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ALERTS

Environmental Law Alert - Environmental Due Diligence Issues Clarified By EPA For 2013 And Beyond – Tenants And Other Operators Beware

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This Alert updates you on newly released U.S. Environmental Protection Agency (EPA) guidance relevant to help manage environmental liabilities and develop closure strategies for contaminated sites. These new guides are: *Revised Enforcement Guidance Regarding the Treatment of Tenants Under the CERCLA Bona Fide Prospective Purchaser Provision* (Dec. 5, 2012) [referred to as "BFPP Tenant Guidance"]; *Institutional Controls: A Guide to Planning, Implementing, Maintaining, and Enforcing Institutional Controls at Contaminated Sites*, EPA-540-R-09-001 (Dec. 2012) [referred to as "IC Guidance"]; and Institutional *Control: A Guide to Preparing Institutional Control Implementation and Assurance Plans at Contaminated Sites*, EPA-540-R-09-002 (Dec. 2012) [referred to as "ICIAP Guidance"]. Please note that the BFPP Tenant Guidance is applicable for any site contaminated with hazardous substances (or petroleum for those sites in Indiana). The IC Guides are relevant to cleanup actions taken at Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, or Superfund), Brownfields, federal facility, underground storage tank (UST), and/or Resource Conservation and Recovery Act (RCRA) sites. Copies of these guides can be viewed and downloaded at:

BFPP Tenant Guidance: http://www.epa.gov/oecaerth/cleanup/revitalization/landowner.html

Both IC Guides: http://www.epa.gov/superfund/policy/ic/guide/index.htm

The **BFPP Tenant Guidance** outlines EPA's now broader policy not to pursue tenants for liability under CERCLA if they meet the same standard as a "Bona Fide Prospective Purchaser" (BFPP). The 2002 Brownfield Amendments to CERCLA established the BFPP defense against liability for pre-existing contamination for qualified new purchasers of contaminated sites. Among other requirements, a qualified BFPP must: conduct All Appropriate Inquiry (AAI) into the past ownership and uses of the property before purchase; comply with any applicable "continuing obligations" including obligations to take "reasonable steps" to stop continuing releases; prevent any future threatened release; mitigate exposure to previously released hazardous substances; and comply with land use restrictions (which often include Institutional Controls or ("ICs") discussed below) imposed as part of prior clean-up activities.

Although the BFPP provisions in the 2002 Brownfield Amendments made clear that the "tenant of a BFPP" could enjoy derivative BFPP liability protections, the statutory language did not address whether a tenant (possibly liable as an 'operator' under CERCLA) could obtain BFPP liability protections independent of the status of the property owner. The

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recently released BFPP Tenant Guidance supersedes guidance issued by EPA in 2009 explaining that tenants could qualify for BFPP protections if their actions as a tenant qualified them as an “owner” of the property (i.e., the tenant acted like an “owner” of the property). The revised BFPP Tenant Guidance goes further and confirms that EPA, through its enforcement discretion, will treat a tenant as a BFPP exempt from CERCLA liability even if they are a current operator.

In light of EPA’s new guidance, prospective tenants of potentially contaminated sites should consider taking the steps necessary to qualify as a “BFPP,” including conducting AAI prior to executing a lease. AAI can be currently achieved by complying with EPA’s AAI rule, which incorporates ASTM E 1527-05, the Standard Practice for conducting a Phase I Environmental Site Assessment (“Phase I ESA”). For the time being, prospective tenants can qualify as BFPPs at properties by performing a Phase I ESA in accordance with ASTM E 1527-05. However, **the ASTM standards sunset after eight (8) years, and a new Phase I ESA standard is in the works at ASTM**. This new Phase I ESA standard, if finalized by ASTM, is anticipated to fine-tune the existing standard in several ways. Two of these changes are discussed briefly below.

The revised Phase I ESA standard may clarify that prospective owners or tenants must provide certain information to their environmental professional (“EP”) about the property they wish to purchase or lease in order to qualify as a BFPP. Perhaps most significantly, the revised Phase I ESA standard may clarify that an EP must evaluate the potential vapor intrusion pathway. Vapor intrusion (VI) is the general term given to migration of hazardous vapors from any subsurface contaminant source, such as soil or groundwater, through the vadose zone and into indoor air. VI currently poses the most significant and challenging environmental remediation issues in the country. The VI exposure pathway continues to evolve at a rapid pace and EPA is poised to publish revised VI guidance in the near future. Assessing and managing the potential VI pathway at contaminated sites has, and will likely continue to be, identified as a “continuing obligation” necessary to maintain an owner or tenant’s BFPP defense. Those seeking BFPP protections in 2013 are encouraged to follow these developments throughout the year.

Following through on one of its top 2012 priorities, **EPA released two key guides regarding the role of institutional controls (“ICs”) in risk-based closure of contaminated sites**. EPA defines ICs as “non-engineered instruments, such as administrative and legal controls, that help minimize the potential for human exposure to contamination and/or protect the integrity of the remedy.” ICs can play critical roles in closure strategies because they reduce exposure to contamination by limiting land or resource use and guide human behavior at a site despite residual contamination remaining. An IC is often associated with managing the potential VI exposure (discussed above).

EPA’s new IC Guidance clarifies how to plan, implement, maintain, and enforce ICs at contaminated sites. The IC Guidance was designed to help promote consistent national policy on these prevalent issues. The ICIAP Guidance is the companion document to the IC Guidance and offers a template to develop IC plans at contaminated sites where the response action includes ICs. EPA describes an ICIAP as a “document designed to

systematically: (a) establish and document the activities associated with implementing and ensuring the long-term stewardship of ICs: and (b) specify the persons and/or entities that will be responsible for conducting these activities." If a responsible party plans to leave residual contamination in place as part of a remedial action, then these IC Guides will help identify the long-term care, stewardship obligations, and costs for such risk-based remedies.

Summary

EPA has clarified that it will extend BFPP protections to tenants (operators) not just prospective purchasers (owners) of contaminated sites. To qualify for the BFPP defense, a prospective purchaser or tenant must conduct AAI, which is commonly achieved by performing a Phase I ESA prior to purchase or lease. The ASTM 2005 standard for Phase I ESAs sunsets in 2013 and several key changes are in the works. One potentially significant change centers on assessing the potential VI pathway as part of a Phase I ESA. If it is determined that the VI exposure is a concern, then post-Closing or post-lease continuing obligations may be triggered. If an IC is implemented in connection with VI or other exposure concerns, then the new IC Guides outline key elements for site managers, consultants, and attorneys to better assess the financial and legal implications with the risk-based remedy.

For more information, contact the Barnes & Thornburg attorney with whom you work, or one of the following attorneys in the firm's Environmental Law Department: David R. Gillay, Chair, Brownfields & Environmental Transactional Diligence, david.gillay@btlaw.com, 317-231-7474; Charles Denton at charles.denton@btlaw.com, 616-742-3974; Timothy Haley at timothy.haley@btlaw.com, 317-231-6493; Joel Bowers at joel.bowers@btlaw.com, 574-237-1287; or Bruce White at 312-214-4584 or bruce.white@btlaw.com.

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