

WHAT IS A BONA FIDE PROSPECTIVE PURCHASER (BFPP)?

Fri Oct 24th, 2025 | Categories: [Environmental Law](#) |

The risks associated with buying contaminated commercial property can be substantial. Under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), buyers can face substantial liability for cleanup and remediation costs regardless of whether they were aware (or should have been aware) of an environmental hazard on the property. Fortunately, prospective buyers have a variety of options to mitigate these risks, including establishing their status as a bona fide prospective purchaser (BFPP). Learn more from an experienced California environmental attorney at Bick Law LLP:

Bona Fide Prospective Purchasers (BFPPs) Can Avoid Liability Under CERCLA

Of all of the potential defenses to liability under CERCLA, the bona fide prospective purchaser (BFPP) defense is among the most robust. As we have [discussed previously](#), knowledge of environmental contamination on an acquired property is *not* a bar to avoiding liability if the buyer qualifies as a BFPP. If buyers conduct environmental site assessments (ESAs) and take the steps required to secure BFPP status, they may be able to avoid liability under CERCLA as a BFPP, even if there is pre-existing contamination on the property at the time of purchase.

This wasn't always the case. As the U.S. Environmental Protection Agency (EPA) [explains](#):

"The bona fide prospective purchaser (BFPP) provision in the 2002 amendments to [CERCLA] dramatically changed the Superfund liability landscape for landowners, as a party can now achieve and maintain status as a BFPP, so long as that party meets specific statutory criteria."

The 2002 amendments to CERCLA play a central role in how companies avoid environmental liability when purchasing contaminated (or potentially contaminated) properties. By meeting the threshold statutory criteria prior to purchase, and meeting the ongoing statutory criteria post-purchase (which EPA refers to as "continuing obligations"), purchasers will have a reasonable defense to - liability for cleanup or remediation related to the subject property.

Threshold Criteria for Securing BFPP Status Under CERCLA

There are two primary threshold criteria for securing BFPP status under CERCLA. Being able to demonstrate that a purchaser has satisfied both of these criteria is essential to establishing a defense to liability as a BFPP. As [summarized](#) by EPA:

"To qualify as a bona fide prospective purchaser . . . a person must perform 'all appropriate inquiry' before acquiring the property. Bona fide prospective purchasers . . . must, in addition, demonstrate that they are not potentially liable or 'affiliated' with any other person that is potentially liable for response costs [related to] the property."

While EPA identifies these as two threshold criteria, this blog discusses the second requirement in two parts: (1) demonstrating that the purchaser is not otherwise a Potentially Responsible Party (PRP), and (2) demonstrating that the purchaser is not “affiliated” with a PRP. Let’s take a look at each of these threshold criteria in a bit more detail.

1. Conducting “All Appropriate Inquiries”

Conducting “all appropriate inquiries,” or “AAI,” involves assessing a property for potential environmental contamination risks. This includes conducting a Phase 1 ESA that meets the most recent ASTM Standard E1527.

Along with conducting a Phase 1 ESA, other AAI requirements include (but are not limited to) conducting interviews with current and past owners, reviewing “commonly known or reasonably ascertainable information about the property,” and identifying “any significant data gaps” in the information obtained. While conducting AAI can be a time- and resource-intensive process, the effort is necessary when pursuing the acquisition of property.

2. Not Potentially Liable

In order to qualify as a BFPP, a buyer must first show that they are not otherwise a 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 they are otherwise liable under CERCLA, they cannot qualify as a BFPP, and the next step — an affiliation analysis — would be unnecessary.

3. Not “Affiliated” with a Potentially Responsible Party

Qualifying as a BFPP also requires documentation that a purchaser is not “affiliated” with any party that is potentially responsible for cleanup and remediation costs related to the subject property. If the buyer is in fact the same entity as a PRP at the property, or is potentially liable under other principles of corporate law, such as successor liability, then the buyer cannot be a BFPP. 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 still be liable under principles of corporate law.-

Affiliations that can disqualify a prospective purchaser from securing protection as a BFPP include:

- Direct or indirect familial relationships
- Contractual or other financial relationships
- Corporate relationships (including those resulting from a business reorganization)

There is an exception for contractual, corporate or financial relationships that are created by the instruments by which title is conveyed or financed, or by a contract for the sale of goods or services, which are evaluated on a case-by-case basis to determine if a PRP is trying to avoid liability through contract. In 2011, EPA published [guidance](#) on CERCLA’s “affiliation” language, which remains in place today.- Separately, in its 2003 Common Elements Guidance, EPA explained 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.” Consistent with that principle, EPA evaluates whether an entity is “affiliated” with a liable party before granting it BFPP status. However, EPA notes that its guidance “is not a regulation and does not create new legal obligations or limit or expand obligations under any federal, state, tribal or local law.”

Complex fact patterns may affect whether an entity is “affiliated” with a liable party. For example, EPA’s 2011 guidance memorandum notes that at least one court has found “affiliation” due to a release in the purchase agreement in which the purchaser released the seller

as to environmental liability and then claimed to be a BFPP, leaving no party available as a liable party, contractually.-

Other fact patterns that require close analysis relate to the tenant-landlord contractual relationship.- EPA has also 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.-

The BFPP defense also interacts closely with the Contiguous Property Owner (CPO) defense; however, the CPO defense does not exclude "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. CERCLA- §§ 101(40) & 107(q)(1)(B). Except for this difference, the affiliation language in the BFPP and CPO provisions is virtually identical.

Continuing Obligations for Maintaining CERCLA Liability Protection as a BFPP

In addition to satisfying the threshold criteria, a purchaser of contaminated property must also meet several continuing obligations to maintain environmental liability protection as a BFPP under CERCLA. Some examples of these continuing obligations include:

- Complying with applicable land use restrictions and not impeding the effectiveness or integrity of institutional controls;
- Demonstrating that no disposal of hazardous substances has occurred subsequent to the acquisition of the subject property;
- Providing "full cooperation, assistance, and facility access" to parties that are authorized to conduct remedial or restoration work on the subject property;
- Providing all legally required notices and complying with all information requests and administrative subpoenas; and,
- Taking "reasonable steps" to prevent the release of hazardous substances from the subject property.

Regarding the "reasonable steps" a BFPP must take to prevent the release of hazardous substances, while a proactive approach is required, EPA staff may also suggest reasonable steps for mitigating contamination risks. EPA staff may make these suggestions, "in [their] discretion and based upon a variety of factors, including site complexity." n.

Schedule a Call with a California Environmental Attorney at Bick Law LLP

If you need to know more about the BFPP rules under CERCLA, we invite you to get in touch. To schedule a call with a California environmental attorney at Bick Law LLP, please call 949-432-3500 today.