



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION IX  
75 Hawthorne Street  
San Francisco, CA 94105

MAR 12 2015

Sallie Lim  
Senior Corporate Counsel  
Legal Department  
Google Inc.  
1600 Amphitheater Parkway  
Mountain View, CA 94043

Re: Planetary Ventures, LLC Lease of Moffett Federal Airfield  
NAS Moffett Field Superfund Site

Dear Ms. Lim:

This letter responds to your request provided by Pamela Andes that the Environmental Protection Agency, Region IX (EPA) issue a Bona Fide Prospective Purchaser (BFPP) letter regarding the status Planetary Ventures, LLC (PV), in light of its long-term lease of an approximately 1,000 acre property of the NASA Ames Research Center Eastside/Airfield, which is within the NAS Moffett Field Superfund site (Moffett Field Site or Site). EPA understands that, in November 2014, PV entered into a sixty-year lease (with the lease extension up to 96 years) of this area (referred to herein as the MFA Leasehold), under which PV expects to take of possession of the leasehold after receipt of this letter. PV is leasing the MFA Leasehold from the National Aeronautics and Space Administration (NASA) and has drafted an Environmental Issues Management Plan (EIMP) that includes descriptions of the current environmental conditions within the MFA Leasehold area, the remedial measures underway, and the procedures to coordinate with parties conducting remedial work at the Site as well as the oversight agencies. Because the MFA Leasehold is on the Moffett Field Site, PV has requested a letter from EPA regarding its status as a potential BFPP under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601(40) and § 9607(r).

As you know, the Moffett Field Site was listed on the National Priorities List (NPL) in 1987, and, under a 1990 Federal Facility Agreement (FFA), the U.S. Department of the Navy (Navy) has been addressing Site contamination under both EPA and State of California oversight. More recently, in 2014, NASA entered into an FFA with EPA and the State to address its own contamination at Moffett Field and its role as owner of the property. The MFA Leasehold is within the Moffett Field Site, abuts the Middlefield-Ellis-Whisman (MEW) Superfund Site, and includes non-Navy contamination that is the responsibility of NASA. Within these Sites, there are Responsible Parties addressing Site contamination under a variety of

enforcement vehicles, including the two aforementioned FFAs, a Consent Decree, and a Unilateral Administrative Order. Ongoing investigations, remediation, and monitoring are being conducted by the Responsible Parties under these instruments.

NASA's 2002 Final Programmatic Environmental Impact Statement (EIS) for the NASA Ames Research Center provided the following potential uses for the property: light industrial use, airfield operation, and research and development. Consistent with the EIS, PV has indicated that the intended land use for the MFA leasehold will include: airfield operations; a golf course; a science, technology, engineering, arts, and mathematics educational facility; industrial use including research and development, testing, light assembly and fabrication; and educational uses related to space, aviation, rover/robotics and other emerging technologies.

With regard to your client's potential liability under the Comprehensive Environmental Response, Compensation and Liability Act -- CERCLA or Superfund -- liability, the Small Business Liability Relief and Brownfields Revitalization Act, referred to as the Brownfields Amendments to Superfund, was signed into law on January 11, 2002. The BFPP provision of the Brownfields Amendments provides a defense to Superfund liability to a person meeting certain criteria. The full text of the Brownfields Amendments may be reviewed at [www.gpo.gov/fdsys/pkg/PLAW-107publ118/html/PLAW-107publ118.htm](http://www.gpo.gov/fdsys/pkg/PLAW-107publ118/html/PLAW-107publ118.htm).

CERCLA 101(40) provides that the BFPP provisions apply to a "person (or tenant of a person)" who qualifies as a BFPP, which conveys potential derivative BFPP status under CERCLA 107(r) on those leasing rather than purchasing property, dependent upon the property owner itself maintaining BFPP status. However, for those entities leasing from a non-BFPP (or an owner that no longer qualifies for BFPP status), EPA has indicated that it could, on a site-by-site basis, exercise its enforcement discretion on a site-specific basis to treat the tenant as a BFPP when the tenant itself meets all of the BFPP provisions in CERCLA §§ 101(40)(A)–(H) and 107(r)(1). (See *Revised Enforcement Guidance Regarding the Treatment of Tenants Under the CERCLA Bona Fide Prospective Purchaser Provision* (December 5, 2012) (*Tenant as BFPP Guidance*)). As noted, in order for a tenant to obtain such BFPP status, that tenant must independently meet the BFPP requirements in CERCLA §§ 101(40) and 107(r)(1). Specifically, the tenant must, on its own, meet the following conditions:

- (1) all disposal of hazardous substances at the facility occurred prior to execution of the lease;
- (2) tenant conducted "all appropriate inquiry" (AAI) prior to execution of the lease;
- (3) tenant provides legally required notices;
- (4) tenant takes reasonable steps with respect to hazardous substance releases;
- (5) tenant provides cooperation, assistance, and access;

- (6) tenant complies with land use restrictions and institutional controls;
- (7) tenant complies with information requests and administrative subpoenas;
- (8) tenant is not potentially liable for response costs at the facility or “affiliated” with any such person, other than through the lease with the owner;<sup>1</sup> and
- (9) tenant does not impede any response action or natural resource restoration.

Among the other above requirements, to qualify as a BFPP as a tenant, the prospective tenant must conduct its own AAI prior to leasing the property, as set forth at 40 C.F.R. Part 312. Additionally, to qualify as a BFPP, the tenant must take “reasonable steps” with respect to stopping continuing releases, preventing threatened future releases, and preventing or limiting human, environmental, or natural resources exposure to earlier releases. In order to do this, a tenant should ensure that it is aware of the condition of the site in order to take reasonable steps with respect to any hazardous substance contamination at or on the property.

PV has worked closely with EPA, NASA, and the State to understand the conditions at the MFA Leasehold property and to develop procedures for taking “reasonable steps” with respect to those conditions. NASA developed Existing Environmental Conditions Reports (EECs) that describe the conditions and requirements of each of the known areas of contamination within the MFA Leasehold. PV has worked with the agencies to compile an Environmental Issues Management Plan (EIMP) which sets forth procedures to be followed by PV and its contractors and sub-tenants during both redevelopment and ongoing use of the property; the EIMP incorporates NASA’s EECs. EPA expects PV to follow those procedures, updating them as appropriate to address any relevant changes in conditions or remedial requirements, as set forth in the EIMP itself.

The EIMP provides a framework for decision-making regarding contamination in soil, groundwater, and existing structures within the MFA Leasehold during both occupancy and during re-development. The EIMP provides procedures to be followed by the tenant and its contractors and sub-lessees to address the known remaining environmental conditions within the MFA Leasehold and contingency actions to be taken in the event that previously unknown environmental conditions are encountered at the Site. The purpose of the EIMP is to provide sufficient information to PV, its sub-tenants, and Project Developers to comply with existing land use controls (LUCs) and take reasonable steps with respect to environmental conditions within the MFA Leasehold to help ensure that occupancy and development activities within the MFA Leasehold do not exacerbate environmental conditions or adversely impact ongoing response actions by the Responsible Parties.

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<sup>1</sup> As described in the *Tenant as BFPP Guidance*, similar to the “no affiliation” provision exception at CERCLA § 101(40)(H)(i)(II) for BFPPs whose only affiliation is solely through the contract for sale, for purposes of the *Tenant as BFPP Guidance*, EPA may use its enforcement discretion to not treat a lease between a tenant and owner as creating a prohibited affiliation.

Based on information reviewed, including the EIMP, EPA believes that the procedures set forth in the EIMP provide currently appropriate reasonable steps with respect to contamination at the MFA Leasehold. The EIMP also provides for ongoing updates to both EPA and the State should conditions change within the MFA Leasehold and for periodic modifications to the EIMP itself to address changes in environmental conditions, land uses, and applicable laws and regulations.

The following is a list of procedures within the EIMP that EPA would like to emphasize; however, all of the relevant procedures in the EIMP should be considered reasonable steps:

- 1) Accommodation and protection of existing interim remedy at Hangar One.
- 2) Accommodation of the existing groundwater extraction and treatment systems and network of monitoring wells in any future construction within the MFA Leasehold.
- 3) Cooperation by providing reasonable access within the MFA Leasehold for remedial activities, including investigation.
- 4) Providing data and information in response to CERCLA information requests.
- 5) Appropriate handling and monitoring of potentially contaminated soil and groundwater encountered within the MFA Leasehold.
- 6) Prohibition on drilling any extraction, monitoring, or injection wells within the MFA Leasehold without EPA and State approval.
- 7) Obtaining EPA approval of plans prior to installation of subsurface structures within the MFA Leasehold and addressing any potential preferential pathways for subsurface vapors to enter into a building from such structures.
- 8) Obtaining EPA approval of building plans prior to construction that may create or impact potential conduits into the building (e.g., penetration of the building foundation slab, elevator shafts, utility vaults), and addressing any potential preferential pathways for subsurface vapors to enter into a building through such conduits.
- 9) Cooperation with land use restrictions, including institutional controls, within the MFA Leasehold in connection with response actions.
- 10) Obtaining EPA, State, and Navy, where applicable, approval of plans prior to any activities that may potentially impact existing interim and final CERCLA remedies.

For more information on reasonable steps, see 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* (March 6, 2003, "Common Elements Guidance"). The Common Elements Reference Sheet is available online at [www2.epa.gov/sites/production/files/documents/common-elem-ref.pdf](http://www2.epa.gov/sites/production/files/documents/common-elem-ref.pdf), and the guidance is at [www2.epa.gov/sites/production/files/documents/common-elem-guide.pdf](http://www2.epa.gov/sites/production/files/documents/common-elem-guide.pdf).

Note that, as described above, the BFPP provision has a number of conditions in addition to those requiring AAI and taking of reasonable steps. For example, tenants are expected to cooperate with the EPA and the State by providing reasonable access within the MFA Leasehold for all cleanup activities.

You will need to assess whether PV satisfies each of the statutory conditions for the BFPP provisions and continues to meet the applicable conditions. I hope that this letter proves helpful. If you have additional questions, please contact Bethany Dreyfus of our Office of Regional Counsel at (415) 972-3886.

Sincerely,



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cc: Lauren Ladwig, Esq., NASA  
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