



## Finding A Safe Harbor From Environmental Liability For Commercial Real Estate Purchasers

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**E**nvironmental liability risks arise for commercial purchasers of property if the property is contaminated by hazardous substances. The transaction will dictate the scope and importance of the environmental due diligence. Broadly speaking, environmental due diligence is the collection and analysis of the environmental conditions or impacts before a transaction to identify and quantify environment-related risks. A threshold inquiry should be undertaken to afford the purchaser a safe harbor from environmental liability. Such protection is available by obtaining bona fide prospective purchaser (BFPP) protection afforded under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601 *et seq.* (CERCLA). To become a BFPP, a buyer must conduct all appropriate inquiries (AAI) into the prior ownership and use of the real estate. Without conducting the AAI, purchasers cannot satisfy the definition of the BFPP and obtain BFPP protection from CERCLA's liability scheme.

Finding a safe harbor from environmental liability is based, in large part, on a buyer conducting effective pre-closing AAI which may also include some post-closing actions as set forth below. To qualify as a BFPP, the purchaser must demonstrate that: (1) all disposal of hazardous substances at the facility occurred before the transfer; (2) the purchaser made all appropriate inquiries into the previous ownership and uses of the facility; (3) the purchaser provides all legally-required notices with respect to the discovery or release of any hazardous substances at the facility; (4) the purchaser exercises appropriate care with respect to hazardous substances found at the facility; (5) the purchaser cooperates and assists those conducting response actions or natural resource restoration; (6) the purchaser is in compliance with any land use restrictions and does not impede the effectiveness or integrity of any response action; (7) the purchaser complies with any request for information or administrative subpoena; and (8) the purchaser is not potentially liable, affiliated with any other person that is potentially liable, or the result of a reorganization of a business entity that was potentially liable. See, generally, 42 U.S.C. Sec. 9601 (40).

CERCLA liability can be onerous, broad and significant. CERCLA imposes liability for environmental contamination upon four broad classes of potentially responsible parties (PRPs), one of which is the owner and operator of a facility from which there is a release, or a threatened release of a hazardous substance. 42 U.S.C. § 9607(a); *Burlington Northern & Santa Fe Ry. Co. v. United States*, 129 S.Ct. 1870 (2009). As initially enacted, under CERCLA, simply owning contaminated property was enough to create CERCLA liability (even if the purchaser did not cause the contamination). In 1986, the innocent purchaser defense (IPD) was added as a way for a purchaser who acquired property without knowledge of contamination to avoid CERCLA owner liability. The IPD, however, afforded no liability protection to the purchaser who performed AAI and found contamination. In response to that situation, the Small Business Liability Relief and Brownfields Revitalization Act amended CERCLA and added new liability protections for landowners. One added protection was the BFPP exemption, which protected purchasers of contaminated properties. AAI is an essential element of the BFPP definition.

A Phase I Environmental Site Assessment is usually undertaken to perform AAI. The Phase I ESA analyzes on-site conditions regarding contamination of the real property and has four basic components:

1. Review of records
2. Site reconnaissance
3. Interviews with current owners and occupants, as well as government officials
4. A report

It is important to note that while the Phase I ESA is the most common analytical tool to conduct AAI, it is not the only method for conducting AAI.

Phase I ESA satisfies one part of the BFPP exemption from CERCLA liability, helps identify the potential applicability of the continuing obligations, and informs the parties of the environmental condition of the site and any potential liabilities. While the Phase I ESAs play a critical role in due diligence, they are not always equivalent to comprehensive environmental due diligence. Likewise, a Phase I ESA does not end the obligations under the BFPP exemption. Instead, a Phase I ESA is a component of environmental due diligence and a tool to assess the initial environmental condition of the real estate. Each real estate transaction should be independently analyzed to determine scope of the environmental due diligence needed and whether the purchaser can qualify under the BFPP exemption to CERCLA liability. A Phase I ESA is a great place to start.