



Lender Liability and Applicability of All Appropriate Inquiries

What is CERCLA?

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as Superfund, authorizes the U.S. Environmental Protection Agency (EPA) to respond to human health and environmental hazards posed by hazardous substances at properties. Under CERCLA, EPA can require liable parties to conduct cleanups, or EPA can conduct a cleanup and subsequently recover cleanup costs from liable parties. Section 107 of CERCLA defines a liable party as:

- The current owner and operator of a contaminated property.
- Any owner or operator at the time of disposal of any hazardous substances.
- Any person who arranged for the disposal or treatment of hazardous substances, or who arranged for the transportation of hazardous substances for disposal or treatment.
- Any person who accepts hazardous substances for transport to the property and selects the disposal site.

Under Section 101(20)(A) of CERCLA, a person is an “owner or operator” of a facility (or property) if that person: (1) owns or operates the facility or (2) owned, operated or otherwise controlled activities at that facility immediately before title to the facility, or control of the facility, was conveyed to a state or local government due to bankruptcy, foreclosure, tax delinquency, abandonment or similar means.

Are lenders liable for contamination under CERCLA?

Banks that hold mortgages on property as secured lenders are exempt from CERCLA liability if certain criteria are met. CERCLA Section 101(20) contains a secured creditor exemption that eliminates owner or operator liability for lenders who hold ownership in a CERCLA facility primarily to protect their security interest in that facility, provided they do not “participate in the management of the facility.” Generally, participation in the management applies if a bank exercises decision-making control over a property’s environmental compliance, or exercises control at a level similar to a manager of the facility or property. Participation in management does not include actions such as conducting property inspections, requiring a response action to address contamination, providing financial advice or renegotiating or restructuring the terms of the security interest. The secured creditor exemption also provides that foreclosure on a property does not result in liability for a bank, provided the bank takes “reasonable steps” to divest itself of the property “at the earliest practicable, commercially reasonable time, on commercially reasonable terms.” Generally, a bank can maintain business activities and close down operations at a property as long as the property is listed for sale shortly after the foreclosure date or at the earliest practicable, commercially reasonable time.

How did the Brownfields Amendments change CERCLA liability?

In 2002, Congress passed the Small Business Liability Relief and Brownfields Revitalization Act (the Brownfields Amendments), which created a new landowner liability protection from CERCLA for bona fide prospective purchasers (BFPPs). Before the Brownfields Amendments, a person who purchased property with knowledge of the contamination was subject to owner or operator liability under CERCLA. In 2018, Congress further amended the brownfields provisions of CERCLA and addressed lessee concerns about potential liability with the reuse of potentially contaminated property. Since the enactment of these amendments, prospective landowners, and tenants of owners, can now purchase (or lease) property with knowledge of contamination and obtain protection from liability, provided they meet certain requirements.

To qualify as a BFPP, a prospective owner must:

- Not be potentially liable for contamination on or at a property.
- Have acquired the property after January 11, 2002.
- Establish that all disposal of hazardous substances occurred before the person acquired the facility.
- Make all appropriate inquiries into previous ownership and uses of the property before acquiring the property.
- Not be affiliated with a party responsible for any contamination.

To maintain BFPP status after purchasing a property, landowners must comply with “continuing obligations” during their property ownership. To comply with the continuing obligations, BFPPs must:

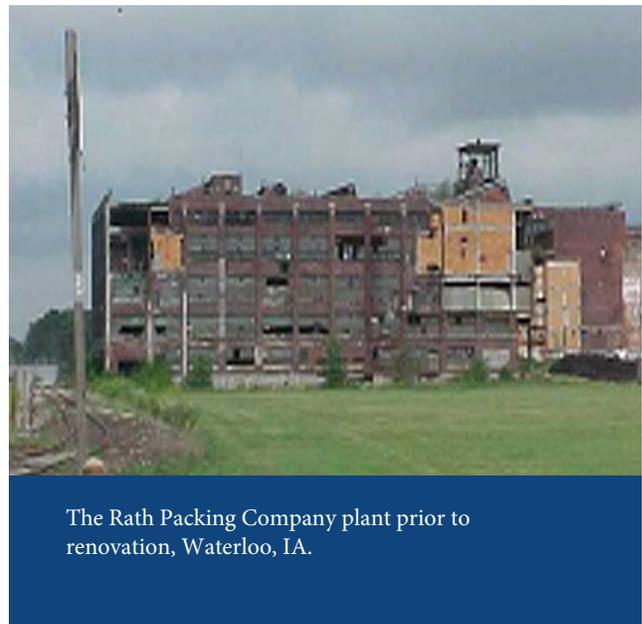
- Provide all legally required notices for the discovery or release of a hazardous substance.
- Exercise appropriate care of the hazardous substances by taking reasonable steps to stop or prevent continuing or threatened future releases and exposures, and to prevent or limit human and environmental exposure to previous releases.
- Provide full cooperation, assistance and access to individuals authorized to conduct response actions or natural resource restoration.
- Comply with land-use restrictions and not impede the effectiveness of institutional controls.
- Comply with information requests and subpoenas.

A tenant of a BFPP, or an entity that holds a leasehold interest in a potentially contaminated property, may qualify as a BFPP if:

- The property owner is a BFPP; or
- The lessee independently meets the BFPP criteria section 101(40), as summarized above; or
- In cases where the property owners lost its BFPP status through no fault of the lessee, the lessee meets the criteria in section 101(40) (except for the requirement for conducting “all appropriate inquiries”).

What are “All Appropriate Inquiries”?

All appropriate inquiries (AAI) is the process of evaluating a property’s environmental conditions and assessing potential liability for any contamination. AAI requirements apply to any party who can potentially claim protection from CERCLA liability as an innocent landowner, contiguous property owner or BFPP. EPA recognizes ASTM International Standards E1527-21 “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process” and E2247-16 “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process for Forestland or Rural Property” as fully compliant with the AAI final rule.



How does AAI apply to lenders?

The AAI rule primarily applies to borrowers who want to claim protection from CERCLA liability as innocent landowners, bona fide prospective purchasers or contiguous property owners. The rule does not change the CERCLA liability exemption for banks that hold mortgages on property as secured lenders. The secured lender exemption is not conditioned by a bank or lender undertaking AAI before issuing a mortgage or before the borrower purchases the property.

Although banks and lenders have protection from CERCLA liability through the secured creditor exemption, banks may choose to further protect themselves from loss (due to decreases in the value of the property or collateral) by requiring that borrowers qualify for liability protections. Banks, therefore, may want to encourage their borrowers to comply with the provisions established for BFPPs and ensure that borrowers properly conduct AAI before acquiring a property.

It is important to note that it is still possible for a bank or lender to be liable for contamination on or at a property if the bank or lender is found to be acting as either an owner or operator of a contaminated property. See above for the explanation of the secured creditor exemption and the definition of “participation in the management” of a property. Also, even if a financial institution qualifies for the secured creditor exemption from CERCLA liability, it is still possible that the state has stricter laws governing lender liability for contaminated properties.



Exterior of the former Construction Machinery Company site. An EPA Hazardous Substance Cleanup Grant helped address contamination at this site, where buildings were neglected after the company closed in the 1990s.

Further information