. The owner of the office building has complied with all of the other requirements of the CPO provision, but is concerned because he previously had purchased a separate piece of property from the owner of the adjacent parcel. EPA generally intends to exercise its enforcement discretion to treat the owner of the office building as if it were a CPO because the existing relationship between the two owners does not relate to the office building property or the source property.

If the owner of the office building had purchased the property from a PRP, and it had previously purchased a piece of property unrelated to the office building from that same PRP, EPA generally intends to treat the owner as a BFPP if all other requirements of the BFPP provision are met. EPA generally does not intend to treat the other purchase from the PRP that is unrelated to the source or the office building as if it were a disqualifying affiliation.

2. *Post-Acquisition Relationships*

EPA generally does not intend to treat familial, contractual, corporate or financial relationships that arise between either a BFPP or a CPO and a PRP after the acquisition of the property as disqualifying affiliations. However, in analyzing the facts and circumstances surrounding post-acquisition relationships, EPA intends to follow the general principles set forth in this memorandum regarding relationships structured in an attempt by the parties to avoid CERCLA liability.¹⁵

Example # 10: Company A acquires an industrial park from Company B that is contaminated. Company B is a PRP as an owner during the time of disposal at the industrial park. Company A meets the BFPP criteria and, at the time of purchase, does not have a disqualifying affiliation with Company B or any other PRP. Later, Company A leases a warehouse within the industrial park to Company B. So long as Company A maintains compliance with the other requirements of the BFPP provision, EPA generally intends to exercise its enforcement discretion to treat Company A as if it were a BFPP.

EPA would generally apply a similar analysis for CPOs. Assume Company A has purchased an industrial park from a third party and is now seeking liability protection as a CPO for contamination discovered subsequent to purchase that is migrating onto the industrial park property. If Company A then leases a warehouse within the industrial park to Company B (a PRP at a site contiguous to the industrial park that is the source of the contamination at issue), EPA generally intends to exercise its enforcement discretion and treat Company A as if it were a CPO so long as Company A complied with the other requirements of the CPO provision.

¹⁵ See Common Elements Guidance at 5.

3. Documents that Typically Accompany Title Transfer

As mentioned above in Section B. 1., the affiliation language in CERCLA § 101(40)(H) provides an exception which is only applicable to BFPPs. This exception allows contractual, corporate, or financial relationships that are “created by the instruments by which title to the facility is conveyed or financed.” EPA generally does not intend to treat certain contractual or financial relationships (*e.g.*, certain types of indemnification¹⁶ or insurance agreements) that are typically created as a part of the transfer of title, although perhaps not part of the deed itself, as disqualifying affiliations.¹⁷ In deciding whether to exercise its enforcement discretion regarding these types of relationships, EPA will analyze the circumstances surrounding the transfer of title and the specifics of the contractual or financial relationships and follow the general principles set forth in this memorandum.

4. Tenants Seeking to Purchase Property They Lease

EPA generally intends to consider several issues when deciding how to exercise its enforcement discretion regarding tenants who purchase property¹⁸ from a PRP owner. The first is whether the tenant/purchaser may be potentially liable for the contamination at the property based on its own actions. If the tenant/purchaser may already be potentially liable, EPA generally does not intend to treat the tenant as a BFPP or CPO. If the tenant/purchaser is not liable, EPA should consider whether the owner/landlord is a PRP or not. If the owner/landlord is not a PRP, then the lease would not be a prohibited affiliation. However, if the landlord is a PRP, EPA will analyze the site-specific facts surrounding the actions of the parties and their relationship in order to determine whether it would be appropriate to exercise enforcement discretion in treating the tenant/purchaser as a BFPP or CPO. In that case, the tenant may contact the appropriate EPA Regional office before purchasing the property so that the Agency and the tenant can work together to resolve the tenant’s liability concerns.

In addition, EPA has previously issued enforcement discretion guidance (“the Tenants Guidance”) regarding how tenants may be able to derive BFPP status during their leasehold from an owner who maintains BFPP status.¹⁹ Regarding tenants who may not be able to derive BFPP status from a BFPP owner because the owner has lost its BFPP status, EPA generally intends to exercise its enforcement discretion in accordance with the policy set forth in the Tenants Guidance.

¹⁶ Although indemnification agreements may allocate responsibility for cleanup costs between a purchaser and seller, they do not relieve a party of its CERCLA liability. See CERCLA § 107(e).

¹⁷ Please note, however, that a recent judicial decision addressed the applicability of the “no affiliation” requirement to a liability release agreement, which the court held was one basis, among others, for rejecting a party’s claim for liability protection as a BFPP. *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, 2011 WL 2119256 (D.S.C. May 27, 2011), *appeal filed*, No. 11-1662 (4th Cir. June 24, 2011). Based on the facts before it, the court found that the purchaser failed to satisfy the “no affiliation” requirement due to a release agreement, in which the purchaser agreed to release the seller as to environmental liability at the site at issue, and the purchaser’s subsequent efforts to dissuade EPA from taking an enforcement action against the seller. *Id.* at 60.

¹⁸ Hereinafter referred to as “tenant/purchaser.”

¹⁹ If the landlord is not a PRP by virtue of qualifying as a BFPP, the tenant may already be a BFPP. See *Enforcement Discretion Guidance Regarding the Applicability of the Bona Fide Prospective Purchaser Definition in CERCLA § 101(40) to Tenants*, (Nakayama and Bodine 1/14/09) (available at: <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/bfpp-tenant-mem.pdf>).

IV. Contact

Questions regarding this guidance and affiliation questions in general should be directed to Mary Godwin in EPA's Office of Site Remediation Enforcement at (202) 564-5114 or godwin.mary@epa.gov and to the Brownfield Coordinator in the appropriate EPA Regional office (please see <http://www.epa.gov/brownfields/corcntct.htm> for contact information).

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