Revitalizing Contaminated Sites: Addressing Liability Concerns



The Revitalization Handbook

March 2011

U.S. Environmental Protection Agency
Office of Site Remediation Enforcement

Cover photo capturing revitalized area provided by U.S. EPA's Region 8 Brownfields Program, The LEED Gold Northside Aztlan Community Center in Fort Collins, Colorado, is now home to a wide variety of classes, sports and events, with amenities such as a triple gymnasium, workout facilities, lounge, game room, computer lab, classrooms, and connections to the Poudre River Trail. Beyond its value as a community asset, the new Northside Aztlan Community Center is the first Leadership in Energy and Environmental Design (LEED) Gold certified community center in the United States. Visit http://www.epa.gov/superfund/programs/recycle/index.html for more information on Superfund Redevelopment.

EPA Pub. No. 330-F-11-002

Office of Site Remediation Enforcement/Office of Enforcement and Compliance Assurance

U.S. Environmental Protection Agency

March 2011

Table of Contents

Preface ..... **iv**

Commonly Used Acronyms and Abbreviations ..... **v**

Purpose and Use of This Handbook ..... **vi**

I. Overview of CERCLA and RCRA **1**
- A. CERCLA 1
  - 1. General Information 1
  - 2. EPA's Brownfields Program and the Brownfields Amendments 1
- B. RCRA 2

II. Liability **4**
- A. CERCLA Liability 4
- B. RCRA Liability 5

III. Statutory Protections and EPA Policies for the Cleanup, Reuse, and Revitalization of Contaminated Sites **6**
- A. CERCLA Statutory Defenses and Liability Protections 6
  - 1. Bona Fide Prospective Purchasers 7
  - 2. Owners of Property Impacted by Contamination from an Off-site Source (Contiguous Property Owners) 9
    - i. Contaminated Aquifers 9
    - ii. Contiguous Property Owners 10
  - 3. Purchasers without Knowledge of Contamination 10
    - i. Third-Party Defense 11
    - ii. Innocent Landowner Liability Protection 11
  - 4. Common Elements Guidance 12
- B. State Response Programs 14
  - 1. Voluntary Cleanup Programs 14
  - 2. Memoranda of Agreement 15
  - 3. Eligible Response Sites 15
- C. Local Government Liability Protections 15
  - 1. Involuntary Acquisition 16
  - 2. Emergency Response 16
  - 3. Land Banks 17
- D. Lender Liability Protections 17
  - 1. Lenders 18
  - 2. Local Governments and Lender Liability 19
  - 3. Underground Storage Tank (UST) Lender Liability Rule 20
- E. Residential Property Owners 21

IV. Site-Specific EPA Tools to Address Status Liability Concerns, and/or Perceived Stigma **22**
- A. Comfort/Status Letters 22
  - 1. Superfund Comfort/Status Letters 22
  - 2. RCRA Comfort/Status Letters 23
  - 3. Reasonable Steps Comfort Letter 23
  - 4. Comfort Letters for National Priorities List Sites and Federally Owned Properties 24
- B. Agreements 25
  - 1. Bona Fide Prospective Purchaser Work Agreements 25
  - 2. Prospective Purchaser Agreements and Prospective Lease Agreements 25
  - 3. Windfall Lien Resolution 27
  - 4. Contiguous Property Owner Assurance Letters and Settlements 27
- C. Other Tools 27
  - 1. Ready for Reuse Determinations 28
  - 2. National Priorities List Deletion 28

V. Other Considerations for Entities Seeking to Clean Up, Reuse, and Revitalize Contaminated Property 29
A. Long-Term Stewardship 29
B. Supplemental Environmental Projects (SEPs) 30
C. OECA Guiding Principles 31
1. Environmental Justice 31
2. Public Participation 33
3. Financial Assurance 34
D. EPA Initiatives and Programs 34
1. ER3 - Environmentally Responsible Redevelopment and Reuse Initiative 35
2. Brownfields Grants and State/Tribal Funding 35
3. Superfund Redevelopment Initiative 36
4. RCRA Brownfields Prevention Initiative 36
5. RE-Powering America's Land Initiative 37

Table of Contents For Handbook Text Boxes

Disclaimers vii
Removal vs. Remedial Action 1
Components of the RCRA Corrective Action Program 5
BFPP Protections Apply to Tenants 7
Windfall Lien Guidance and Settlements 8
Threshold Criteria for EPA's Contaminated Aquifer Guidance 9
All Appropriate Inquiries 13
Affiliation 13
Meaning of "Involuntary Acquisition" 16
States with Land Bank Legislation 17
"Participation in Management" Defined 19
Threshold Criteria for Residential Property Owners Under EPA Guidance 21
Evaluation Criteria for Superfund Comfort/Status Letters 22
Private Party Tools 23
Differences Between BFPP Liability Protection and PPAs 26
Examples of Engineered Controls 29
Examples of Institutional Controls 30
Environmental Justice 32
Community Engagement Initiative: Public Participation in the Cleanup Process 33
Office of Brownfields and Land Revitalization Grants and Funding Web Access 36

Appendices

Appendix A Common Elements Guidance
Appendix B Top 10 Questions to Ask Before Buying a Superfund Site
Appendix C CERCLA Liability and Local Government Acquisitions and Other Activities
Appendix D Brownfields Enforcement and Land Revitalization Policy and Guidance Documents
Appendix E Contact Information

Preface

The U.S. Environmental Protection Agency's (EPA) Office of Site Remediation Enforcement (OSRE) implements the enforcement of EPA's hazardous waste cleanup laws, including the Comprehensive Environmental Response, Compensation, and Liability Act (also known as CERCLA or Superfund), the corrective action and underground storage tank cleanup provisions of the Resource Conservation and Recovery Act (RCRA), and the Oil Pollution Act (OPA). The main objective of the cleanup enforcement program is to ensure prompt site cleanup and the participation of liable parties in performing and paying for cleanups in a manner that ensures protection of human health and the environment.

Congress passed the Small Business Liability Relief and Brownfields Revitalization Act of 2002 (Public Law 107-118) (hereinafter, the Brownfields Amendments), which modified Superfund and further promoted the cleanup, reuse, and redevelopment of sites by addressing liability concerns associated with unused or under-utilized property. One important mission of OSRE is to provide guidance on the liability protections available to property owners and other parties as a result of the Brownfields Amendments and other federal laws governing contamination cleanup. OSRE has played, and continues to play, a key role in the reuse and revitalization of contaminated sites, including brownfield sites, by providing guidance and developing tools that will assist parties seeking to clean up, reuse, or redevelop contaminated properties.

OSRE is committed to encouraging site reuse because it helps EPA achieve enforcement and environmental protection goals, such as long-term site stewardship and sustainable land use planning. Often, reuse can support these enforcement and environmental protection goals and help remove obstacles to cleanups and revitalization. Over the years, OSRE has highlighted these efforts through a series of handbooks, most recently *Revitalizing Contaminated Sites: Addressing Liability Concerns* (2008) and the *Brownfields Handbook: How to Manage Federal Environmental Liability Risks* (2002). This 2011 edition of the handbook, *Revitalizing Contaminated Sites: Addressing Liability Concerns (The Revitalization Handbook)* is a compilation of enforcement tools, guidance, and policy documents that are available to help promote the cleanup and revitalization of contaminated sites.

While OSRE intends this handbook to be useful for years to come, it recognizes that developments in the brownfields area will yield new policy and guidance documents. Please refer to EPA's Brownfields and Revitalization website (http://www.epa.gov/compliance/cleanup/revitalization) for new and updated documents.

OSRE looks forward to the challenge of protecting human health and the environment through the cleanup and subsequent revitalization of contaminated property.

Commonly Used Acronyms and Abbreviations

AAI	All Appropriate Inquiries
BFPP	Bona Fide Prospective Purchaser
Brownfields Amendments	Small Business Liability Relief and Brownfields Revitalization Act of 2002
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
CPO	Contiguous Property Owner
DOJ	United States Department of Justice
ER3	Environmentally Responsible Redevelopment and Reuse Initiative
HSTF	Hazardous Substance Trust Fund
ILO	Innocent Landowner
Lender Liability Act	Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996
MOA	Memorandum of Agreement
MOU	Memorandum of Understanding
NCP	National Contingency Plan
NPL	National Priorities List
OBLR	Office of Brownfields and Land Revitalization
OECA	Office of Enforcement and Compliance Assurance
OPA	Oil Pollution Act
OSRE	Office of Site Remediation Enforcement
O&M	Operation and Maintenance
PLA	Prospective Lease Agreement
PPA	Prospective Purchaser Agreement
PRP	Potentially Responsible Party
RCRA	Resource Conservation and Recovery Act
RfR	Ready for Reuse
SEP	Supplemental Environmental Project
SRI	Superfund Redevelopment Initiative
TSD	Treatment, Storage, and Disposal
UST	Underground Storage Tank
VCP	Voluntary Cleanup Program

Purpose and Use of This Handbook

This handbook summarizes the statutory and regulatory provisions of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601 et seq. (CERCLA, commonly known as Superfund) and the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 et seq. (RCRA), as well as the policy and guidance documents most useful in managing environmental cleanup liability risks associated with the revitalization of contaminated sites. It is designed for use by parties involved in the assessment, cleanup, and revitalization of sites, and provides a basic description of the tools parties can use to address liability concerns.

There are a number of things a party may want to consider before revitalizing contaminated property. For example:

- A party should determine the end use of the property, and should collect and consider information on past uses and potential contamination.
- If a party intends to purchase the property, it should consider whether it needs to conduct all appropriate inquiries to take advantage of CERCLA liability protections, such as the bona fide prospective purchaser protection.
- Should the party need information or have concerns about cleanup or liability protection, it should identify the most appropriate level of government to consult.
- A party may want to employ private mechanisms such as indemnification or insurance tools (see Tools Between Private Parties text box), or work at the state level and make use of existing state tools, programs, or incentives such as the state's voluntary cleanup program. If contamination on the property warrants EPA's attention under CERCLA or RCRA, a party should first determine if EPA or the state is taking or plans to take action at the property. After determining where the property fits in the federal or state cleanup pipeline, a party may use this handbook to help decide which tool or tools are most appropriate for addressing potential CERCLA or RCRA liability risks.

Both CERCLA and RCRA are designed to protect human health and the environment from the dangers of improperly disposed hazardous substances, though these two programs address different parts of the hazardous waste problem. The RCRA programs focus on how wastes should be managed to avoid potential threats to human health and the environment. CERCLA, on the other hand, applies primarily when mismanagement has already occurred, resulting in releases of hazardous substances to the environment. The two laws overlap in significant respects, however; for example, both CERCLA and RCRA have cleanup authorities that may apply to certain violations of waste management standards.

Though many prospective purchasers, developers, and lenders hesitate to get involved with contaminated properties because they fear that they might be held liable under CERCLA or RCRA, many contaminated properties may never receive EPA's attention under CERCLA, RCRA, or any other federal law. Accordingly, parties' fears of federal involvement -- to the extent that they impact an entity's decision to get involved with a brownfield site -- rather than actual EPA practice are often the primary obstacles to the redevelopment and reuse of brownfields. EPA hopes that this handbook will provide a better understanding of these laws and their implementation.

DISCLAIMERS

This document provides general information and guidance regarding facilitating reuse of properties. It does not address all information, factors, or considerations that may be relevant. This document is not legally binding. The word "should" and other similar terms used in this document are intended as general recommendations or suggestions that might be generally applicable or appropriate and should not be taken as providing legal, technical, financial, or other advice regarding a specific situation or set of circumstances. This document may be revised at any time without public notice.

This document describes and summarizes statutory provisions, regulatory requirements, and policies. The document is not a substitute for these provisions, regulations, or policies, nor is it a regulation itself. In the event of a conflict between the discussion in this document and any statute, regulation, or policy, this document would not be controlling and cannot be relied upon to contradict or argue against any EPA position taken administratively or in court. It does not impose legally binding requirements on EPA or the regulated community, and might not apply to a particular situation based upon the specific circumstances. This document does not modify or supersede any existing EPA guidance document or affect the Agency's enforcement discretion in any way.

I. Overview of CERCLA and RCRA

A. CERCLA

1. General Information

In 1980, in response to public concern about abandoned hazardous waste sites such as Love Canal, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601 et seq. CERCLA, commonly referred to as Superfund, authorizes the federal government to assess and/or clean up contaminated sites and provides authority for emergency response involving hazardous materials.

CERCLA establishes a comprehensive liability scheme to hold certain categories of parties liable to conduct and/or pay for cleanup of such releases. EPA may exercise its response authority through removal or remedial actions. Remedial responses financed by the Hazardous Substance Trust Fund are undertaken only at sites on EPA's National Priorities List (NPL). The National Contingency Plan (NCP), 40 C.F.R. Part 300, provides the "blueprint" for conducting removal and remedial actions under CERCLA.

REMOVAL VS. REMEDIAL ACTION

- A **removal action** generally is a short-term and/or emergency action that may be necessary to address a release or threat of release of a hazardous substance into the environment. CERCLA § 101(23). Removals may include adding security fencing, providing alternate water supplies, or temporarily evacuating or relocating a community. Depending on the amount of time available for planning, removal actions are classified as: 1) emergency; 2) time-critical; and 3) non-time-critical. Typically, removal actions are limited to 12 months in duration or $2 million in response costs. CERCLA § 104(c)(1).

- A **remedial action** generally addresses long-term threats to human health and the environment caused by more persistent contamination sources. CERCLA § 101(24). Remedial actions permanently and significantly reduce the risks associated with releases or threats of releases of hazardous substances that are serious but lack the time-criticality of a removal action.

2. EPA's Brownfields Program and the Brownfields Amendments

There are many different types of contaminated or potentially contaminated property in the United States. Some may be "Superfund sites"-- sites where the federal government is, or plans to be, involved in cleanup efforts, many of which are listed on the NPL. Other properties may be "brownfields"-- properties where expansion, redevelopment, or reuse may be complicated by the presence (or potential presence) of contamination. Often, the federal government is not involved in cleanups at brownfield sites. Rather, state and tribal response programs play a significant role in cleaning up and helping to revitalize these sites. Other contaminated properties may be

"RCRA brownfields" -- RCRA facilities where reuse or redevelopment is slowed due to real or perceived concerns about requirements imposed by RCRA for actual or potential contamination.

EPA launched the Brownfields Initiative in the mid-1990s and developed guidance and tools to help further the Initiative's goals to empower states, communities, and other stakeholders to assess, safely clean up, sustainably reuse, and prevent future brownfield sites.

Congress codified many of EPA's Brownfields Initiative practices, policies, and guidances when it passed the Small Business Liability Relief and Brownfields Revitalization Act of 2002 (Public Law 107-118) (Brownfields Amendments). The Brownfields Amendments define a brownfield site as "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant." CERCLA § 101(39). The Brownfields Amendments also include provisions to address the liability concerns of certain landowners, provide statutory authority for EPA's brownfields grant program, enable EPA to obtain a windfall lien on certain properties owned by bona fide prospective purchasers, create a bar to EPA enforcement at certain brownfields sites being addressed under state response programs, and authorize EPA to provide grants to states and tribes to develop response programs.

As noted above, under CERCLA's liability scheme, the owner of a contaminated property is responsible for the property's cleanup based solely on its ownership status, even if the owner did not contribute to the contamination. As a result, entities that want to purchase contaminated properties are often concerned about incurring CERCLA liability once they acquire the property. To address these liability concerns, the Brownfields Amendments included new or clarified liability protections for landowners who acquire property and continue to meet certain criteria after acquisition. The three landowner liability protections addressed in the Brownfields Amendments are for:

- Bona fide prospective purchasers (BFPPs);
- Contiguous property owners (CPOs); and
- Innocent landowners (ILOs).

The CERCLA liability scheme and all these landowner liability protections and related cleanup enforcement policy and guidance are discussed in Section III.

More information on the Superfund enforcement program is available on EPA's website at http://www.epa.gov/compliance/cleanup/superfund/index.html. Information on the Superfund program is available at http://www.epa.gov/superfund. EPA also hosts a website specifically addressing brownfields issues at http://epa.gov/brownfields.

B. RCRA

In 1976, Congress enacted the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 et seq., which authorizes EPA to establish programs to regulate hazardous waste (Subtitle C), solid waste (Subtitle D), and underground storage tanks (Subtitle I). RCRA's goals include:

- Protecting human health and the environment from hazards posed by waste disposal;
- Conserving energy and natural resources through waste recycling and recovery;
- Reducing the amount of waste generated; and
- Ensuring that wastes are managed in an environmentally safe manner.

Through RCRA Subtitle C, Congress gave EPA the authority to manage hazardous waste from "cradle to grave." There are Subtitle C regulations for the generation, transportation, and treatment, storage, or disposal of hazardous waste. These regulations first identify the criteria to determine which solid wastes are hazardous, and then establish various requirements for the three categories of hazardous waste handlers: generators, transporters, and treatment, storage, or disposal facilities (TSDs). In addition, the Subtitle C regulations set technical standards for the design and safe operation of TSDs. These regulations for TSDs serve as the basis for developing and issuing permits, which TSDs are required to obtain. Unlike CERCLA, RCRA does not contain a bona fide prospective purchaser or similar liability protection.

Subtitle I authorizes EPA to establish a regulatory program that includes technical requirements to prevent, detect, and clean up releases from underground storage tanks (UST). Tanks subject to Subtitle I may be found at a variety of locations, including convenience stores, service stations, small and large manufacturing facilities, and airports. Since the UST program is not part of RCRA Subtitle C, there are separate technical and administrative requirements, including notification, design and installation standards, and closure.

II. Liability

This Chapter covers:

- CERCLA Liability; and
- RCRA Liability.

A. CERCLA Liability

CERCLA's "polluter pays" liability scheme ensures that parties who have responsibility for contamination, often referred to as potentially responsible parties (PRPs), rather than the general public, pay for cleanups. As described in CERCLA § 107(a), the following categories of persons may be held liable for the costs or performance of a cleanup under CERCLA:

(1) The current owner or operator of a facility;

(2) An owner or operator at the time of disposal;

(3) A person who arranged for the disposal or treatment of hazardous substances ("generator" or "arranger"); and

(4) A person who accepted hazardous substances for transport and selected the site to which the substances were transported ("transporter").

Under CERCLA's comprehensive liability scheme, a PRP's liability for cleanup is:

- **Strict** - A party is liable if it falls within one of the above categories in CERCLA § 107(a) even if it did not act negligently or in bad faith.
- **Joint and several** - If two or more parties are responsible for the contamination at a site, any one or more of the parties may be held liable for the entire cost of the cleanup, regardless of their share of the waste contributed, unless a party can show that the injury or harm at the site is divisible.
- **Retroactive** - A party may be held liable even if the hazardous substance disposal occurred before CERCLA was enacted in 1980.

Additionally, EPA has adopted an "enforcement first" policy throughout the Superfund cleanup process to compel those responsible for contaminated sites to take the lead in cleanup, thus conserving taxpayer money. Using the enforcement authorities provided by Congress, EPA may enter into settlements with or compel PRPs to implement a cleanup at a site where a release of hazardous substances has occurred. When EPA spends Fund monies to finance a removal or remedial action, EPA may then seek reimbursement from responsible parties. Private entities may also conduct cleanups and seek reimbursement of eligible response costs from PRPs.

B. RCRA Liability

Under RCRA Subtitle C, EPA has developed a comprehensive program to manage solid and hazardous waste. Past and present activities at RCRA facilities have sometimes resulted in releases of hazardous waste and hazardous constituents into soil, ground water, surface water, and air. RCRA generally mandates that EPA require the investigation and cleanup, or remediation, of these releases at RCRA facilities. This cleanup process is known as "corrective action." EPA possesses several corrective action authorities to compel cleanup. Owners/operators of facilities where releases have occurred are required to clean up contamination caused by the mismanagement of wastes. The box below displays the components of the corrective action process. Since the steps necessary to achieve cleanup at a facility will depend on site-specific conditions, the corrective action process is flexible. The components may occur in any order, and not every component is necessary to determine that no further action is required.

COMPONENTS OF THE RCRA CORRECTIVE ACTION PROGRAM

- Initial Site Assessment (RCRA Facility Assessment);
- Release Assessment and Site Characterization (RCRA Facility Investigation);
- Interim Actions to control or abate ongoing risks to human health and the environment (Interim Measures);
- Evaluation of different remedial alternatives to remediate the site (Corrective Measures Study);
- Remedy selection for a thorough cleanup of the hazardous release (Statement of Basis); and
- Design, construction, operation, maintenance, and monitoring of the chosen remedy (Corrective Measures Implementation).

States are an integral part of the RCRA program. EPA may approve a state's or territory's RCRA program to operate in lieu of EPA's program. EPA generally approves a state-administered RCRA action program if the state requirements are no less stringent than the federal requirements and the state has the ability to take adequate enforcement actions. In authorized states, facilities must comply with the authorized state requirements rather than the corresponding federal requirements. After authorization, both the state and EPA have the authority to enforce those requirements.

Currently, 50 states and territories have been granted authority to implement the base, or initial, program, and 42 states and the territory of Guam are authorized to operate the corrective action program in lieu of EPA's program. Owners and operators of corrective action sites in authorized states should also contact their state regulatory agency because the state program may have different or more stringent requirements than the federal RCRA corrective action program.

More information on the RCRA state authorization program is available on EPA's website at http://www.epa.gov/epawaste/laws-regs/state/index.htm. More information on the RCRA cleanup enforcement program is available on EPA's website at http://www.epa.gov/compliance/cleanup/rcra/.

III. Statutory Protections and EPA Policies for the Cleanup, Reuse, and Revitalization of Contaminated Sites

The Office of Site Remediation Enforcement (OSRE) in EPA's Office of Enforcement and Compliance Assurance (OECA) is charged with enforcing CERCLA, RCRA corrective action, underground storage tank programs, and aspects of the Oil Pollution Act, 33 U.S.C. § 2701 et seq. (OPA). In this capacity, OSRE began to develop a comprehensive approach in the early 1990s to define liability issues and provide appropriate liability relief under these statutes to assist with the redevelopment and revitalization of contaminated property. More specifically, OSRE began to develop guidance documents to explain its understanding of liability under these laws, as well as how and when EPA may exercise discretion to those who were interested in redeveloping and revitalizing contaminated sites.

Partly in response to EPA's efforts, Congress enacted the Brownfields Amendments, amending the Superfund statute to clarify certain landowner liability concerns and provide funding for grants for the assessment and cleanup of contaminated property. EPA continues to promote site cleanup by potentially responsible parties (PRPs) and private parties. EPA supports revitalization through the issuance of enforcement discretion guidance documents, model enforcement documents, responses to frequently asked questions, fact sheets, and other documents that provide liability guidance or relief to potential developers and owners of contaminated land. All these documents, along with all current Superfund enforcement and brownfields policy and guidance documents, are available on EPA's website at http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund/. Those enforcement discretion documents that are relevant to revitalization are summarized in Appendix D of this handbook.

More information on the Superfund enforcement program is available on EPA's website at http://www.epa.gov/oecaerth/cleanup/superfund/index.html. Information on the Superfund program is available at http://www.epa.gov/superfund.

A. Brownfields Amendments to CERCLA

This Section covers:

- Bona Fide Prospective Purchaser;
- Contiguous Property Owners;
- Third-Party Defense;
- Innocent Landowner Liability; and
- Common Elements Guidance.

1. Bona Fide Prospective Purchasers

The 2002 Brownfields Amendments created a new liability protection for a bona fide prospective purchaser (BFPP). Before the passage of the Brownfields Amendments, prospective purchasers of contaminated property could not avoid the liability associated with being the current owner if they purchased with knowledge of contamination, unless they entered into a prospective purchaser agreement (PPA) with EPA before acquisition that included covenants not to sue under CERCLA §§ 106 and 107. Now, however, as a result of the Brownfields Amendments, a party can achieve and maintain status as a BFPP without entering into a PPA with EPA, so long as that person meets the statutory criteria to assert the defense. A key advantage of the BFPP protection is that it is self-implementing and, therefore, EPA is not required to make determinations as to whether a party qualifies for BFPP status.

BFPP PROTECTIONS APPLY TO TENANTS

On January 14, 2009, EPA published its *Enforcement Discretion Guidance Regarding the Applicability of the Bona Fide Prospective Purchaser Definition in CERCLA § 101(40) to Tenants.* This guidance advises EPA regions on how to exercise enforcement discretion with regard to the BFPP provision. Because leasehold interests may play a critical role in facilitating the cleanup and reuse of brownfields and other contaminated properties, this guidance clarifies a tenant's responsibilities with respect to BFPP status. The statute provides that tenants of BFPPs should be treated as having BFPP status. Further, EPA, on a site-specific basis, intends to exercise its enforcement discretion not to enforce against:

- A tenant whose lease gives sufficient "indicia of ownership" to be considered an "owner" and who meets the elements of §§ 101(40)(A)-(H) and 107(r)(1); and
- A tenant of an owner who has lost BFPP status, if the tenant meets BFPP requirements.

This document is accessible on the internet at http://www.epa.gov/compliance/resources/policies/cleanup/superfund/bfpp-tenant-mem.pdf.

The BFPP provision found in CERCLA § 107(r) dramatically changed the CERCLA liability landscape by providing a method to establish a defense to liability for disposal that occurred before acquisition. Section 107(r) protects from owner/operator liability a BFPP who acquires property after January 11, 2002, and meets the criteria in CERCLA § 101(40) and § 107(r).

To successfully assert the innocent landowner defense, persons cannot know or have reason to know about the contamination on the property. Now persons may acquire property *knowing, or having reason to know*, of contamination on the property and not be liable under CERCLA as long as they meet the statutory criteria for the BFPP defense.

BFPPs must perform "all appropriate inquiries" (AAI) before acquiring the property. BFPPs cannot otherwise be a PRP at the site or have a prohibited "affiliation" with a liable party at the site.

BFPPs must also satisfy additional obligations throughout the period of ownership:

- Complying with land use restrictions and not impeding the effectiveness or integrity of institutional controls;
- Exercising appropriate care with respect to hazardous substances found at the property, including, among other things, taking "reasonable steps" to stop any continuing release and to prevent any threatened future release;
- Providing cooperation, assistance, and access;
- Complying with information requests and administrative subpoenas; and
- Providing legally required notices. CERCLA § 101(40).

BFPPs also must not impede the performance of a response action or natural resource restoration. CERCLA § 107(r).

BFPPs are not liable as owner/operators for CERCLA response costs, but the property they acquire may be subject to a windfall lien where an EPA response action has increased the fair market value of the property. That is, the United States, after spending Superfund money for cleanup at a property, may have a windfall lien on the property for the lesser of the unrecovered response costs or the increase in fair market value at the property attributable to the Superfund cleanup. The windfall lien provision is found in CERCLA § 107(r), and does not supplant the lien provision found in CERCLA § 107(l).

WINDFALL LIEN GUIDANCE AND SETTLEMENTS

EPA and DOJ jointly issued guidance on the windfall lien provision, *Interim Enforcement Discretion Policy Concerning "Windfall Liens" Under Section 107(r) of CERCLA*, on July 16, 2003. EPA separately published the accompanying *"Windfall Lien" Guidance Frequently Asked Questions*. In addition to explaining how EPA intends to perfect the windfall lien and when EPA may seek to forclose on this lien, the guidance includes two attachments: 1) a sample "comfort letter" that explains to the recipient whether EPA believes there is a possible windfall lien applicable to the property; and 2) a model settlement document, which EPA may use to settle any applicable windfall lien provision in exchange for monetary or other adequate consideration. This guidance was also accompanied by a *Windfall Lien Frequently Asked Questions* fact sheet issued on July 16, 2003.

In January 2008, EPA issued another windfall lien guidance, titled *Windfall Lien Administrative Procedures* and the associated *Model Notice of Intent to File a Windfall Lien Letter*. These documents provide guidance on the timing for filing notice of a windfall lien on a property and the EPA administrative procedures that should accompany filing a windfall lien notice.

For more discussion of resolution of windfall liens, please refer to Section IV.B.3.

2. Owners of Property Impacted by Contamination from an Off-site Source (Contiguous Property Owners)

i. Contaminated Aquifers

Owners of property above aquifers contaminated from an off-site source may be concerned about CERCLA liability even though they did not cause and could not have prevented the ground water contamination. Certain protections from liability for contiguous landowners may be found in EPA guidance issued before and after the Brownfields Amendments.

In May 1995, OSRE developed the *Final Policy Toward Owners of Property Containing Contaminated Aquifers* in response to this concern. EPA stated that it would not require cleanup or the payment of cleanup costs if the landowner did not cause or contribute to the contamination. It also stated that if a third party sued or threatened to sue, EPA would consider entering into a settlement with the landowner covered under the policy to prevent third-party damages being awarded.

THRESHOLD CRITERIA FOR EPA'S CONTAMINATED AQUIFER GUIDANCE

A landowner may be covered by this policy. EPA will exercise its discretion or may enter into a settlement if all the following criteria of policy are met:

- The hazardous substances contained in the aquifer are present solely as the result of subsurface migration from a source or sources outside the landowner's property;
- The landowner did not cause, contribute to, or make the contamination worse through any act or omission on his part;
- The person responsible for contaminating the aquifer is not an agent or employee of the landowner, and was not in a direct or indirect contractual relationship with the landowner (exclusive of conveyance of title); and
- The landowner is not considered a liable party under CERCLA for any other reason such as contributing to the contamination as a generator or transporter.

This policy may not apply in cases where:

- The property contains a ground water well that may influence the migration of contamination in the affected aquifer; or
- The landowner acquires the property, directly or indirectly, from a person who caused the original release.

The policy identifies certain exceptions when the policy will not be applicable, including, among others, when a well on the property may affect the migration of contaminants, or when there is a contractual relationship between the landowner and the person causing the off-site contamination. In addition, the policy required that the landowner must not be liable based on some other connection to the site, such as being a generator or transporter.

ii. Contiguous Property Owners

The Brownfields Amendments provide statutory protection for contiguous property owners (CPOs). Specifically, CERCLA § 107(q) excludes from the definition of "owner or operator" a person who owns property that is "contiguous," or otherwise similarly situated to, a facility that is the only source of contamination found on the person's property. Like the contaminated aquifer policy, this provision protects parties that are victims of pollution caused by a neighbor's actions.

To qualify as a statutory CPO, a landowner must meet the criteria set forth in CERCLA § 107(q)(1)(A). A CPO must perform AAI before acquiring the property, and demonstrate that it is not affiliated with a liable party at the time of purchase and throughout its ownership of the property (for more on affiliation requirements, please see the text box on the same subject). Persons who know, or have reason to know, before purchase, that the property is or could be contaminated, cannot qualify for the CPO liability protection under the Brownfields Amendments, although such parties may still be entitled to rely on the BFPP statutory defense or EPA may exercise its enforcement discretion not to pursue such persons, as set forth in EPA's 1995 contaminated aquifer guidance. Like BFPPs, CPOs must also satisfy ongoing obligations after purchase.

On January 13, 2004, EPA issued its *Interim Enforcement Discretion Guidance Regarding Contiguous Property Owners* (Contiguous Property Owner Guidance), which discusses CERCLA §107(q) and may be found at http://www.epa.gov/compliance/resources/policies/cleanup/superfund/contig-prop.pdf. The guidance addresses: 1) the statutory criteria; 2) the application of CERCLA §107(q) to current and former owners of property; 3) the relationship between section 107(q) and EPA's Residential Homeowner Policy and Contaminated Aquifers Policy; and 4) discretionary mechanisms EPA may provide to resolve remaining liability concerns of contiguous property owners. The guidance document was followed by a *Contiguous Property Owner Reference Sheet*, which is available on the internet at http://www.epa.gov/compliance/resources/policies/cleanup/superfund/contig-prop-faq.pdf.

Moreover, on November 9, 2009, EPA drafted a model CERCLA Section 107(q)(3) CPO assurance letter in accordance with the 2004 enforcement discretion guidance mentioned above. Use of such letters is limited to several types of enumerated circumstances and is anticipated to be rare because CERCLA 107(q) is self-implementing. For more information on CPO assurance letters, see http://www.epa.gov/compliance/resources/policies/cleanup/superfund/cpo-assure-mod-ltr-mem.pdf.

3. Purchasers without Knowledge of Contamination

Entities that acquire property and had no knowledge of the contamination at the time of purchase might be eligible for CERCLA's third-party defense or innocent landowner defense, in addition to the BFPP defense.

i. Third-Party Defense

CERCLA § 107(b) includes the following defenses to liability if a person can show, by a preponderance of the evidence, that the contamination was solely caused by:

- An act of God (CERCLA § 107(b)(1));
- An act of war (CERCLA § 107(b)(2)); or
- The act or omission of a third party (CERCLA § 107(b)(3)).

To invoke CERCLA's § 107(b)(3) third-party defense, the third party's act or omission must not occur "in connection with a contractual relationship." Moreover, an entity asserting the CERCLA § 107(b)(3) defense must show that: a) it exercised due care with respect to the contamination; and b) it took precautions against the third party's foreseeable acts or omissions, and the consequences that could foreseeably result from such acts or omissions.

ii. Innocent Landowner Liability Protection

The Superfund Amendments and Reauthorization Act of 1986 (Public Law 96-510) expanded the third-party defense by creating innocent landowner exclusions to the definition of a "contractual relationship." The 2002 Brownfields Amendments later clarified the innocent landowner liability protection. Previously, the deed transferring title between a PRP and the new landowner was a "contractual relationship" that prevented the new landowner from raising the traditional CERCLA § 107(b)(3) third-party defense. To promote redevelopment and provide more certainty, Congress created the "innocent landowner defense," which requires an entity to meet the criteria set forth in CERCLA § 101(35) in addition to the requirements of CERCLA § 107(b)(3). CERCLA § 101(35)(A) distinguishes between three types of innocent landowners:

- Purchasers who acquire property without knowledge of contamination and who have no reason to know about the contamination, CERCLA § 101(35)(A)(i);
- Governments "which acquired the facility by escheat, or through any other involuntary transfers or acquisition, or through the exercise of eminent domain authority by purchase or condemnation," CERCLA § 101(35)(A)(ii); and
- Inheritors of contaminated property, CERCLA § 101(35)(A)(ii).

For all three types of landowners, the facility must be acquired after the disposal or placement of the hazardous substances on, in, or at the facility. Further, a set of continuing obligations similar to what is required of BFPPs also applies. CERCLA § 101(35)(A).

For purchasers who acquire property without knowledge of contamination, an owner must have conducted AAI before purchase and complied with other pre- and post-purchase requirements. The 2002 Brownfields Amendments also elaborated on the AAI requirement. *See* the "All Appropriate Inquiries" text box in this handbook.

The innocent landowner defense may provide liability protection to some owners of contaminated property -- especially those that purchased property before January 1, 2002, and are therefore ineligible for the BFPP protection -- but generally most post-2002 prospective purchasers are unlikely to rely on this defense because of the requirement that the purchaser have no knowledge of contamination at the site at the time of acquisition.

Several of EPA's guidance documents discuss the ILO liability protection, including the Common Elements guidance, discussed below. The Common Elements guidance is also included at Appendix A.

4. Common Elements Guidance

In March 2003, EPA issued its "Common Elements" guidance for the three property owner classes -- bona fide prospective purchaser (BFPP), contiguous property owner (CPO), and innocent purchaser (ILO) -- addressed in the Brownfields Amendments. *See 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 ("Common Elements").*

The guidance was accompanied by the "*Common Elements" Guidance Reference Sheet*, also issued on March 6, 2003, which highlights the significant points of the guidance. Both of these documents are available in Appendix A of this handbook.

The Brownfields Amendments identify threshold criteria and ongoing obligations that these types of landowners must meet to obtain the liability protections afforded by the statute. Many of these obligations are overlapping and thus the shorthand name ("Common Elements") for the guidance. Included with the guidance are three documents:

(1) A chart laying out the common statutory obligations;

(2) A questions and answers document pertaining to the "reasonable steps" statutory criteria; and

(3) A model comfort/status letter for providing site-specific suggestions as to reasonable steps.

The Common Elements guidance first discusses the threshold criteria BFPPs, CPOs, and innocent landowners must meet to assert these liability protections.

The first threshold requirement is that the landowner must perform all appropriate inquiries (AAI) before purchasing the property. CERCLA §§ 101(40)(B), 107(q)(1)(A)(viii), 101(35)(A)(i), and (B)(i).

ALL APPROPRIATE INQUIRIES

BFPPs, CPOs, and innocent landowners must all undertake "all appropriate inquiries" (AAI) under CERCLA § 101(35)(B) before acquiring property to obtain liability protection. CERCLA § 101(35)(B) required EPA to publish a regulation to "establish standards and practices for the purpose of satisfying the requirement to carry out [AAI] . . . ." EPA's *All Appropriate Inquiries Rule* ("AAI Rule"), 40 C.F.R. Part 312, became final on November 1, 2006 (70 FR 66070). Parties affected by the AAI Rule are those purchasing commercial or industrial real estate who wish to take advantage of CERCLA's new liability protections, and those persons conducting a site characterization or assessment with funds provided by certain federal brownfields grants.

For more information on the AAI Rule, please visit http://www.epa.gov/brownfields/aai/.

Second, the BFPP and CPO protections require that the purchaser not be "affiliated" with a liable party, CERCLA §§ 101(40)(H), 107(q)(1)(A)(ii), and for the innocent landowner defense, the act or omission that caused the release or threat of release of hazardous substances and the resulting damages must have been caused by a third party with whom the purchaser does not have an employment, agency, or contractual relationship. CERCLA §§ 107(b)(3), 101(35)(A).

AFFILIATION

The BFPP and CPO liability protections require that the purchaser or owner of the property at issue not be "affiliated" with a person that is potentially liable at that property. For both liability protections, "affiliation" includes a familial, contractual, financial, or corporate relationship. The affiliation language is found in Section 101(40) for those seeking liability protection as a BFPP, while the affiliation language for a CPO is found in Section 107(q)(1)(A). The CPO affiliation language differs from the BFPP affiliation language in that there is no exception for relationships created by the instruments by which title to the facility is conveyed or financed. Except for this difference, the affiliation language in the BFPP and CPO provisions is virtually identical. EPA has issued guidance detailing how it will implement the affiliation language in the exercise of its enforcement discretion.

Third, the Common Elements guidance discusses the common ongoing obligations for each type of landowner liability protection, identified as follows:

- Complying with land use restrictions and not impeding the effectiveness or integrity of institutional controls;
- Taking "reasonable steps to prevent releases" with respect to hazardous substances affecting a landowner's property;
- Providing cooperation, assistance, and access to the property;
- Complying with information requests and subpoenas; and
- Providing legally required notices.

Prospective purchasers or owners of contaminated property may want to use the Common Elements guidance to understand the different liability protections that may be available and their requirements.

B. State Response Programs

This Section covers:

- Voluntary Cleanup Programs;
- Memoranda of Agreement; and
- Eligible Response Sites.

1. Voluntary Cleanup Programs

State response programs play a significant role in assessing and cleaning up brownfield sites. As Congress recognized in the legislative history of the Brownfield Amendments,

> *"[t]he vast majority of contaminated sites across the Nation will not be cleaned up by the Superfund program. Instead, most sites will be cleaned up under State authority."*

Voluntary cleanup programs (VCPs) are typically programs authorized by state statutes to address brownfield and other lower-risk sites. Links to state VCPs can be found on EPA's website at http://www.epa.gov/compliance/cleanup/revitalization/state.html.

EPA has historically supported the use of VCPs and continues to provide grant funding to establish and enhance VCPs. EPA also continues to provide general enforcement assurances to individual states to encourage the assessment and cleanup of sites addressed under VCP oversight. This approach to VCPs was codified in the Brownfields Amendments as CERCLA § 128:

- CERCLA § 128(a) addresses grant funding and memoranda of agreement (MOAs) for state response programs (*i.e.*, VCPs);
- CERCLA § 128(b) addresses the "enforcement bar," which limits EPA enforcement actions under CERCLA §§ 106(a) and 107(a), at "eligible response sites" addressed in compliance with state response programs that specifically govern cleanups to protect human health and the environment; and
- CERCLA § 128(b)(1)(C) addresses the establishment and maintenance of a public record by a state to document the cleanup and potential use restrictions of sites addressed by a VCP.

2. Memoranda of Agreement

Since 1995, EPA has encouraged the use of voluntary cleanup programs (VCPs) at lower-risk sites by entering into non-binding memoranda of agreement (MOAs) with interested states based on a review of the state VCP's capabilities. MOAs can be a valuable mechanism to support and strengthen efforts to achieve protective cleanups under VCP oversight. The purpose of the MOAs is to foster more effective and efficient working relationships between EPA and individual states regarding the use of their VCPs. Specifically, MOAs define EPA and state roles and responsibilities and provide EPA recognition of the state's capabilities. MOAs typically include a general statement of EPA enforcement intentions regarding certain sites cleaned up under the oversight of a VCP. A number of states are also using their VCPs to address facilities subject to corrective action under the Resource Conservation and Recovery Act (RCRA). As a result, EPA and several states have expanded upon the CERCLA VCP MOA concept to address some facilities subject to RCRA corrective action. Those agreements are commonly known as RCRA Memoranda of Understanding (MOUs). EPA has also entered into a few MOAs that address multiple cleanup programs and are consistent with EPA's One Cleanup Program. More information on EPA's One Cleanup Program is available on EPA's website at http://www.epa.gov/oswer/onecleanupprogram/.

Copies of specific MOAs or MOUs, and additional information about state and tribal response programs are available from EPA's website at http://www.epa.gov/brownfields/state_tribal/moa_mou.htm.

3. Eligible Response Sites

The Brownfields Amendments included the concept of an "eligible response site" (CERCLA § 101(41)), which is a site at which EPA may not take an enforcement action under §§ 106 or 107 if it is already being cleaned up under a state response program, and which may be eligible for deferral from listing on the National Priorities List (NPL) in certain circumstances. CERCLA §§ 128(b), 105(h). If an EPA Region determines that a site is not an "eligible response site," that site will not be subject to the deferral provisions in § 105(h) and the limitations on EPA's enforcement and cost recovery authorities under § 128(b). For more information on eligible response sites, please see EPA's March 2003 guidance, *Regional Determinations Regarding Which Sites Are Not "Eligible Response Sites"* at http://www.epa.gov/compliance/resources/policies/cleanup/superfund/reg-determ-small-bus-mem.pdf.

C. Local Government Liability Protections

This Section covers:

- Involuntary Acquisition;
- Emergency Response; and
- Land Banks.

1. Involuntary Acquisition

CERCLA provides that a unit of state or local government will not be considered an owner or operator of contaminated property (and thus will be exempt from potential CERCLA liability as a PRP) if the state or local government acquired ownership or control involuntarily. This provision includes a non-exhaustive list of examples of involuntary acquisitions, including obtaining property through bankruptcy, tax delinquency, abandonment, or "other circumstances in which the government entity involuntarily acquires title by virtue of its function as a sovereign." CERCLA § 101(20)(D). It is important to note that this exclusion will not apply to any state or local government that caused or contributed to the release or threatened release of a hazardous substance from a facility.

MEANING OF "INVOLUNTARY ACQUISITION"

In EPA's 1995 *Municipal Immunity from CERCLA Liability for Property Acquired through Involuntary State Action*, EPA stated that an involuntary acquisition or transfer includes one "in which the government's interest in, and ultimate ownership of, a specific asset exists only because the conduct of a non-governmental party…gives rise to a statutory or common law right to property on behalf of the government." EPA acknowledges that tax foreclosure and other acquisitions by government entities often require some affirmative or volitional act by the local government. Therefore, a government entity does not have to be completely passive during the acquisition in order for the acquisition of property to be considered "involuntary" under CERCLA. Instead, EPA considers an acquisition to be "involuntary" if the government's interest in, and ultimate ownership of, the property exists only because the actions of a non-governmental party give rise to the government's legal right to control or take title to the property.

Municipal Immunity from CERCLA Liability for Property Acquired through Involuntary State Action may be found at http://www.epa.gov/compliance/resources/policies/cleanup/superfund/immunity-cercla-mem.pdf

CERCLA § 101(35)(A)(ii) also discusses involuntary acquisitions in the context of the innocent landowner defense pursuant to CERCLA § 101(35)(A). Please see Section III.A.3.ii for further detail.

For more information on state and local government involuntary acquisition, see EPA's website at http://www.epa.gov/compliance/cleanup/revitalization/local-acquis.html. EPA's *CERLCA Liability and Local Government Acquisition and Other Activities* is included in Appendix C.

2. Emergency Response

Local units of government, especially fire, health, and public safety departments, are often the first responders to emergencies and dangerous situations at contaminated properties in their communities. So as not to interfere with these activities, Congress included the emergency response exemption in CERCLA § 107(d)(2). Under this provision, state or local governments will not be liable for "costs or damages as a result of actions taken in response to an emergency created by a release or threatened release of a hazardous substance." To qualify, the state or local government must not own the property and must not act in a grossly negligent manner or

intentionally engage in misconduct. Further, EPA may reimburse local governments up to $25,000 for the costs of temporary measures under CERCLA § 123.

3. Land Banks

An increasing number of states and municipalities are passing legislation that authorizes land banks. Enabled by state legislation and enacted by local ordinances, a land bank is a governmental entity or nonprofit that acquires, holds, leases, and/or manages vacant, abandoned, and tax delinquent properties. They are charged with bringing such properties into productive use. Land banks can allow local governments to overcome redevelopment barriers that prevent the conversion of underutilized land to higher uses. They can also facilitate land reuse while advancing public policy goals such as provision of affordable housing, stabilization of neighborhoods, development of open space, revitalization of brownfields, smart growth planning, and a reduction of crime, potential fire hazards, and urban blight.

Although the responsibilities of land banks will vary according to state law and the authorizing legislation, common responsibilities and authorities of a land bank include inventory of vacant and abandoned properties, acquisition, property management, property disposition, and waiver of delinquent taxes.

STATES WITH LAND BANK LEGISLATION

- Michigan
- Ohio
- Georgia
- Indiana
- Texas
- Kentucky
- Maryland
- Missouri
- Tennessee

While many land bank properties may not be contaminated, it is important to be aware of the potential for contamination. Purchasers of property from a land bank may want to assess whether there is an applicable CERCLA exemption, affirmative defense, or liability protection. These concerns also apply in the local government context. Whether a local government acquiring a land bank property will qualify under the involuntary acquisition exemption, BFPP, or the third - party defense will be determined on a case-by-case basis.

D. Lender Liability Protections

In the 1990s, it became apparent to EPA and DOJ that liability concerns and fears of enforcement were discouraging financial institutions from lending money to developers of contaminated land, and municipalities from exercising their governmental involuntary acquisition rights and performing cleanup functions on such properties.

EPA initially tried to address the concerns of lenders and municipalities through the Lender Liability Rule promulgated in 1992. A federal court vacated the rule, however, on the ground that "EPA lacked authority to issue" the rule as a binding regulation. *Kelly v. EPA*, 15 F.3d 1100 (D.C. Cir. 1994), *reh. denied*, 25 F.3d 1088 (D.C. Cir. 1994), *cert. denied*, *Am. Bankers Ass'n v. Kelly*, 115 S.Ct. 900 (1995). After the court decision, EPA and DOJ issued the *Policy on CERCLA Enforcement Against Lenders and Government Entities that Acquire Property Involuntarily* on September 22, 1995, which stated that EPA and DOJ were not precluded from following the provisions of the rule as enforcement policy.

This Section covers:

- Lenders;
- Local Governments and Lender Liability; and
- Underground Storage Tank Lender Liability Rule Lenders.

1. Lenders

On August 1, 1996, EPA issued a fact sheet summarizing EPA's position on lender liability titled *The Effect of Superfund on Lenders That Hold Security Interests in Contaminated Property*. Lenders were concerned, however, that EPA's 1995 enforcement policy did not apply to contribution actions brought by third parties attempting to recover their CERCLA response costs from lenders. Partly in response to these concerns, Congress enacted the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, 110 Stat. 3009-462 (1996)("Lender Liability Act").

Section 2502 of the Lender Liability Act amended CERCLA's secured creditor exemption contained in CERCLA § 101(20)(E). Using language very similar to the language of the CERCLA Lender Liability Rule, Congress in CERCLA §§ 101(20)(E)-(G) elaborated on the original exemption by defining key terms and listing activities that a lender may undertake without forfeiting the exemption. Under the statute, a lender is not an "owner or operator" under CERCLA if, "without participating in the management" of a vessel or facility, it holds indicia of ownership primarily to protect its security interest. CERCLA § 101(20)(E)(i). "Participation in management" is further defined in the statute in § 101(20)(F). Additional information is available in the "Participation in Management" text box below.

After the enactment of the Lender Liability Act, EPA issued guidance to further clarify the circumstances in which EPA will apply the provisions of the Lender Liability Rule and its preamble in its interpretation of CERCLA's secured creditor exemption. *See Policy on Interpreting CERCLA Provisions Addressing Lenders and Involuntary Acquisitions by Government Entities (October 1995)*. EPA's subsequent *Policy on Interpreting CERCLA Provisions Addressing Lenders and Involuntary Acquisitions by Government Entities (June 1997)* explains that when interpreting the amended secured creditor exemption, EPA will treat the Lender Liability Rule and its preamble as authoritative guidance.

"PARTICIPATION IN MANAGEMENT" DEFINED

A lender "participates in management" (and will not qualify for the exemption) if the lender:

- Exercises decision-making control over environmental compliance related to the facility, and in doing so, undertakes responsibility for hazardous substance handling or disposal practices; or
- Exercises control at a level similar to that of a manager of the facility, and in doing so, assumes or manifests responsibility with respect to day-to-day decision-making on environmental compliance; or
- Exercises all, or substantially all, of the operational (as opposed to financial or administrative) functions of the facility other than environmental compliance.

The term "participate in management" does not include certain activities such as when the lender:

- Inspects the facility;
- Requires a response action or other lawful means to address a release or threatened release;
- Conducts a response action under CERCLA § 107(d)(1) or under the direction of an on-scene coordinator;
- Provides financial or other advice in an effort to prevent or cure default; or
- Restructures or renegotiates the terms of the security interest; provided the actions do not rise to the level of participating in management.

After foreclosure, a lender who did not participate in management before foreclosure is not an "owner or operator" if the lender:

- Sells, releases (in the case of a lease finance transaction), or liquidates the facility;
- Maintains business activities or winds up operations;
- Undertakes an emergency response or action under the direction of an on-scene coordinator; or
- Takes any other measure to preserve, protect, or prepare the facility for sale or disposition; provided the lender seeks to divest itself of the facility at the earliest practicable, commercially reasonable time, on commercially reasonable terms. EPA considers this test to be met if the lender, within 12 months of foreclosure, lists the property with a broker or advertises it for sale in an appropriate publication.

2. Local Governments and Lender Liability

Section 2504 of the Lender Liability Act codifies the portion of the CERCLA Lender Liability Rule that addresses involuntary acquisitions by government entities. State or local governments that acquire property by involuntary means such as bankruptcy, tax delinquency, or abandonment are excluded from the definition of "owner or operator" in CERCLA, and therefore are not liable under CERCLA Section 107(a), if they did not otherwise cause or contribute to contamination at the facility. CERCLA § 101(20)(D). There is also an innocent landowner affirmative defense available for government entities that acquire property "by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation." CERCLA § 101(35)(A)(ii). Governments should be aware, however, that additional conditions, criteria, and continuing obligations must be met as part of the innocent landowner defense.

EPA's *Policy on Interpreting CERCLA Provisions Addressing Lenders and Involuntary Acquisitions by Government Entities (October 1995)* and *Policy on Interpreting CERCLA Provisions Addressing Lenders and Involuntary Acquisitions by Government Entities (June 1997)* provide guidance on lender liability. Involuntary acquisition issues are further clarified by EPA's *Municipal Immunity from CERCLA Liability for Property Acquired through Involuntary State Action (October 1995)* and *The Effect of Superfund on Involuntary Acquisitions of Contaminated Property by Government Entities (December 1995).* EPA continues to follow these documents as guidance when addressing local government liability.

State or local government entities that acquire property after the enactment of the 2002 Brownfields Amendments and are concerned about potential contamination may want to seek the advice of legal counsel before taking title to ensure that they will have liability protection (*e.g.*, BFPP status or protection under the involuntary acquisition provision or third-party defense). State or local government entities should note that to achieve BFPP status, an entity must conduct AAI before purchase and comply with the other BFPP requirements (CERCLA §§ 101(40)(A)-(H), 107(r)(1)). Conducting proper AAI before purchase is also important for state and local government entities relying on the BFPP protection for brownfield grant eligibility.

3. Underground Storage Tank (UST) Lender Liability Rule

Local communities often struggle with what to do about polluted, abandoned gas stations and other petroleum-contaminated properties, generally referred to as petroleum brownfields, which can be eyesores and blight communities. Often, citizens and businesses shy away from the reuse potential of these properties, fearing the potential liability of environmental contamination under Subtitle I of RCRA. The *Underground Storage Tank (UST) Lender Liability Rule* (40 C.F.R. §§ 280.200-.230) provides one method by which EPA has addressed fears of potential liability to encourage the reuse of abandoned gas station sites.

While developing the UST Lender Liability Rule, EPA recognized that many security interest holders were abandoning the UST properties they held as collateral instead of foreclosing on those properties and risking potential liability for cleanup costs.

The UST Lender Liability Rule exempts certain classes of "owners" and "operators" (*i.e.*, holders of security interests as described in the rule) from identified RCRA regulatory requirements including corrective action, technical requirements, and financial responsibility, provided that specified criteria are met.

By allowing security interest holders to market their foreclosed properties without incurring RCRA liability, the UST Lender Liability Rule encourages the reuse of gas stations that may otherwise end up abandoned. The rule also protects human health and the environment by requiring security interest holders to empty any tanks they acquire through foreclosure, thus preventing future releases. Additional information on the UST Lender Liability Rule is available on EPA's website at http://www.epa.gov/oust/fedlaws/280_i.pdf.

E. Residential Property Owners

In 1991, EPA issued its *Policy Towards Owners of Residential Properties at Superfund Sites*, an enforcement discretion policy, the goal of which was to relieve residential owners of the fear that they might be subject to an enforcement action involving contaminated property, even though they had not caused the contamination on the property.

Under this policy, residential property is defined as "single family residences of one-to-four dwelling units…" Further, this policy deems irrelevant a residential owner's knowledge of contamination. The residential owner policy applies to residents as well as their lessees, so long as the activities the resident takes on the property are consistent with the policy. The policy also applies to residential owners who acquire property through purchase, foreclosure, gift, inheritance, or other form of acquisition, as long as the activities the resident undertakes on the property after acquisition are consistent with the policy.

Residential property owners who purchase contaminated property after January 1, 2002, may also take advantage of the statutory BFPP protection. The Brownfields Amendments addressed residential property owners by clarifying the type of pre-purchase investigation (*i.e.*, AAI) that a residential property owner must conduct to obtain BFPP status. Specifically, an inspection and title search that reveal no basis for further investigation will qualify as all appropriate inquiry for a residential purchaser. CERCLA § 101(40)(B)(iii).

THRESHOLD CRITERIA FOR RESIDENTIAL PROPERTY OWNERS UNDER EPA GUIDANCE

An owner of residential property located on a CERCLA site may be protected from liability if the owner:

- Has not and does not engage in activities that lead to a release or threat of release of hazardous substances, resulting in EPA taking a response action at the site;
- Cooperates fully with EPA by providing access and information when requested and does not interfere with the activities that either EPA or a state is taking to implement a CERCLA response action;
- Does not improve the property in a manner inconsistent with residential use; and
- Complies with institutional controls (*e.g.*, property use restrictions) that may be placed on the residential property as part of EPA's response action.

IV. Site-Specific EPA Tools to Address Status Liability Concerns, and/or Perceived Stigma

A. Comfort/Status Letters

Comfort/status letters provide a prospective purchaser with the information EPA has about a particular property and EPA's intentions with respect to the property as of the date of the letter. The "comfort" comes from a greater understanding of what EPA knows about the property and what its intentions are with respect to any response activities. Comfort/status letters are not "no action" assurances; that is, they are not assurances by EPA that it will not take an enforcement action at a particular site in the future.

This Section covers:

- Superfund Comfort/Status Letters;
- RCRA Comfort/Status Letters;
- Bona Fide Prospective Purchaser Reasonable Steps Comfort Letters; and
- Comfort Letters for National Priorities List Sites and Federally Owned Properties.

1. Superfund Comfort/Status Letters

On November 8, 1996, EPA issued its *Policy on the Issuance of Comfort/Status Letters*. The letters provide a party with relevant releasable information EPA has pertaining to a particular piece of property, what that information means, and the status of any ongoing, completed or planned federal Superfund action at the property. Comfort/status letters may be considered when they may facilitate the cleanup and redevelopment of brownfields, where there is a realistic perception or probability of incurring Superfund liability, and where there is no other mechanism available to adequately address a party's concerns.

The policy lists four types of comfort letters:

- No Previous Superfund Interest Letter;
- No Current Superfund Interest Letter;
- Federal Superfund Interest Letter; and
- State Action Letter.

EVALUATION CRITERIA FOR SUPERFUND COMFORT/STATUS LETTERS

EPA may issue a comfort letter upon request if:

- The letter may facilitate cleanup and redevelopment of potentially contaminated property;
- There is a realistic perception or probability of incurring CERCLA liability; and
- There is no other mechanism available to adequately address the party's concerns.

PRIVATE PARTY TOOLS

Various private tools can be used to manage environmental liability risks associated with brownfields and other properties. These tools may include:

- **Indemnification Provisions** - These are private contractual mechanisms in which one party promises to cover the costs of liability of another party. Indemnification provisions provide prospective buyers, lenders, insurers, and developers with a means of assigning responsibility among themselves for cleanup costs, and encourage negotiations among private parties without government involvement.

- **Environmental Insurance Policies** - The insurance industry offers products intended to allocate and minimize liability exposures among parties involved in brownfields redevelopment. These products include cost cap, pollution legal liability, and secured creditor policies. Insurance products may serve as a tool to manage environmental liability risks, but, many factors affect their utility including the types of coverage available, the dollar limits on claims, the policy time limits, site assessment requirements, and the cost of available products. Parties involved in brownfields redevelopment considering environmental insurance should always secure the assistance of skilled brokers and lawyers to help select appropriate coverage.

2. RCRA Comfort/Status Letters

RCRA treatment, storage, and disposal (TSD) facilities present unique challenges in terms of cleanup and reuse, but may also provide opportunities for revitalization. Recognizing that situations often exist at RCRA facilities analogous to Superfund sites, EPA developed guidance for issuing comfort/status letters for RCRA TSD facilities. *Comfort/Status Letters for RCRA Brownfield Properties*, issued on February 5, 2001, limited the use of such letters to those situations that could facilitate the cleanup and reuse of brownfields, where there was a realistic perception or probability of EPA initiating a RCRA cleanup action, and where there was no other mechanism to adequately address the party's concern.

The proper use of RCRA comfort/status letters was explained further in the April 8, 2003 guidance *Prospective Purchaser Agreements and Other Tools to Facilitate Cleanup and Reuse of RCRA Sites*. That guidance highlights RCRA PPAs, and the February 23, 2003 *Final Guidance on Completion of Corrective Action Activities at RCRA Facilities* highlights RCRA PPAs as resource intensive but potentially valuable tools to help revitalize RCRA sites. The guidances provide examples where RCRA PPAs have been successfully used and identify certain factors that should be considered before issuing a RCRA PPA.

3. Reasonable Steps Comfort/Status Letter

EPA has the discretion, in appropriate circumstances, to provide a bona fide prospective purchaser (BFPP) (see Section III.A.1), contiguous property owner (CPO) (see Section III.A.2.ii), or innocent landowner (see Section III.A.3.ii) with a comfort/status letter addressing what "reasonable steps" a landowner could take at a particular site to meet its continuing obligations with respect to hazardous substances found at the property. In issuing this type of

letter EPA makes an assessment of the actions proposed by the landowner and, based on site-specific factors and environmental concerns, determines any potential incompatibilities between the proposed actions and EPA's response actions. EPA also suggests what steps might be appropriate for the landowner to take with respect to the planned or completed response action. This letter does not provide a release from CERCLA liability, but only provides information with respect to reasonable steps based on the available information and the nature and extent of contamination known to EPA at the time the letter is issued. If additional information regarding the nature and extent of hazardous substance contamination at the site becomes available, additional actions may be necessary to satisfy the reasonable steps requirement.

A sample of this type of letter is included in Attachment C in Appendix A of this handbook, *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 ("Common Elements").*

4. Comfort Letters for National Priorities List Sites and Federally Owned Properties

EPA may issue a comfort letter to address various issues concerning perceived National Priorities List (NPL) stigma and CERCLA liability involved in closing military base property. In January 1996, EPA updated its *Model Comfort Letter Clarifying NPL Listing, Uncontaminated Parcel Identifications, and CERCLA Liability Issues Involving Transfers of Federally Owned Property* (January 1996). This type of comfort letter may include a determination that a remedy is operating properly and successfully.

The model letter also describes certain CERCLA provisions a federal agency must comply with before transferring any property on which hazardous substances have been stored for a year or more, or are known to have been released or disposed of. The letter may include:

- Information regarding the hazardous substances;
- A covenant that all remedial action necessary to protect human health and the environment with respect to any hazardous substances remaining on the property has been taken before the date of transfer; and
- A covenant stating that the United States will conduct any additional remedial actions found necessary after the date of transfer.

Information about EPA's efforts to clean up, transfer, and reuse federal facilities, and the *Model Comfort Letter Clarifying NPL Listing, Uncontaminated Parcel Identifications, and CERCLA Liability Issues Involving Transfers of Federally Owned Property* (January 1996) are available at http://www.epa.gov/fedfac/.

B. Agreements

EPA has long recognized the value of redeveloping contaminated land and the importance of helping address reasonable liability concerns to encourage prospective purchasers of such land.

This Section covers:

- Bona Fide Prospective Purchaser Work Agreements;
- Prospective Purchaser Agreements and Prospective Lease Agreements;
- Windfall Lien Resolutions; and
- Contiguous Property Owner Assurance Letters and Settlements.

1. Bona Fide Prospective Purchaser Work Agreements

As discussed in Section III.A.1, a bona fide prospective purchaser (BFPP) may purchase property with knowledge of the contamination. Although the activities of most BFPPs will not require liability protection beyond what is provided by the self-implementing BFPP provision, if a BFPP wants to perform cleanup work at a contaminated site of federal interest that exceed the BFPP reasonable steps requirement, a work agreement may be used to address potential liability concerns.

As a result of this need and to further encourage reuse and redevelopment of contaminated sites, EPA and DOJ jointly issued a model administrative order titled *Issuance of CERCLA Model Agreement and Order on Consent for Removal Action by a Bona Fide Prospective Purchaser (November 2006)*, for use as an agreement with a BFPP who intends to perform removal work at its property beyond reasonable steps. The purpose of the model is to promote land reuse and revitalization by addressing liability concerns associated with acquisition of contaminated property. In particular, the removal work to be performed under the model must be of greater scope and magnitude than the "reasonable steps" with respect to the hazardous substances at the property that must be performed by BFPPs if they are to maintain their protected status under the statute.

The model provides a covenant not to sue for "existing contamination" and requires the person performing the removal work to reimburse EPA's oversight costs. Contribution protection and a release and waiver of any windfall lien are also provided.

The model is for use at sites of federal interest where the work is more significant and complex than what is generally required as "reasonable steps" with respect to the hazardous substances at the property.

2. Prospective Purchaser Agreements and Prospective Lease Agreements

Long before the BFPP liability protection was available, EPA entered into prospective purchaser agreements (PPAs) and prospective lease agreements (PLAs). PPAs and PLAs are agreements between a liable party and EPA whereby EPA provides the party with liability relief in exchange for payment and/or cleanup work. PPAs and PLAs are available for CERCLA and RCRA sites.

Between 1989 and 2001, EPA published the following policies that addressed PPAs and PLAs:

- *Guidance on Landowner Liability under Section 107(a)(1) of CERCLA, De Minimis Settlements under Section 122(g)(1)(B) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property* (June 6, 1989). Models attached to the 1989 guidance were for settlements with *de minimis* landowners under § 122(g)(1)(B).
- *Guidance on Agreements with Prospective Purchasers of Contaminated* Property (May 24, 1995).
- *Expediting Requests for Prospective Purchaser Agreements* (October 1, 1999).
- *Support of Regional Efforts to Negotiate Prospective Purchaser Agreements (PPAs) at Superfund Sites and Clarification of PPA Guidance* (January 10, 2001).
- *Memorandum on Prospective Purchaser Agreements and Other Tools to Facilitate Cleanup and Reuse of RCRA* Sites (April 8, 2003).

DIFFERENCES BETWEEN BFPP LIABILITY PROTECTION AND PPAS

	BFPP	PPAs
Method of Execution	Self-Implementing	Negotiation and EPA Approval
Timing	Obtained when purchaser meets threshold and maintains statutory requirements	After federal government approves PPA terms
Transaction Costs	Lower transaction costs and some continuing obligations	Higher transaction cost

After the enactment of the Brownfields Amendments, EPA issued a policy on May 31, 2002, *Bona Fide Prospective Purchasers and the New Amendments to CERCLA*, which discusses the interplay between the legislatively created BFPP and EPA's use of PPAs. In that policy, EPA stated that in most circumstances, where a party meets the BFPP requirements, PPAs will no longer be needed to enjoy liability relief under CERCLA as a present owner. There are, however, limited circumstances under which EPA will continue to consider entering into a PPA, such as when:

- Significant environmental benefits will be derived from the project in terms of cleanup;
- The facility is currently involved in CERCLA litigation such that there is a very real possibility that a party who buys the facility would be sued by a third party; and
- There are unique, site-specific circumstances not otherwise addressed, and the PPA will serve a significant public interest.

In special circumstances, the assurances to BFPPs provided by the above-referenced guidance documents may be supplemented for cleanup work performed by BFPPs under EPA supervision. A Bona Fide Prospective Purchaser Work Agreement may be an available tool. See Section IV.B.1 for more information about Bona Fide Prospective Purchaser Work Agreements.

3. Windfall Lien Resolution

In the *Interim Enforcement Discretion Policy Concerning "Windfall Liens" Under Section 107(r) of CERCLA* (July 16, 2003), EPA anticipates that there may be situations where a site has a windfall lien (for more on windfall liens, see Section III.A.1) and a bona fide prospective purchaser wants to satisfy any existing or potential windfall lien before or close to the time of acquisition. Congress specifically provided EPA with the authority to resolve windfall lien exposure in CERCLA § 107(r)(2). EPA and DOJ have developed a model document to facilitate resolution of windfall liens as an attachment to the windfall liens guidance.

More information on windfall lien resolution and the model document for such a resolution is available in the *Interim Enforcement Discretion Policy Concerning "Windfall Liens" Under Section 107(r) of CERCLA* (July 16, 2003) at http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-windfall-lien.pdf.

4. Contiguous Property Owner Assurance Letters and Settlements

The Brownfields Amendments provide CERCLA liability protections for contiguous property owners (CPOs). Some landowners continue to have liability concerns, however, especially where EPA has conducted a response action on the neighboring contaminated property or the CPO's property. In such cases, EPA has the discretion to offer assurance that no enforcement action will be brought against a CPO for contamination resulting from a neighbor's actions, or to enter into a settlement agreement with the CPO, providing the CPO with cost recovery or contribution protection from potentially responsible parties at the site.

Guidance on the appropriateness of an assurance letter or an agreement is found in EPA's *Interim Enforcement Discretion Guidance Regarding Contiguous Property Owners* (January 13, 2004) at http://www.epa.gov/compliance/resources/policies/cleanup/superfund/contig-prop.pdf. EPA also issued a *Model CERCLA Section 107(q)(3) Contiguous Property Owner Assurance Letter* (November 11, 2009) available at http://www.epa.gov/compliance/resources/policies/cleanup/superfund/cpo-assure-mod-ltr.pdf.

C. Other Tools

This Section covers:

- Ready for Reuse Determinations and
- National Priorities List Deletion.

1. Ready for Reuse Determinations

When all or a portion of a Superfund site is protective for specified uses, EPA has the discretion to issue a Ready for Reuse (RfR) determination. RfR determinations are intended to facilitate reuse and provide helpful information to the real estate marketplace about the environmental status of the Superfund site.

RfR determinations are technical rather than legal and explain the nature and extent of contamination. Before EPA created the RfR determination, potential users often had to seek out information about a site's environmental condition from many different sources, and the information that was available was often expressed in terms difficult for the marketplace to interpret. This meant that many sites able to accommodate certain types of uses were needlessly difficult to market. With the creation of the RfR determination, potential users and the real estate marketplace will have an affirmative statement written in plain English, and accompanied by supporting decision documentation, that a site identified as ready for reuse will remain protective of the remedy as long as all required response conditions and use limitations identified in the site's response decision documents and land title documents continue to be met.

For more information on RfR determinations, please refer to http://www.epa.gov/superfund/programs/recycle/tools/rfr.html. Additionally, EPA drafted *Guidance for Preparing Superfund Ready for Reuse Determinations* (February 12, 2004), which is available at www.epa.gov/superfund/programs/recycle/pdf/rfrguidance.pdf.

2. National Priorities List Deletion

Under certain conditions, EPA may delete or recategorize a property or portion of a property from the National Priorities List (NPL). States play a key role in NPL deletions. Before developing a notice of intent to delete, EPA must consult with the state. In consultation with the state, EPA must consider:

- Whether responsible parties or other parties have taken all appropriate response actions that are required;
- Whether no further response actions are required; and
- Whether the remedial investigation has shown that the release poses no significant threat to public health or the environment and taking of remedial measures is therefore not appropriate.

Sites may not be deleted from the NPL without state concurrence and publication of a proposed deletion in the Federal Register. It is important to note that deletion or partial deletion of a site from the NPL does not itself create, alter, or remove any legal rights or obligations. More information on NPL deletion is available on the EPA website at http://www.epa.gov/superfund/sites/npl/index.htm.

V. Other Considerations for Entities Seeking to Clean Up, Reuse, and Revitalize Contaminated Property

A. Long-Term Stewardship

The success of the Brownfields program in responding to and even bolstering market demand for properties with known or suspected contamination has led to increased demand for contaminated properties that are cleaned up under the other EPA programs. The demand for, and use of, such sites includes those properties where some contamination remains, but is controlled on site. Therefore long-term stewardship activities are needed to ensure the continued protection of the remedy and human health and the environment.

Long-term stewardship generally refers to the activities and processes used to control and manage residual contamination, limit inappropriate exposures, control land and resource uses, and ensure the continued protectiveness of "engineered" controls and "institutional" controls at sites. Long-term stewardship also takes on greater importance with the increased demand for the reuse of properties, especially properties where cleanup does not result in unrestricted uses or unlimited exposures.

Physical or "engineered" controls are the engineered physical barriers or structures designed to monitor and prevent or limit exposure to the contamination. Certain engineered cleanups will involve ongoing operation and maintenance (O&M), monitoring, evaluation, periodic repairs, and sometimes replacement of remedy components.

EXAMPLES OF ENGINEERED CONTROLS

- Landfill soil caps
- Impermeable liners
- Other containment covers
- Underground slurry walls
- Fences
- Bioremediation
- Ground water pump-and-treat and monitoring systems

Legal or "institutional" controls are non-engineered instruments, such as administrative and/or legal mechanisms, intended to minimize the potential for human exposure to contamination by limiting land or resource use. Institutional controls may be used to supplement engineering controls and also must be implemented, monitored, and evaluated for effectiveness as long as the risks at a site are present. Institutional controls may also include informational devices, such as signs, state registries, and deed notices. In February 2005, to further explain the requirements of institutional controls, EPA published a guidance document titled *Institutional Controls: A Citizen's Guide to Understanding Institutional Controls at Superfund, Brownfields, Federal Facilities, Underground Storage Tanks, and Resource Conservation and Recovery Act Cleanups.* EPA has also developed two cross-program guidances addressing the entire lifecycle of institutional controls, from evaluation to implementation and enforcement. These and other

institutional controls guidance are available on the EPA institutional controls webpage at http://www.epa.gov/superfund/policy/ic/index.htm.

EXAMPLES OF INSTITUTIONAL CONTROLS

- Government Controls -- Permits, Zoning
- Informational Devices -- Notices, Advisories, Warnings
- Proprietary Controls -- Easements, Restrictive Covenants
- Enforcement Mechanisms -- Administrative Orders, Cleanup Agreements

EPA, the states, and local governments have increased their knowledge about the long-term requirements needed to reuse and revitalize contaminated sites. The cleanup remedies for contaminated sites and properties often require the management and oversight of on-site waste materials and contaminated environmental media for long periods of time. EPA and its regulatory partners implement (or ensure that responsible parties implement) long-term stewardship after construction of the remedy for site cleanup and for as long as wastes are controlled on site. Long-term stewardship can last many years, decades, or in some cases, even longer. Long-term stewardship involves ongoing coordination and communication among numerous stakeholders, each with different responsibilities, capabilities, and information needs.

Even though the various cleanup programs have different authorities, there are common elements to address the long-term stewardship efforts. For example, under Superfund, long-term stewardship activities are performed as part of the O&M of a remedy. Responsibility for O&M is contingent upon whether the cleanup was conducted by a potentially responsible party (PRP), including federal facilities, or whether EPA funded the cleanup. Under the RCRA program, cleanups are conducted in connection with the closure of regulated units and in facility-wide corrective action under either a permit, imminent hazard, or other order or agreement.

Under the brownfields program, EPA provides cleanup grants to state and local governments and non-profit organizations to carry out cleanup activities, including monitoring and enforcement of institutional controls.

Pursuant to the underground storage tanks (UST) program requirements, when a release has been detected or discovered at a UST, the UST owner/operator must perform corrective action to clean up any contamination caused by the release. Under cooperative agreements between EPA and the states, states are largely responsible for overseeing corrective actions in connection with USTs, including long-term stewardship. EPA is generally responsible for overseeing the corrective actions, including long-term stewardship activities on tribal lands.

More information on long-term stewardship is available on EPA's Land Revitalization website at http://www.epa.gov/oswer/landrevitalization/download/lts_report_sept2005.pdf.

B. Supplemental Environmental Projects (SEPs)

In certain circumstances, supplemental environmental projects (SEPs) may play a role in revitalizing contaminated sites. SEPs are not developed, funded, or managed by EPA. Rather,

they are environmentally beneficial projects undertaken by a defendant or respondent in settlement of an environmental enforcement action. SEPs are activities that go beyond what is required for compliance, and that the violator is not otherwise legally required to perform. EPA's 1998 SEP Policy describes when and how an SEP may be included as part of an enforcement settlement. Although not appropriate for every enforcement settlement, where a violator is willing and the conditions of the SEP Policy are met, SEPs may help address environmental concerns related to the violations at issue in the enforcement action.

As stated in the November 2006 Brownfield Sites and Supplemental Environmental Projects (SEPs) fact sheet, SEPs that require assessment and/or cleanup of brownfield sites cannot be included in settlements because appropriations law prohibits the Agency from including SEPs to perform activities that Congress has already funded through EPA. Congress provides funds for assessment and cleanup activities to EPA's brownfields program. In an appropriate enforcement settlement, however, and as long as all the other requirements of the SEP Policy are met, SEPs that complement brownfield site assessment or cleanup activities may be included in settlement. Examples of such SEPs are green building projects, projects that call for the violator to provide energy-efficient building materials to a redeveloper, urban forest projects, and stream restoration projects. To learn more about the general requirements for a SEP, please refer to EPA Supplemental Environmental Projects Policy (SEP Policy) (May 1, 1998).

C. OECA Guiding Principles

OECA is guided in the development of policy documents not only by enforcement principles such as "polluter pays" and "enforcement first," but also by broader principles that have been established to carry out EPA's mission.

This Section covers:

- Environmental Justice;
- Public Participation; and
- Financial Assurance.

1. Environmental Justice

EPA recognizes that minority and/or low-income communities may be disproportionately exposed to environmental harms and risks. As a result, EPA works to protect these and other communities burdened by adverse human health and environmental effects and has incorporated environmental justice as a priority throughout EPA. Accordingly, EPA maintains its ongoing commitment to the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. More information about EPA's environmental justice program as it relates to Superfund can be found at http://www.epa.gov/oswer/ej/index.html.

ENVIRONMENTAL JUSTICE

Environmental justice includes the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.

What is meant by fair treatment and meaningful involvement?

- "Fair treatment" means that no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental, and commercial operations or policies.

- "Meaningful involvement" means that:

    1. People have an opportunity to participate in decisions about activities that may affect their environment and/or health;
    2. The public's contribution can influence the regulatory agency's decision;
    3. Their concerns will be considered in the decision-making process; and
    4. Decision makers seek out and facilitate the involvement of those potentially affected.

EPA is committed to improving environmental performance through compliance with environmental requirements, preventing pollution, promoting environmental stewardship, and incorporating environmental justice across the spectrum of our programs, policies, and activities. When working with local environmental justice communities, EPA encourages parties to:

- Meaningfully involve the community in the planning, cleanup, and revitalization process;
- Review the cumulative effects of multiple sources of contamination in close proximity to one another;
- Ensure an equitable distribution of brownfields assistance to environmental justice communities;
- Adhere to community commitments made in brownfields grant proposals;
- Assist environmental justice communities in obtaining independent technical advisors to help communities navigate the brownfields cleanup and redevelopment process;
- Provide equal opportunity for local minority-owned businesses specializing in environmental assessment and cleanup work to compete for contracts needed to plan, clean up, and revitalize brownfields; and
- Take steps to limit the displacement, equity loss, and cultural loss of the local community.

2. Public Participation

Citizens are an essential component of the Superfund cleanup and RCRA permitting processes and the revitalization of these sites and brownfields sites. Formal public participation activities, required by law or regulation, are designed to provide citizens with both access to information and opportunities to participate in the cleanup process. EPA uses the term "public participation" to denote activities that:

- Encourage public input and feedback;
- Encourage a dialogue with the public;
- Provide access to decision makers;
- Assimilate public viewpoints and preferences; and
- Demonstrate that those viewpoints and preferences have been considered by the decision makers.

COMMUNITY ENGAGEMENT INITIATIVE: PUBLIC PARTICIPATION IN THE CLEANUP PROCESS

EPA benefits from active participation of the public. Effectively engaging communities means EPA will need to make information easy to understand; find diverse ways to reach the public (both electronically and via traditional means); find creative ways to hear their needs and suggestions; and work with partners, stakeholders, and other federal agencies to make informed decisions and find the best solutions. Against this broad spectrum of activities, certain guiding principles provide consistency in developing a more robust community engagement process.

EPA's guiding principles are to:

- Proactively include community stakeholders in the decision-making process;
- Make decision-making processes transparent, accessible, and understandable;
- Include a diversity of stakeholders;
- Explain government roles and responsibilities; and
- Ensure consistent participation by responsible parties.

In the revitalization context, working with a variety of community members, local planners, and elected officials is an effective way to identify and integrate long-term community needs into reuse plans for the site. Redevelopment planning enables citizens to realize their vision for the future reuse of the site. This process should encourage participation of all community members in goal development, action planning, and implementation. By considering a community's vision of future land uses for contaminated sites, EPA often can tailor cleanup options to accommodate community goals.

While successful redevelopment planning can occur at any stage of a cleanup, redevelopment planning should begin as early as possible in the remedial process. The planning process can last several days or months depending on the issues facing the community. It is vital to help communities think of long-term strategies for sustainable future land use, and EPA should begin the public participation process in the earliest stages of redevelopment.

3. Financial Assurance

Financial assurance requirements are implemented under Superfund and RCRA to ensure that adequate funds are available to address closure and cleanup of facilities or sites that handle hazardous materials.

Financial assurance requirements play an important role in promoting the revitalization of contaminated sites. Where financial resources are available for cleanup or closure activities, entities interested in reusing or redeveloping the property are not confronted with the question of where to obtain the resources for cleaning up the property. When there are inadequate financial assurance funds, EPA or the states may have to spend taxpayer money to fund cleanups. This not only shifts the responsibility away from the liable party, it may also result in a significant delay in closure or cleanup activities. While the property awaits the performance of closure or cleanup activities, it is often difficult to attract outside parties to the property for further reuse and redevelopment.

EPA optimizes financial safeguards through compliance assistance, compliance monitoring, and enforcement. OECA has developed tools, guidance, and training to assist the regions and states in these areas, which are available on EPA's website at http://www.epa.gov/epawaste/hazard/tsd/td/ldu/financial/index.htm.

D. EPA Initiatives and Programs

OSRE has worked closely with other EPA offices including the Office of Brownfields and Land Revitalization (OBLR), the Office of Site Remediation and Technology Innovation (OSRTI), and the Office of Solid Waste (OSW), all within the Office of Solid Waste and Emergency Response (OSWER), to develop and launch new initiatives or programs to address certain revitalization challenges.

This Section covers:

- The Environmentally Responsible Redevelopment and Reuse Initiative;
- Brownfields Grants and State/Tribal Funding;
- The Superfund Redevelopment Initiative;
- The RCRA Brownfields Initiative; and
- RE-Powering America's Land Initiative.

1. ER3 - Environmentally Responsible Redevelopment and Reuse Initiative

In 2004, OSRE launched the Environmentally Responsible Redevelopment and Reuse (ER3) Initiative as a tool using established liability relief principles and other Agency-wide incentives to promote the sustainable cleanup and redevelopment of contaminated sites. Sustainable development, including the redevelopment of formerly contaminated sites, is a multi-faceted, long-term approach that balances environmental cleanup and protection with economically sound development practices and the promotion of social equity.

The cleanup and redevelopment of contaminated sites produces significant environmental benefits and in most cases is preferable to a property remaining underutilized or idle. Current development practices, however, can also have significant environmental impacts, such as excessive use of scarce natural resources, energy consumption, wildlife habitat destruction, and storm water runoff. Sustainable development not only counters these negative trends, but in some cases can actually enhance the environment. Sustainable development reflects the synergy between the business of development and the environment rather than the trade-off between them.

The ER3 program builds on EPA's efforts to use redevelopment and revitalization of contaminated sites as an effective tool to spur cleanups that otherwise may not occur. By promoting and facilitating environmentally responsible redevelopment at formerly contaminated sites, the goal of ER3 is to establish the next generation of environmental protection - one that proactively prevents and/or reduces contamination in the developed environment without sacrificing profitability for developers.

For information on ER3 pilot projects, see EPA's website at http://www.epa.gov/compliance/cleanup/revitalization/er3/.

2. Brownfields Grants and State/Tribal Funding

The 2002 Brownfield Amendments established a competitive grant program for the assessment and cleanup of brownfield sites, along with environmental job training under CERCLA § 104(k). OBLR administers this program, often with OECA's assistance. Regarding site cleanup, the brownfield grant program provides direct funding for brownfields assessment, cleanup, and revolving loans (establishment of a revolving loan fund for eligible entities to make loans to be used for cleanup), which helps communities revitalize blighted sites by allowing them to take what is often the first step in the process -- addressing potential contamination. To be eligible for a brownfield grant, an entity must be an eligible entity and must plan to use the grant funding at an eligible "brownfield site." CERCLA §§ 104(k)(1), 104(k)(3), and 101(39). The 2002 Brownfields Amendments define a brownfield site broadly, but exclude certain sites from funding eligibility. Certain sites are excluded based on their regulatory or ownership status.

CERCLA § 104(k)(4)(B) imposes certain other restrictions on the use of brownfield grant funding, such as the prohibition on the use of funds to pay response costs at a site at which a recipient of the federal grant funds would be considered liable as a PRP.

Because state and tribal response programs play a significant role in cleaning up brownfields, the Brownfields Amendments also authorized EPA to provide assistance to states and tribes to establish or enhance their response programs. CERCLA § 128(a).

OFFICE OF BROWNFIELDS AND LAND REVITALIZATION

GRANTS AND FUNDING WEB ACCESS

For information on the EPA brownfields grant program, please refer to:
http://www.epa.gov/brownfields

3. Superfund Redevelopment Initiative

EPA's Superfund Redevelopment Initiative (SRI) helps communities return some of the nation's worst hazardous waste sites to safe and productive use. While cleaning up these Superfund sites and making them protective of human health and the environment, EPA is working with communities and other partners in considering future use opportunities and integrating appropriate reuse options into the cleanup process.

EPA's goal is to make sure that at every cleanup site, EPA and its partners have an effective process and the necessary tools and information to fully explore future uses before the cleanup remedy is implemented. This gives EPA the best chance of making its remedies consistent with the likely future use of a site. In turn, EPA gives communities the best opportunity to use sites productively following cleanup.

More information on SRI is available at
http://www.epa.gov/superfund/programs/recycle/index.html.

4. RCRA Brownfields Prevention Initiative

A potential RCRA brownfield is a RCRA facility that is not in full use, where there is redevelopment potential, and where reuse or redevelopment of that site is slowed due to real or perceived concerns about actual or potential contamination, liability, and RCRA requirements. The RCRA Brownfields Prevention Initiative was established by EPA to encourage the reuse of potential RCRA brownfields so that the land better serves the needs of the community, either through more productive commercial or residential development or as greenspace.

More information on the RCRA Brownfields Prevention Initiative is available on EPA's website at http://www.epa.gov/epawaste/hazard/correctiveaction/bfields.htm.

The initiative links EPA's brownfields program with EPA's RCRA corrective action program and other EPA cleanup programs as well as with state cleanup programs to help communities address contaminated and often blighted properties that may stand in the way of economic vitality. The initiative includes:

- Showcasing cleanup and revitalization approaches through RCRA brownfields prevention pilot projects;
- Addressing barriers to cleanup and revitalization with targeted site efforts (TSEs);
- Supporting outreach efforts of EPA regional offices, states, and the RCRA community through conferences, training, Internet seminars, and the RCRA brownfields web page; and
- Identifying policies that inadvertently may be hindering cleanup and addressing them with guidance and technical assistance or through other means.

5. RE-Powering America's Land Initiative

EPA's RE-Powering America's Land Initiative encourages renewable energy development on current and formerly contaminated land and mine sites. This initiative identifies the renewable energy potential of these sites and provides a variety of resources for communities, developers, industry, state and local governments, or any other party interested in reusing contaminated or formerly contaminated land for renewable energy development.

More information on EPA's RE-Powering America's Land Initiative is available at http://www.epa.gov/renewableenergyland/.

APPENDICES

Appendix A Common Elements Guidance, March 6, 2003

Appendix B Top 10 Questions to Ask Before Buying a Superfund Site

Appendix C CERCLA Liability and Local Government Acquisitions and Other Activities

Appendix D Brownfields Enforcement and Land Revitalization Policy and Guidance Documents

Appendix E Contact Information

Appendix A

Common Elements Guidance

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR - 6 2003

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: 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 ("Common Elements")

FROM: Susan E. Bromm, Director
Office of Site Remediation Enforcement

TO: Director, Office of Site Remediation and Restoration, Region I
Director, Emergency and Remedial Response Division, Region II
Director, Hazardous Site Cleanup Division, Region III
Director, Waste Management Division, Region IV
Directors, Superfund Division, Regions V, VI, VII and IX
Assistant Regional Administrator, Office of Ecosystems Protection and Remediation, Region VIII
Director, Office of Environmental Cleanup, Region X
Director, Office of Environmental Stewardship, Region I
Director, Environmental Accountability Division, Region IV
Regional Counsel, Regions II, III, V, VI, VII, IX, and X
Assistant Regional Administrator, Office of Enforcement, Compliance, and Environmental Justice, Region VIII

I. Introduction

The Small Business Liability Relief and Brownfields Revitalization Act, ("Brownfields Amendments"), Pub. L. No. 107-118, enacted in January 2002, amended the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), to provide important liability limitations for landowners that qualify as: (1) bona fide prospective purchasers, (2) contiguous property owners, or (3) innocent landowners (hereinafter, "landowner liability protections" or "landowner provisions").

Recycled/Recyclable • Printed with Vegetable Oil Based Inks on 100% Recycled Paper (40% Postconsumer)

To meet the statutory criteria for a landowner liability protection, a landowner must meet certain threshold criteria and satisfy certain continuing obligations.[1] Many of the conditions are the same or similar under the three landowner provisions ("common elements"). This memorandum is intended to provide Environmental Protection Agency personnel with some general guidance on the common elements of the landowner liability protections. Specifically, this memorandum first discusses the threshold criteria of performing "all appropriate inquiry" and demonstrating no "affiliation" with a liable party. The memorandum then discusses the continuing obligations:

- compliance with land use restrictions and not impeding the effectiveness or integrity of institutional controls;
- taking "reasonable steps" with respect to hazardous substances affecting a landowner's property;
- providing cooperation, assistance and access;
- complying with information requests and administrative subpoenas; and
- providing legally required notices.

A chart summarizing the common elements applicable to bona fide prospective purchasers, contiguous property owners, and innocent landowners is attached to this memorandum (Attachment A). In addition, two documents relating to reasonable steps are attached to this memorandum: (1) a "Questions and Answers" document (Attachment B); and (2) a sample site-specific Comfort/Status Letter (Attachment C).

This memorandum addresses only some of the criteria a landowner must meet in order to qualify under the statute as a bona fide prospective purchaser, contiguous property owner, or innocent landowner (i.e., the common elements described above). Other criteria (e.g., the criterion that a contiguous property owner "did not cause, contribute, or consent to the release or threatened release," found in CERCLA § 107(q)(1)(A)(i), and the criterion that a bona fide prospective purchaser and innocent landowner purchase the property after all disposal of hazardous substances at the facility, found in CERCLA §§ 101(40)(A), 101(35)(A)), are not addressed in this memorandum. In addition, this guidance does not address obligations landowners may have under state statutory or common law.

This memorandum is an interim guidance issued in the exercise of EPA's enforcement discretion. As EPA gains more experience implementing the Brownfields Amendments, the Agency may revise this guidance. EPA welcomes comments on this guidance and its implementation. Comments may be submitted to the contacts identified at the end of this memorandum.

---

[1] See CERCLA §§ 101(40)(B)-(H), 107(q)(1)(A), 101(35)(A)-(B).

II. Background

The bona fide prospective purchaser provision, CERCLA § 107(r), provides a new landowner liability protection and limits EPA's recourse for unrecovered response costs to a lien on property for the increase in fair market value attributable to EPA's response action. To qualify as a bona fide prospective purchaser, a person must meet the criteria set forth in CERCLA § 101(40), many of which are discussed in this memorandum. A purchaser of property must buy the property after January 11, 2002 (the date of enactment of the Brownfields Amendments), in order to qualify as a bona fide prospective purchaser. These parties may purchase property with knowledge of contamination after performing all appropriate inquiry, and still qualify for the landowner liability protection, provided they meet the other criteria set forth in CERCLA § 101(40).[2]

The new contiguous property owner provision, CERCLA § 107(q), excludes from the definition of "owner" or "operator" a person who owns property that is "contiguous" or otherwise similarly situated to, a facility that is the only source of contamination found on his property. To qualify as a contiguous property owner, a landowner must meet the criteria set forth in CERCLA § 107(q)(1)(A), many of which are common elements. This landowner provision "protects parties that are essentially victims of pollution incidents caused by their neighbor's actions." S. Rep. No. 107-2, at 10 (2001). Contiguous property owners must perform all appropriate inquiry prior to purchasing property. Persons who know, or have reason to know, prior to purchase, that the property is or could be contaminated, cannot qualify for the contiguous property owner liability protection.[3]

The Brownfields Amendments also clarified the CERCLA § 107(b)(3) innocent landowner affirmative defense. To qualify as an innocent landowner, a person must meet the criteria set forth in section 107(b)(3) and section 101(35). Many of the criteria in section 101(35) are common elements. CERCLA § 101(35)(A) distinguishes between three types of innocent landowners. Section 101(35)(A)(i) recognizes purchasers who acquire property without knowledge of the contamination. Section 101(35)(A)(ii) discusses governments acquiring contaminated property by escheat, other involuntary transfers or acquisitions, or the exercise of eminent domain authority by purchase or condemnation. Section 101(35)(A)(iii) covers inheritors of contaminated property. For purposes of this guidance, the term "innocent landowner" refers only to the unknowing purchasers as defined in section 101(35)(A)(i). Like

---

[2] For a discussion of when EPA will consider providing a prospective purchaser with a covenant not to sue in light of the Brownfields Amendments, see "Bona Fide Prospective Purchasers and the New Amendments to CERCLA," B. Breen (May 31, 2001).

[3] CERCLA § 107(q)(1)(C) provides that a person who does not qualify as a contiguous property owner because he had, or had reason to have, knowledge that the property was or could be contaminated when he bought the property, may still qualify for a landowner liability protection as a bona fide prospective purchaser, as long as he meets the criteria set forth in CERCLA § 101(40).

contiguous property owners, persons desiring to qualify as innocent landowners must perform all appropriate inquiry prior to purchase and cannot know, or have reason to know, of contamination in order to have a viable defense as an innocent landowner.

III. Discussion

A party claiming to be a bona fide prospective purchaser, contiguous property owner, or section 101(35)(A)(i) innocent landowner bears the burden of proving that it meets the conditions of the applicable landowner liability protection.[4] Ultimately, courts will determine whether landowners in specific cases have met the conditions of the landowner liability protections and may provide interpretations of the statutory conditions. EPA offers some general guidance below regarding the common elements. This guidance is intended to be used by Agency personnel in exercising enforcement discretion. Evaluating whether a party meets these conditions will require careful, fact-specific analysis.

A. Threshold Criteria

To qualify as a bona fide prospective purchaser, contiguous property owner, or innocent landowner, a person must perform "all appropriate inquiry" before acquiring the property. Bona fide prospective purchasers and contiguous property owners must, in addition, demonstrate that they are not potentially liable or "affiliated" with any other person that is potentially liable for response costs at the property.

1. *All Appropriate Inquiry*

To meet the statutory criteria of a bona fide prospective purchaser, contiguous property owner, or innocent landowner, a person must perform "all appropriate inquiry" into the previous ownership and uses of property before acquisition of the property. CERCLA §§ 101(40)(B), 107(q)(1)(A)(viii), 101(35)(A)(i),(B)(i). Purchasers of property wishing to avail themselves of a landowner liability protection cannot perform all appropriate inquiry after purchasing contaminated property. As discussed above, bona fide prospective purchasers may acquire property with knowledge of contamination, after performing all appropriate inquiry, and maintain their protection from liability. In contrast, knowledge, or reason to know, of contamination prior to purchase defeats the contiguous property owner liability protection and the innocent landowner liability protection.

The Brownfields Amendments specify the all appropriate inquiry standard to be applied. The Brownfields Amendments state that purchasers of property before May 31, 1997 shall take into account such things as commonly known information about the property, the value of the property if clean, the ability of the defendant to detect contamination, and other similar criteria. CERCLA § 101(35)(B)(iv)(I). For property purchased on or after May 31, 1997, the procedures

---

[4] CERCLA §§ 101(40), 107(q)(1)(B), 101(35).

of the American Society for Testing and Materials ("ASTM"), including the document known as Standard E1527 - 97, entitled "Standard Practice for Environmental Site Assessments: Phase 1 Environmental Site Assessment Process," are to be used. CERCLA § 101(35)(B)(iv)(II). The Brownfields Amendments require EPA, not later than January 2004, to promulgate a regulation containing standards and practices for all appropriate inquiry and set out criteria that must be addressed in EPA's regulation. CERCLA § 101(35)(B)(ii), (iii). The all appropriate inquiry standard will thus be the subject of future EPA regulation and guidance.

2. *Affiliation*

To meet the statutory criteria of a bona fide prospective purchaser or contiguous property owner, a party must not be potentially liable or affiliated with any other person who is potentially liable for response costs.[5] Neither the bona fide prospective purchaser/contiguous property owner provisions nor the legislative history define the phrase "affiliated with," but on its face the phrase has a broad definition, covering direct and indirect familial relationships, as well as many contractual, corporate, and financial relationships. It appears 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. EPA recognizes that the potential breadth of the term "affiliation" could be taken to an extreme, and in exercising its enforcement discretion, EPA intends to be guided by Congress' intent of preventing transactions structured to avoid liability.

The innocent landowner provision does not contain this "affiliation" language. In order

---

[5] The bona fide prospective purchaser provision provides, in pertinent part:

> NO AFFILIATION—The person is not—(i) potentially liable, or affiliated with any other person that is potentially liable, for response costs at a facility through— (I) any direct or indirect familial relationship; or (II) any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by the instruments by which title to the facility is conveyed or financed or by a contract for the sale of goods or services); or (ii) the result of a reorganization of a business entity that was potentially liable. CERCLA § 101(40)(H).

The contiguous property owner provision provides, in pertinent part:

> NOT CONSIDERED TO BE AN OWNER OR OPERATOR— . . . (ii) the person is not— (I) potentially liable, or affiliated with any other person that is potentially liable, for response costs at a facility through any direct or indirect familial relationship or any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by a contract for the sale of goods or services); or (II) the result of a reorganization of a business entity that was potentially liable[.] CERCLA § 107(q)(1)(A)(ii).

to meet the statutory criteria of the innocent landowner liability protection, however, a person must establish by a preponderance of the evidence that the act or omission that caused the release or threat of release of hazardous substances and the resulting damages were caused by a third party with whom the person does not have an employment, agency, or contractual relationship. Contractual relationship is defined in section 101(35)(A).

B. Continuing Obligations

Several of the conditions a landowner must meet in order to achieve and maintain a landowner liability protection are continuing obligations. This section discusses those continuing obligations: (1) complying with land use restrictions and institutional controls; (2) taking reasonable steps with respect to hazardous substance releases; (3) providing full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration; (4) complying with information requests and administrative subpoenas; and (5) providing legally required notices.

1. *Land Use Restrictions and Institutional Controls*

The bona fide prospective purchaser, contiguous property owner, and innocent landowner provisions all require compliance with the following ongoing obligations as a condition for maintaining a landowner liability protection:

- the person is in compliance with any land use restrictions established or relied on in connection with the response action and

- the person does not impede the effectiveness or integrity of any institutional control employed in connection with a response action.

CERCLA §§ 101(40)(F), 107(q)(1)(A)(V), 101(35)(A). Initially, there are two important points worth noting about these provisions. First, because institutional controls are often used to implement land use restrictions, failing to comply with a land use restriction may also impede the effectiveness or integrity of an institutional control, and vice versa. As explained below, however, these two provisions do set forth distinct requirements. Second, these are ongoing obligations and, therefore, EPA believes the statute requires bona fide prospective purchasers, contiguous property owners, and innocent landowners to comply with land use restrictions and to implement institutional controls even if the restrictions or institutional controls were not in place at the time the person purchased the property.

Institutional controls are administrative and legal controls that minimize the potential for human exposure to contamination and protect the integrity of remedies by limiting land or

resource use, providing information to modify behavior, or both.[6] For example, an institutional control might prohibit the drilling of a drinking water well in a contaminated aquifer or disturbing contaminated soils. EPA typically uses institutional controls whenever contamination precludes unlimited use and unrestricted exposure at the property. Institutional controls are often needed both before and after completion of the remedial action. Also, institutional controls may need to remain in place for an indefinite duration and, therefore, generally need to survive changes in property ownership (i.e., run with the land) to be legally and practically effective.

Generally, EPA places institutional controls into four categories:

(1) governmental controls (e.g., zoning);
(2) proprietary controls (e.g., covenants, easements);
(3) enforcement documents (e.g., orders, consent decrees); and
(4) informational devices (e.g., land record/deed notices).

Institutional controls often require a property owner to take steps to implement the controls, such as conveying a property interest (e.g., an easement or restrictive covenant) to another party such as a governmental entity, thus providing that party with the right to enforce a land use restriction; applying for a zoning change; or recording a notice in the land records.

Because institutional controls are tools used to limit exposure to contamination or protect a remedy by limiting land use, they are often used to implement or establish land use restrictions relied on in connection with the response action. However, the Brownfields Amendments require compliance with land use restrictions relied on in connection with the response action, even if those restrictions have not been properly implemented through the use of an enforceable institutional control. Generally, a land use restriction may be considered "relied on" when the restriction is identified as a component of the remedy. Land use restrictions relied on in connection with a response action may be documented in several places depending on the program under which the response action was conducted, including: a risk assessment; a remedy decision document; a remedy design document; a permit, order, or consent decree; under some state response programs, a statute (*e.g.*, no groundwater wells when relying on natural attenuation); or, in other documents developed in conjunction with a response action.

An institutional control may not serve the purpose of implementing a land use restriction for a variety of reasons, including: (1) the institutional control is never, or has yet to be, implemented; (2) the property owner or other persons using the property impede the effectiveness of the institutional controls in some way and the party responsible for enforcement of the institutional controls neglects to take sufficient measures to bring those persons into compliance; or (3) a court finds the controls to be unenforceable. For example, a chosen remedy might rely on an ordinance that prevents groundwater from being used as drinking water. If the local government failed to enact the ordinance, later changed the ordinance to allow for drinking

---

[6] For additional information on institutional controls, see "Institutional Controls: A Site Manager's Guide to Identifying, Evaluating, and Selecting Institutional Controls at Superfund and RCRA Corrective Action Cleanups," September 2000, (OSWER Directive 9355.0-74FS-P).

water use, or failed to enforce the ordinance, a landowner is still required to comply with the groundwater use restriction identified as part of the remedy to maintain its landowner liability protection. Unless authorized by the regulatory agency responsible for overseeing the remedy, if the landowner fails to comply with a land use restriction relied on in connection with a response action, the owner will forfeit the liability protection and EPA may use its CERCLA authorities to order the owner to remedy the violation, or EPA may remedy the violation itself and seek cost recovery from the noncompliant landowner.

In order to meet the statutory criteria of a bona fide prospective purchaser, contiguous property owner, or innocent landowner, a party may not impede the effectiveness or integrity of any institutional control employed in connection with a response action. See CERCLA §§ 101(40)(F)(ii), 107(q)(1)(A)(v)(II), 101(35)(A)(iii). Impeding the effectiveness or integrity of an institutional control does not require a physical disturbance or disruption of the land. A landowner could jeopardize the reliability of an institutional control through actions short of violating restrictions on land use. In fact, not all institutional controls actually restrict the use of land. For example, EPA and State programs often use notices to convey information regarding contamination on site rather than actually restricting the use. To do this, EPA or a State may require a notice to be placed in the land records. If a landowner removed the notice, the removal would impede the effectiveness of the institutional control. A similar requirement is for a landowner to give notice of any institutional controls on the property to a purchaser of the property. Failure to give this notice may impede the effectiveness of the control. Another example of impeding the effectiveness of an institutional control would be if a landowner applies for a zoning change or variance when the current designated use of the property was intended to act as an institutional control. Finally, EPA might also consider a landowner's refusal to assist in the implementation of an institutional control employed in connection with the response action, such as not recording a deed notice or not agreeing to an easement or covenant, to constitute a violation of the requirement not to impede the effectiveness or integrity of an institutional control.[7]

An owner may seek changes to land use restrictions and institutional controls relied on in connection with a response action by following procedures required by the regulatory agency responsible for overseeing the original response action. Certain restrictions and institutional controls may not need to remain in place in perpetuity. For example, changed site conditions, such as natural attenuation or additional cleanup, may alleviate the need for restrictions or institutional controls. If an owner believes changed site conditions warrant a change in land or resource use or is interested in performing additional response actions that would eliminate the need for particular restrictions and controls, the owner should review and follow the appropriate regulatory agency procedures prior to undertaking any action that may violate the requirements of this provision.

---

[7] This may also constitute a violation of the ongoing obligation to provide full cooperation, assistance, and access. CERCLA §§ 101(40)(E), 107(q)(1)(A)(iv), 101(35)(A).

2. *Reasonable Steps*

a. Overview

Congress, in enacting the landowner liability protections, included the condition that bona fide prospective purchasers, contiguous property owners, and innocent landowners take "reasonable steps" with respect to hazardous substance releases to do all of the following:

- Stop continuing releases,
- Prevent threatened future releases, and
- Prevent or limit human, environmental, or natural resource exposure to earlier hazardous substance releases.

CERCLA §§ 101(40)(D), 107(q)(1)(A)(iii), 101(35)(B)(i)(II).[8] Congress included this condition as an incentive for certain owners of contaminated properties to avoid CERCLA liability by, among other things, acting responsibly where hazardous substances are present on their property. In adding this new requirement, Congress adopted an approach that is consonant with traditional common law principles and the existing CERCLA "due care" requirement.[9]

By making the landowner liability protections subject to the obligation to take "reasonable steps," EPA believes Congress intended to balance the desire to protect certain landowners from CERCLA liability with the need to ensure the protection of human health and the environment. In requiring reasonable steps from parties qualifying for landowner liability protections, EPA believes Congress did not intend to create, as a general matter, the same types of response obligations that exist for a CERCLA liable party (e.g., removal of contaminated soil,

---

[8] CERCLA § 101(40)(D), the bona fide prospective purchaser reasonable steps provision, provides: "[t]he person exercises appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to— (i) stop any continuing release; (ii) prevent any threatened future release; and (iii) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance."

CERCLA § 107(q)(1)(A), the contiguous property owner reasonable steps provision, provides: "the person takes reasonable steps to— (I) stop any continuing release; (II) prevent any threatened future release; and (III) prevent or limit human, environmental, or natural resource exposure to any hazardous substance released on or from property owned by that person."

CERCLA § 101(35)(B)(II), the innocent landowner reasonable steps provision, provides: "the defendant took reasonable steps to— (aa) stop any continuing release; (bb) prevent any threatened future release; and (cc) prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substance."

[9] See innocent landowner provision, CERCLA § 107(b)(3)(a).

extraction and treatment of contaminated groundwater).[10] Indeed, the contiguous property owner provision's legislative history states that absent "exceptional circumstances . . . , these persons are not expected to conduct ground water investigations or install remediation systems, or undertake other response actions that would be more properly paid for by the responsible parties who caused the contamination." S. Rep. No. 107-2, at 11 (2001). In addition, the Brownfields Amendments provide that contiguous property owners are generally not required to conduct groundwater investigations or to install ground water remediation systems. CERCLA § 107(q)(1)(D).[11] Nevertheless, it seems clear that Congress also did not intend to allow a landowner to ignore the potential dangers associated with hazardous substances on its property.

Although the reasonable steps legal standard is the same for the three landowner provisions, the obligations may differ to some extent because of other differences among the three statutory provisions. For example, as noted earlier, one of the conditions is that a person claiming the status of a bona fide prospective purchaser, contiguous property owner, or innocent landowner must have "carried out all appropriate inquiries" into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices. CERCLA §§ 101(40)(B), 107(q)(1)(A)(viii), 101(35)(B). However, for a contiguous property owner or innocent landowner, knowledge of contamination defeats eligibility for the liability protection. A bona fide prospective purchaser may purchase with knowledge of the contamination and still be eligible for the liability protection. Thus, only the bona fide prospective purchaser could purchase a contaminated property that is, for example, on CERCLA's National Priorities List[12] or is undergoing active cleanup under an EPA or State

---

[10] There could be unusual circumstances where the reasonable steps required of a bona fide prospective purchaser, contiguous property owner, or innocent landowner would be akin to the obligations of a potentially responsible party (e.g., the only remaining response action is institutional controls or monitoring, the benefit of the response action will inure primarily to the landowner, or the landowner is the only person in a position to prevent or limit an immediate hazard). This may be more likely to arise in the context of a bona fide prospective purchaser as the purchaser may buy the property with knowledge of the contamination.

[11] CERCLA § 107(q)(1)(D) provides:

> GROUND WATER. - With respect to a hazardous substance from one or more sources that are not on the property of a person that is a contiguous property owner that enters ground water beneath the property of the person solely as a result of subsurface migration in an aquifer, subparagraph (A)(iii) shall not require the person to conduct ground water investigations or to install ground water remediation systems, except in accordance with the policy of the Environmental Protection Agency concerning owners of property containing contaminated aquifers, dated May 24, 1995.

[12] The National Priorities List is "the list compiled by EPA pursuant to CERCLA § 105, of uncontrolled hazardous substance releases in the United States that are priorities for long-term remedial evaluation and response." 40 C.F.R. § 300.5 (2001).

cleanup program, and still maintain his liability protection.

The pre-purchase "appropriate inquiry" by the bona fide prospective purchaser will most likely inform the bona fide prospective purchaser as to the nature and extent of contamination on the property and what might be considered reasonable steps regarding the contamination - - how to stop continuing releases, prevent threatened future releases, and prevent or limit human, environmental, and natural resource exposures. Knowledge of contamination and the opportunity to plan prior to purchase should be factors in evaluating what are reasonable steps, and could result in greater reasonable steps obligations for a bona fide prospective purchaser.[13] Because the pre-purchase "appropriate inquiry" performed by a contiguous property owner or innocent landowner must result in no knowledge of the contamination for the landowner liability protection to apply, the context for evaluating reasonable steps for such parties is different. That is, reasonable steps in the context of a purchase by a bona fide prospective purchaser may differ from reasonable steps for the other protected landowner categories (who did not have knowledge or an opportunity to plan prior to purchase). Once a contiguous property owner or innocent landowner learns that contamination exists on his property, then he must take reasonable steps considering the available information about the property contamination.

The required reasonable steps relate only to responding to contamination for which the bona fide prospective purchaser, contiguous property owner, or innocent landowner is not responsible. Activities on the property subsequent to purchase that result in new contamination can give rise to full CERCLA liability. That is, more than reasonable steps will likely be required from the landowner if there is new hazardous substance contamination on the landowner's property for which the landowner is liable. See, e.g., CERCLA § 101(40)(A) (requiring a bona fide prospective purchaser to show "[a]ll disposal of hazardous substances at the facility occurred before the person acquired the facility").

As part of the third party defense that pre-dates the Brownfields Amendments and continues to be a distinct requirement for innocent landowners, CERCLA requires the exercise of "due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all the relevant facts and circumstances." CERCLA § 107(b)(3)(a). The due care language differs from the Brownfields Amendments' new reasonable steps language. However, the existing case law on due care provides a reference point for evaluating the reasonable steps requirement. When courts have examined the due care requirement in the context of the pre-existing innocent landowner defense, they have generally concluded that a landowner should take some positive or affirmative step(s) when confronted with hazardous substances on its property. Because the due care cases cited in Attachment B (see Section III.B.2.b "Questions and Answers," below) interpret the due care statutory language and not the reasonable steps statutory language, they are provided as a reference point for the reasonable steps analysis, but are not intended to define reasonable steps.

The reasonable steps determination will be a site-specific, fact-based inquiry. That

[13] As noted earlier, section 107(r)(2) provides EPA with a windfall lien on the property.

inquiry should take into account the different elements of the landowner liability protections and should reflect the balance that Congress sought between protecting certain landowners from CERCLA liability and assuring continued protection of human health and the environment. Although each site will have its own unique aspects involving individual site analysis, Attachment B provides some questions and answers intended as general guidance on the question of what actions may constitute reasonable steps.

b. Site-Specific Comfort/Status Letters Addressing Reasonable Steps

Consistent with its "Policy on the Issuance of Comfort/Status Letters," ("1997 Comfort/Status Letter Policy"), 62 Fed. Reg. 4,624 (1997), EPA may, in its discretion, provide a comfort/status letter addressing reasonable steps at a specific site, upon request. EPA anticipates that such letters will be limited to sites with significant federal involvement such that the Agency has sufficient information to form a basis for suggesting reasonable steps (e.g., the site is on the National Priorities List or EPA has conducted or is conducting a removal action on the site). In addition, as the 1997 Comfort/Status Letter Policy provides, "[i]t is not EPA's intent to become involved in typical real estate transactions. Rather, EPA intends to limit the use of . . . comfort to where it may facilitate the cleanup and redevelopment of brownfields, where there is the realistic perception or probability of incurring Superfund liability, and where there is no other mechanism available to adequately address the party's concerns." Id. In its discretion, a Region may conclude in a given case that it is not necessary to opine about reasonable steps because it is clear that the landowner does not or will not meet other elements of the relevant landowner liability protection. A sample reasonable steps comfort/status letter is attached to this memorandum (see Attachment C).

The 1997 Comfort/Status Letter Policy recognizes that, at some sites, the state has the lead for day-to-day activities and oversight of a response action, and the Policy includes a "Sample State Action Letter." For reasonable steps inquiries at such sites, Regions should handle responses consistent with the existing 1997 Comfort/Status Letter Policy. In addition, where appropriate, if EPA has had the lead at a site with respect to response actions (e.g., EPA has conducted a removal action at the site), but the state will be taking over the lead in the near future, EPA should coordinate with the state prior to issuing a comfort/status letter suggesting reasonable steps at the site.

3. *Cooperation, Assistance, and Access*

The Brownfields Amendments require that bona fide prospective purchasers, contiguous property owners, and innocent landowners provide full cooperation, assistance, and access to persons who are authorized to conduct response actions or natural resource restoration at the vessel or facility from which there has been a release or threatened release, including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action or natural resource restoration at the vessel or facility. CERCLA §§ 101(40)(E), 107(q)(1)(A)(iv), 101(35)(A).

4. *Compliance with Information Requests and Administrative Subpoenas*

The Brownfields Amendments require bona fide prospective purchasers and contiguous property owners to be in compliance with, or comply with, any request for information or administrative subpoena issued by the President under CERCLA. CERCLA §§ 101(40)(G), 107(q)(1)(A)(vi). In particular, EPA expects timely, accurate, and complete responses from all recipients of section 104(e) information requests. As an exercise of its enforcement discretion, EPA may consider a person who has made an inconsequential error in responding (e.g., the person sent the response to the wrong EPA address and missed the response deadline by a day), a bona fide prospective purchaser or contiguous property owner, as long as the landowner also meets the other conditions of the applicable landowner liability protection.

5. *Providing Legally Required Notices*

The Brownfields Amendments subject bona fide prospective purchasers and contiguous property owners to the same "notice" requirements. Both provisions mandate, in pertinent part, that "[t]he person provides all legally required notices with respect to the discovery or release of any hazardous substances at the facility." CERCLA §§ 101(40)(C), 107(q)(1)(A)(vii). EPA believes that Congress' intent in including this as an ongoing obligation was to ensure that EPA and other appropriate entities are made aware of hazardous substance releases in a timely manner.

"Legally required notices" may include those required under federal, state, and local laws. Examples of federal notices that may be required include, but are not limited to, those under: CERCLA § 103 (notification requirements regarding released substances); EPCRA § 304 ("emergency notification"); and RCRA § 9002 (notification provisions for underground storage tanks). The bona fide prospective purchaser and contiguous property owner have the burden of ascertaining what notices are legally required in a given instance and of complying with those notice requirements. Regions may require these landowners to self-certify that they *have provided* (in the case of contiguous property owners), or *will provide* within a certain number of days of purchasing the property (in the case of bona fide prospective purchasers), all legally required notices. Such self-certifications may be in the form of a letter signed by the landowner as long as the letter is sufficient to satisfy EPA that applicable notice requirements have been met. Like many of the other common elements discussed in this memorandum, providing legally required notices is an ongoing obligation of any landowner desiring to maintain its status as a bona fide prospective purchaser or contiguous property owner.

IV. Conclusion

Evaluating whether a landowner has met the criteria of a particular landowner provision will require careful, fact-specific analysis by the regions as part of their exercise of enforcement discretion. This memorandum is intended to provide EPA personnel with some general guidance on the common elements of the landowner liability protections. As EPA implements the Brownfields Amendments, it will be critical for the regions to share site-specific experiences and

information pertaining to the common elements amongst each other and with the Office of Site Remediation Enforcement, in order to ensure national consistency in the exercise of the Agency's enforcement discretion. EPA anticipates that its Landowner Liability Protection Subgroup, which is comprised of members from various headquarters offices, the Offices of Regional Counsel, the Office of General Counsel, and the Department of Justice, will remain intact for the foreseeable future and will be available to serve as a clearinghouse for information for the regions on the common elements.

Questions and comments regarding this memorandum or site-specific inquiries should be directed to Cate Tierney, in OSRE's Regional Support Division (202-564-4254, Tierney.Cate@EPA.gov), or Greg Madden, in OSRE's Policy & Program Evaluation Division (202-564-4229, Madden.Gregory@EPA.gov).

V. Disclaimer

This memorandum is intended solely for the guidance of employees of EPA and the Department of Justice and it creates no substantive rights for any persons. It is not a regulation and does not impose legal obligations. EPA will apply the guidance only to the extent appropriate based on the facts.

Attachments

cc: Jewell Harper (OSRE)
Paul Connor (OSRE)
Sandra Connors (OSRE)
Thomas Dunne (OSWER)
Benjamin Fisherow (DOJ)
Linda Garczynski (OSWER)
Bruce Gelber (DOJ)
Steve Luftig (OSWER)
Earl Salo (OGC)
EPA Brownfields Landowner Liability Protection Subgroup

Attachment A

Chart Summarizing Applicability of "Common Elements" to Bona Fide Prospective Purchasers, Contiguous Property Owners, and Section 101(35)(A)(i) Innocent Landowners

Common Element among the Brownfields Amendments Landowner Provisions	**Bona Fide Prospective Purchaser**	**Contiguous Property Owner**	**Section 101 (35)(A)(i) Innocent Landowner**
All Appropriate Inquiry	U	U	U
No affiliation demonstration	U	U	u
Compliance with land use restrictions and institutional controls	U	U	U
Taking reasonable steps	U	U	U
Cooperation, assistance, access	U	U	U
Compliance with information requests and administrative subpoenas	U	U	u u
Providing legally required notices	U	U	u u u

u Although the innocent landowner provision does not contain this "affiliation" language, in order to meet the statutory criteria of the innocent landowner liability protection, a person must establish by a preponderance of the evidence that the act or omission that caused the release or threat of release of hazardous substances and the resulting damages were caused by a third party with whom the person does not have an employment, agency, or contractual relationship. CERCLA § 107(b)(3). Contractual relationship is defined in section 101(35)(A).

u u Compliance with information requests and administrative subpoenas is not specified as a statutory criterion for achieving and maintaining the section 101(35)(A)(i) innocent landowner liability protection. However, CERCLA requires compliance with administrative subpoenas from all persons, and timely, accurate, and complete responses from all recipients of EPA information requests.

u u u Provision of legally required notices is not specified as a statutory criterion for achieving and maintaining the section 101(35)(A)(i) innocent landowner liability protection. These landowners may, however, have notice obligations under federal, state and local laws.

Attachment B

Reasonable Steps Questions and Answers

The "reasonable steps" required of a bona fide prospective purchaser, contiguous property owner, or section 101(35)(A)(i) innocent landowner under CERCLA §§ 101(40)(D), 107(q)(1)(A)(iii), and 101(35)(B)(i)(II), will be a site-specific, fact-based inquiry. Although each site will have its own unique aspects involving individual site analysis, below are some questions and answers intended to provide general guidance on the question of what actions may constitute reasonable steps. The answers provide a specific response to the question posed, without identifying additional actions that might be necessary as reasonable steps or actions that may be required under the other statutory conditions for each landowner provision (e.g., providing cooperation and access). In addition, the answers do not address actions that may be required under other federal statutes (e.g., the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq*.; the Clean Water Act, 33 U.S.C. § 1251, *et seq.*; and the Toxic Substances Control Act, 15 U.S.C. § 2601, *et seq*.), and do not address landowner obligations under state statutory or common law.[14]

Notification

Q1: If a person conducts "all appropriate inquiry" with respect to a property where EPA has conducted a removal action, discovers hazardous substance contamination on the property that is unknown to EPA, and then purchases the property, is notification to EPA or the state about the contamination a reasonable step?

A1: Yes. First, bona fide prospective purchasers may have an obligation to provide notice of the discovery or release of a hazardous substance under the legally required notice provision, CERCLA § 101(40)(C). Second, even if not squarely required by the notice conditions, providing notice of the contamination to appropriate governmental authorities would be a reasonable step in order to prevent a "threatened future release" and "prevent or limit . . . exposure." Congress specifically identified "notifying appropriate Federal, state, and local officials" as a typical reasonable step. S. Rep. No.107-2, at 11 (2001); see also, Bob's Beverage Inc. v. Acme, Inc., 169 F. Supp. 2d 695, 716 (N.D. Ohio 1999) (failure to timely notify EPA and Ohio EPA of groundwater contamination was factor in conclusion that party failed to exercise due care), *aff'd*, 264 F. 3d 692 (6th Cir. 2001). It should be noted that the bona fide prospective purchaser provision is the only one of the three landowner provisions where a person can purchase property with knowledge that it is contaminated and still qualify for the landowner liability protection.

[14] The Brownfields Amendments did not alter CERCLA § 114(a), which provides: "[n]othing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State."

Site Restrictions

Q2: Where a property owner discovers unauthorized dumping of hazardous substances on a portion of her property, are site access restrictions reasonable steps?

A2: Site restrictions are likely appropriate as a first step, once the dumping is known to the owner. Reasonable steps include preventing or limiting "human, environmental, or natural resource exposure" to hazardous substances. CERCLA §§ 101(40)(D)(iii), 107(q)(1)(A)(iii)(III), 101(35)(B)(i)(II)(cc). The legislative history for the contiguous property owner provision specifically notes that "erecting and maintaining signs or fences to prevent public exposure" may be typical reasonable steps. S. Rep. No. 107-2, at 11 (2001); see also, Idylwoods Assoc. v. Mader Capital, Inc., 915 F. Supp. 1290, 1301 (W.D.N.Y. 1996) (failure to restrict access by erecting signs or hiring security personnel was factor in evaluating due care), *aff'd on reh'g*, 956 F. Supp. 410, 419-20 (W.D.N.Y. 1997); New York v. Delmonte, No. 98-CV-0649E, 2000 WL 432838, *4 (W.D.N.Y. Mar. 31, 2000) (failure to limit access despite knowledge of trespassers was not due care).

Containing Releases or Threatened Releases

Q3: If a new property owner discovers some deteriorating 55 gallon drums containing unknown material among empty drums in an old warehouse on her property, would segregation of the drums and identification of the material in the drums constitute reasonable steps?

A3: Yes, segregation and identification of potential hazards would likely be appropriate first steps. Reasonable steps must be taken to "prevent any threatened future release." CERCLA §§ 101(40)(D)(ii), 107(q)(1)(A)(iii)(II), 101(35)(B)(i)(II)(bb). To the extent the drums have the potential to leak, segregation and containment (e.g., drum overpack) would prevent mishandling and releases to the environment. For storage and handling purposes, an identification of the potential hazards from the material will likely be necessary. Additional identification steps would likely be necessary for subsequent disposal or resale if the material had commercial value.

Q4: If a property owner discovers that the containment system for an on-site waste pile has been breached, do reasonable steps include repairing the breach?

A4: One of the reasonable steps obligations is to "stop any continuing release." CERCLA §§ 101(40)(D)(i), 107(q)(1)(A)(iii)(I), 101(35)(B)(i)(II)(aa). In general, the property owner should take actions to prevent contaminant migration where there is a breach from an existing containment system. Both Congress and the courts have identified maintenance of hazardous substance migration controls as relevant property owner obligations. For example, in discussing contiguous property owners' obligations for migrating groundwater plumes, Congress identified "maintaining any existing barrier or other elements of a response action on their property that

address the contaminated plume" as a typical reasonable step. S. Rep. No. 107-2, at 11 (2001); see also, Franklin County Convention Facilities Auth. v. American Premier Underwriters, Inc., 240 F.3d 534, 548 (6th Cir. 2001) (failure to promptly erect barrier that allowed migration was not due care); United States v. DiBiase Salem Realty Trust, No. Civ. A. 91-11028-MA, 1993 WL 729662, *7 (D. Mass. Nov. 19, 1993) (failure to reinforce waste pit berms was factor in concluding no due care), *aff'd*, 45 F.3d 541, 545 (1st Cir. 1995). In many instances, the current property owner will have responsibility for maintenance of the containment system. If the property owner has responsibility for maintenance of the system as part of her property purchase, then she should repair the breach. In other instances, someone other than the current landowner may have assumed that responsibility (e.g., a prior owner or other liable parties that signed a consent decree with EPA and/or a State). If someone other than the property owner has responsibility for maintenance of the containment system pursuant to a contract or other agreement, then the question is more complicated. At a minimum, the current owner should give notice to the person responsible for the containment system and to the government. Moreover, additional actions to prevent contaminant migration would likely be appropriate.

Q5: If a bona fide prospective purchaser buys property at a Superfund site where part of the approved remedy is an asphalt parking lot cap, but the entity or entities responsible for implementing the remedy (e.g., PRPs who signed a consent decree) are unable to repair the deteriorating cap (e.g., the PRPs are now defunct), should the bona fide prospective purchaser repair the deteriorating asphalt parking lot cap as reasonable steps?

A5: Taking "reasonable steps" includes steps to: "prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substances." CERCLA §§ 101(40)(D)(iii), 107(q)(1)(A)(iii)(III), 101(35)(B)(i)(II)(cc). In this instance, the current landowner may be in the best position to identify and quickly take steps to repair the asphalt cap and prevent additional exposures.

Remediation

Q6: If a property is underlain by contaminated groundwater emanating from a source on a contiguous or adjacent property, do reasonable steps include remediating the groundwater?

A6: Generally not. Absent exceptional circumstances, EPA will not look to a landowner whose property is not a source of a release to conduct groundwater investigations or install groundwater remediation systems. Since 1995, EPA's policy has been that, in the absence of exceptional circumstances, such a property owner did not have "to take any affirmative steps to investigate or prevent the activities that gave rise to the original release" in order to satisfy the innocent landowner due care requirement. See May 24, 1995 "Policy Toward Owners of Property Containing Contaminated Aquifers." ("1995 Contaminated Aquifers Policy"). In the Brownfields Amendments, Congress explicitly identified this policy in noting that reasonable

steps for a contiguous property owner "shall not require the person to conduct groundwater investigations or to install groundwater remediation systems," except in accordance with that policy. See CERCLA § 107(q)(1)(D). The policy does not apply "where the property contains a groundwater well, the existence or operation of which may affect the migration of contamination in the affected area." 1995 Contaminated Aquifers Policy, at 5. In such instances, a site-specific analysis should be used in order to determine reasonable steps. In some instances, reasonable steps may simply mean operation of the groundwater well consistent with the selected remedy. In other instances, more could be required.

Q7: If a protected landowner discovers a previously unknown release of a hazardous substance from a source on her property, must she remediate the release?

A7: Provided the landowner is not otherwise liable for the release from the source, she should take some affirmative steps to "stop the continuing release," but EPA would not, absent unusual circumstances, look to her for performance of complete remedial measures. However, notice to appropriate governmental officials and containment or other measures to mitigate the release would probably be considered appropriate. Compare Lincoln Properties, Ltd. v. Higgins, 823 F. Supp. 1528, 1543-44 (E.D. Calif. 1992) (sealing sewer lines and wells and subsequently destroying wells to protect against releases helped establish party exercised due care); Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1508 (11th Cir. 1996) (timely development of maintenance plan to remove tar seeps was factor in showing due care was exercised); New York v. Lashins Arcade Co., 91 F.3d 353 (2nd Cir. 1996) (instructing tenants not to discharge hazardous substances into waste and septic systems, making instructions part of tenancy requirements, and inspecting to assure compliance with this obligation, helped party establish due care); with Idylwoods Assoc. v. Mader Capital, Inc., 956 F. Supp. 410, 419-20 (W.D.N.Y. 1997) (property owner's decision to do nothing resulting in spread of contamination to neighboring creek was not due care); Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co., 14 F.3d 321, 325 (7th Cir. 1994) (party that "made no attempt to remove those substances or to take any other positive steps to reduce the threat posed" did not exercise due care). As noted earlier, if the release is the result of a disposal after the property owner's purchase, then she may be required to undertake full remedial measures as a CERCLA liable party. Also, if the source of the contamination is on the property, then the property owner will not qualify as a contiguous property owner but may still qualify as an innocent landowner or a bona fide prospective purchaser.

Site Investigation

Q8: If a landowner discovers contamination on her property, does the obligation to take reasonable steps require her to investigate the extent of the contamination?

A8: Generally, where the property owner is the first to discover the contamination, she should

take certain basic actions to assess the extent of contamination. Absent such an assessment, it will be very difficult to determine what reasonable steps will stop a continuing release, prevent a threatened future release, or prevent or limit exposure. While a full environmental investigation may not be required, doing nothing in the face of a known or suspected environmental hazard would likely be insufficient. See, e.g., United States v. DiBiase Salem Realty Trust, 1993 WL 729662, *7 (failure to investigate after becoming aware of dangerous sludge pits was factor in concluding party did not exercise due care), *aff'd*, 45 F.3d 541, 545 (1st Cir. 1995); United States v. A&N Cleaners and Launderers, Inc., 854 F. Supp. 229 (S.D.N.Y. 1994) (dictum) (failing to assess environmental threats after discovery of disposal would be part of due care analysis). Where the government is actively investigating the property, the need for investigation by the landowner may be lessened, but the landowner should be careful not to rely on the fact that the government has been notified of a hazard on her property as a shield to potential liability where she fails to conduct any investigation of a known hazard on her property. Compare New York v. Lashins Arcade Co., 91 F.3d 353, 361 (2nd Cir. 1996) (no obligation to investigate where RI/FS already commissioned) with DiBiase Salem Realty Trust, 1993 WL 729662, *7 (State Department of Environmental Quality knowledge of hazard did not remove owner's obligation to make some assessment of site conditions), *aff'd*, 45 F.3d 541, 545 (1st Cir. 1995).

Performance of EPA Approved Remedy

Q9: If a new purchaser agrees to assume the obligations of a prior owner PRP, as such obligations are defined in an order or consent decree issued or entered into by the prior owner and EPA, will compliance with those obligations satisfy the reasonable steps requirement?

A9: Yes, in most cases compliance with the obligations of an EPA order or consent decree will satisfy the reasonable steps requirement so long as the order or consent decree comprehensively addresses the obligations of the prior owner through completion of the remedy. It should be noted that not all orders or consent decrees identify obligations through completion of the remedy and some have open-ended cleanup obligations.

Attachment C

Sample Federal Superfund Interest Reasonable Steps Letter

The sample comfort/status letter below may be used in the exercise of enforcement discretion where EPA has sufficient information regarding the site to have assessed the hazardous substance contamination and has enough information about the property to make suggestions as to steps necessary to satisfy the "reasonable steps" requirement. In addition, like any comfort/status letter, the letters should be provided in accordance with EPA's "Comfort/Status Letter Policy." That is, they are not necessary or appropriate for purely private real estate transactions. Such letters may be issued when: (1) there is a realistic perception or probability of incurring Superfund liability, (2) such comfort will facilitate the cleanup and redevelopment of a brownfield property, (3) there is no other mechanism to adequately address the party's concerns, and (4) EPA has sufficient information about the property to provide a basis for suggesting reasonable steps.

[Insert Addressee]

Re: **[Insert Name or Description of Property]**

Dear **[insert name of requester]:**

I am writing in response to your letter dated **[insert date]** concerning the property referenced above. As you know, the **[insert name]** property is located within or near the **[insert name of CERCLIS site.]** EPA is currently **[insert description of action EPA is taking or plans to take and any contamination problem.]**

The **[bona fide prospective purchaser, contiguous property owner, or innocent landowner]** provision states that a person meeting the criteria of **[insert section]** is protected from CERCLA liability. **[For bona fide prospective purchaser only, it may be appropriate to insert following language: To the extent EPA's response action increases the fair market value of the property, EPA may have a windfall lien on the property. The windfall lien is limited to the increase in fair market value attributable to EPA's response action, capped by EPA's unrecovered response costs.]** (I am enclosing a copy of the relevant statutory provisions for your reference.) To qualify as a **[bona fide prospective purchaser, contiguous property owner, or section 101(35)(A)(i) innocent landowner]**, a person must (among other requirements) 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. You have asked what actions you must take, as the **[owner or prospective owner]** of the property, to satisfy the "reasonable steps" criterion.

As noted above, EPA has conducted a **[insert most recent/relevant action to "reasonable steps" inquiry taken by EPA]** at **[insert property name]** and has identified a

number of environmental concerns. Based on the information EPA has evaluated to date, EPA believes that, for an owner of the property, the following would be appropriate reasonable steps with respect to the hazardous substance contamination found at the property:

[insert paragraphs outlining reasonable steps with respect to each environmental concern]

This letter does not provide a release from CERCLA liability, but only provides information with respect to reasonable steps based on the information EPA has available to it. This letter is based on the nature and extent of contamination known to EPA at this time. If additional information regarding the nature and extent of hazardous substance contamination at **[insert property name]** becomes available, additional actions may be necessary to satisfy the reasonable steps criterion. In particular, if new areas of contamination are identified, you should ensure that reasonable steps are undertaken. As the property owner, you should ensure that you are aware of the condition of your property so that you are able to take reasonable steps with respect to any hazardous substance contamination at or on the property.

Please note that the **[bona fide prospective purchaser, contiguous property owner, or innocent landowner]** provision has a number of conditions in addition to those requiring the property owner to take reasonable steps. Taking reasonable steps and many of the other conditions are continuing obligations of the **[bona fide prospective purchaser, contiguous property owner, or section 101(35)(A)(i) innocent landowner]**. You will need to assess whether you satisfy each of the statutory conditions for the **[bona fide prospective purchaser, contiguous property owner, or innocent landowner]** provision and continue to meet the applicable conditions.

EPA hopes this information is useful to you. If you have any questions, or wish to discuss this letter, please feel free to contact **[insert EPA contact and address]**.

Sincerely,

[insert name of EPA contact]

Appendix B

Top Ten Questions to Ask Before Buying a Superfund Site

NOVEMBER 2006
EPA-330-F-06-001

Top 10 Questions to Ask When Buying a Superfund Site

Office of Enforcement and Compliance Assurance

Office of Site Remediation Enforcement

This brochure provides answers to questions that are useful to ask when acquiring federal Superfund sites. Its purpose is to support the reuse of sites by informing parties about the opportunities and issues associated with their reuse. For purposes of this brochure, site is defined as any property where a hazardous substance has come to be located. Thus, even a property not the source of the release of hazardous substances can be part of the site if hazardous substances come to be located on or under the property.



The 2002 Superfund liability protections[1] are designed to be self-implementing, meaning that a prospective purchaser does not need to obtain approval from the U.S. Environmental Protection Agency ("EPA") prior to purchasing a federal Superfund site where an EPA action is ongoing or has been completed. However, EPA strongly recommends that prospective purchasers contact the appropriate EPA Regional office[2] prior to purchase of a federal Superfund site or a property within a site to discuss the cleanup status of the site and other site-related issues.

1. WHY IS BUYING A SUPERFUND SITE OR PROPERTIES WITHIN A SUPERFUND SITE A GOOD IDEA?

LOCATION, LOCATION, LOCATION. Many federal Superfund sites have advantageous locations that are accessible to urban infrastructure and the public. Some federal, state, and local government agencies offer grants, loans, and tax incentives to encourage development of formerly contaminated properties and their surrounding areas. In addition, the scope of contamination at many federal Superfund sites is well documented, which minimizes future surprises regarding undiscovered contamination.

Federal Superfund sites throughout the country have been transformed into major shopping centers, business parks, residential subdivisions, and recreational facilities. Many more federal Superfund sites are being revitalized for use by small businesses. A large number of federal Superfund sites are suitable for revitalization even during the cleanup.

Revitalizing federal Superfund sites has an additional significant environmental benefit. A study conducted by George Washington University has estimated that for every formerly contaminated acre revitalized, 4.5 acres of undeveloped land are preserved.[3]

---

[1] The most recent Superfund liability protections were included in an amendment to the Superfund law, the Small Business Liability Relief and Brownfields Revitalization Act (commonly referred to as the Brownfields Amendments), which were enacted on January 11, 2002.

[2] Information on contacting EPA's Regional Offices is available on EPA's Web site at http://www.epa.gov/epahome/whereyoulive.htm#regiontext.

[3] Deason, Sherk, and Carroll, The George Washington University. *Public Policies and Private Decisions Affecting the Redevelopment of Brownfields: An Analysis of Critical Factors, Relative Weights and Areal Differentials*, prepared for U.S. EPA, Sept. 2001.

2. How Can I Find Out More Information About The Status Of A Site And If It's Safe For Reuse?

THE VAST MAJORITY OF FEDERAL SUPERFUND SITES ARE PROTECTIVE OF HUMAN HEALTH AND THE ENVIRONMENT FOR CERTAIN TYPES OF REUSE ACTIVITIES AFTER THEY ARE CLEANED UP. And many are protective for reuse during cleanup. However, not all site cleanups are protective for all uses. Superfund cleanups may be designed to accommodate specific uses. For example, a property cleaned to accommodate commercial/industrial uses may be protective for uses such as manufacturing, shopping or office complexes. In addition, a large number of federal Superfund sites, or portions of the sites, are suitable for revitalization during the cleanup so that the property can be used in a timely manner.



Portions of the Industri-plex site in Woburn, MA, have been redeveloped as public road extensions, a Residence Inn, a Target retail store, and a multi-modal Regional Transportation Center.

Fact sheets describing a site's history, current cleanup status, and who to contact for more information are available on EPA's Web site at http://cfpub.epa.gov/supercpad/cursites/srchsites.cfm.

EPA also offers many tools to help facilitate the reuse of a federal Superfund site including:

- comfort/status letters[4]
- site-specific reuse fact sheets and
- Ready for Reuse ("RfR") Determinations

Some EPA regional offices have or are developing prospective purchaser inquiry procedures and will schedule conference calls or meetings with prospective purchasers to discuss whether the proposed use of the site is compatible with an ongoing cleanup, any current or future property restrictions on the site, resolution of potential liens, and other matters.

3. How Do I Identify All Of The Parties I Have To Deal With To Buy The Site Or Property Within The Site And What Is EPA's Role?

THERE IS NO SIMPLE SOLUTION TO IDENTIFY ALL PARTIES ASSOCIATED WITH A FEDERAL SUPERFUND SITE. As with the purchase of any property, negotiations to buy a federal Superfund site begin with the current owner who can be identified through title or tax records. In almost all instances, EPA does not own the site being cleaned up. Generally, EPA's involvement relates to addressing the following questions:

1. What is the current status of a site's cleanup and what are EPA's future anticipated actions?
2. Is the proposed redevelopment compatible with a site's cleanup and with the existing and potential future property restrictions? **Note:** EPA does not offer guarantees of compatibility.
3. Is the prospective purchaser aware of the applicable landowner liability protections under CERCLA?
4. How can EPA work with the prospective purchaser to settle or resolve any EPA liens?[5]

EPA is willing to work with prospective purchasers to clarify issues, including the existence and satisfaction of EPA liens and property use restrictions.

[4] A comfort/status letter is a letter intended to combat the stigma and concerns about liability associated with contaminated sites by clarifying the cleanup status and likelihood of EPA involvement at a site.

[5] See Question 8 below for more information regarding EPA liens.

4. IF I BUY THE PROPERTY, WILL I BE RESPONSIBLE FOR PAST OR FUTURE CLEANUP COSTS?

IN MOST CASES A PROSPECTIVE PURCHASER WILL NOT BE RESPONSIBLE FOR PAST OR FUTURE FEDERAL SUPERFUND CLEANUP COSTS FOR EXISTING CONTAMINATION THAT IS PRESENT ON THE PROPERTY WHEN THE SITE IS PURCHASED. New purchasers are protected from owner or operator liability under the federal Superfund law so long as the new purchaser meets the definition of a "bona fide prospective purchaser" ("BFPP") under 42 U.S.C. § 9601(40). This BFPP provision states that a purchaser who acquires a federal Superfund site or other contaminated property after January 11, 2002, and who complies with eight statutory criteria will not incur federal Superfund liability as an owner of the property. (See exhibit "Eight Criteria for Managing Liability as a BFPP" on the following page.)



Once contaminated with coal tar and creosote, the Reilly Tar & Chemical site in St. Louis Park, Minnesota now boasts a park, a residential development, and a pond that provides wildlife habitats.

A new purchaser must achieve and maintain BFPP status for as long as potential liability exists to remain protected from federal Superfund liability for the existing contamination at the site. Potential liability exists for as long as hazardous substances remain on the property and/or the statute of limitations on cost recovery actions is in effect. Although a BFPP is not personally liable, the property itself could be subject to a lien as a result of EPA incurring costs to clean up the site.[6]

Ten Criteria for All Appropriate Inquiry

- Inquiry by environmental professional
- Interviews with past/present owners
- Review of historical sources of information
- Search for recorded cleanup liens
- Review of federal, state and local records
- Visual inspection
- Specialized knowledge of BFPP
- Relationship of purchase price to value of property
- Commonly known/reasonably ascertainable information
- Obviousness of presence of contamination

Some of the criteria for obtaining BFPP status must be satisfied prior to acquiring a site. Other criteria for maintaining BFPP status are ongoing obligations that must be met after purchase of the site. One example of a threshold criterion that must be satisfied prior to purchase is that a BFPP must perform 'all appropriate inquiries' ("AAI") concerning environmental conditions at the site. The Final Rule for AAI, which sets forth standards for satisfying the criterion, is effective on November 1, 2006. Information on how to comply with this regulation is available on EPA's Web site at http://www.epa.gov/brownfields/regneg.htm. (See exhibit "Ten Criteria for All Appropriate Inquiry" on this page.)

It is important to note that new purchasers could become liable for environmental contamination if they interfere with the existing remedy, exacerbate existing contamination, or cause a new release of hazardous substances. EPA is willing to discuss potential liability issues, including qualifications for BFPP status, with prospective purchasers and their lenders. Please note that EPA cannot give prospective purchasers legal advice. Legal advice must be sought from private legal counsel, but EPA can explain the available liability protections.

[6] *See* Question 8 below for more information regarding liens.

As previously stated, a purchaser who achieves and maintains BFPP status is not responsible for existing contamination, but may nonetheless want to voluntarily clean up a site, rather than wait for the potentially responsible party or the government to do it.

When appropriate, EPA will enter into an agreement with a BFPP willing to perform a cleanup action at a site. EPA is currently developing a model work agreement for BFPPs.

There are many reasons why a BFPP would want to perform the cleanup:

- **faster cleanup:** a BFPP may be able to clean up a site more quickly
- **better coordination:** a BFPP may be better able to coordinate cleanup activities into its reuse and/or redevelopment plans

Eight Criteria for Managing Liability as a BFPP

- All disposal of hazardous substances occurred before acquisition.
- The person made all appropriate inquiries about the property before acquisition.
- The person provided all legally required notices with respect to discovery or release of any hazardous substances at the facility.
- The person exercises appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to prevent releases.
- The person provides full cooperation and access to EPA.
- The person complies with land restrictions in connection with the response action and does not impede the effectiveness of institutional controls.
- The person complies with requests for information and subpoenas.
- The person is not potentially liable or affiliated with a potentially responsible party ("PRP").

- **purchasing incentives:** a BFPP may be able to negotiate a lower purchase price from the seller by undertaking cleanup work that the seller would otherwise be responsible for
- **windfall lien settlements:** a BFPP may be able to settle a windfall lien (see Question 8) by agreeing to perform all or part of a necessary cleanup and/or
- **cost recovery:** a BFPP may be entitled to cost recovery from responsible parties under appropriate circumstances

5. DO I NEED A DOCUMENT FROM EPA CONFIRMING I HAVE BFPP STATUS?

NO, THE BFPP PROVISION IS DESIGNED TO BE SELF-IMPLEMENTING which means that a prospective purchaser may achieve, and then after the purchase maintain, BFPP status without obtaining approval or oversight from EPA. In appropriate circumstances, however, EPA may issue a status/comfort letter to prospective purchasers or their lenders to describe: the cleanup status of a site; anticipated future cleanup actions, if any; the available liability protection provisions; the site-specific reasonable steps a purchaser should take with respect to the appropriate care criteria; and the status of any EPA liens.

EPA strongly recommends that prospective purchasers contact the appropriate EPA Regional office prior to purchase of a federal Superfund site to discuss the cleanup status of the site and other site-related issues. For EPA Regional contact information, go to http://www.epa.gov/superfund/programs/recycle/contact.htm. In addition, EPA strongly encourages prospective purchasers to contact the state environmental protection agency where the site is located to discuss potential state issues such as liability and additional cleanup.

6. As The Property Owner, Will I Be Responsible For Ongoing Or Future Cleanup Actions At The Site?

No, a property owner with BFPP status will generally not be responsible for the ongoing or future cleanup actions, beyond resolving any applicable liens.[7] However, certain responsibilities associated with BFPP status may involve actions to prevent or mitigate releases. For example, in certain circumstances, BFPPs may need to take reasonable steps to stop continuing releases, prevent threatened future releases, and prevent or limit human, environmental, or natural resource exposure to earlier hazardous substance releases. This could include actions such as erecting or maintaining perimeter fences, removing drums, or creating containment berms, to fulfill appropriate care obligations. For general information about appropriate care and reasonable steps to prevent releases, go to http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-ref.pdf.

7. Are There Limitations On What I Can Do At The Site, And If So How Can I Find Out Whether Any Property Restrictions Are In Effect And What They Are?

There may be limits on uses of the site or properties within the site. The statutory criteria for maintaining BFPP status include not impeding the integrity or effectiveness of institutional controls ("ICs") and complying with all land use restrictions. Accordingly, prospective purchasers must determine whether any temporary, permanent, or future use restrictions are or will be placed on the site during cleanup (EPA calls these use restrictions 'institutional controls') and how they may affect their plans for the site property. Prospective purchasers must also determine if engineered controls, such as a clay cap or monitoring wells, limit what they can do at the site property.



Davie Landfill in Broward County, Florida has been redeveloped into Vista View Park, which includes walking, horseback riding, and bike trails; a picnic area; and a catch-and-release fishing

Prospective purchasers can find out whether any restrictions apply to the site property by contacting EPA's Regional office, the state environmental agency and/or the local government, and by talking to the current owner. Prospective purchasers can also find out this information by performing all appropriate inquiries as described in Question 4 above and at http://www.epa.gov/brownfields/regneg.htm. By learning whether any restrictions apply to the site property, and what they are, prospective purchasers can determine how their plans for the site property are affected.

Enforcement of property restrictions established as part of a cleanup (e.g., restricting site property for commercial uses only) is normally overseen by the state or local government. EPA (or the state) may also conduct periodic reviews to examine how the cleanup is functioning (typically every five years) and whether it remains protective.

To ensure that BFPPs maintain their liability protections, it is important that all the property restrictions are followed and that the BFPP's use of the site does not adversely affect or impede the cleanup. In addition, BFPPs may be asked to implement appropriate property restrictions after they purchase the site property, so EPA encourages them to inquire about property restrictions before they purchase the site. A BFPP may purchase a site before EPA has made a final cleanup decision and, therefore, EPA may be unable to predict what property restrictions are appropriate and will need to be implemented in the future.

[7] See Question 8 for a discussion on liens.

8. Does EPA use liens That Could Affect Me If I Acquire A Site Or Property Within A site And how can I resolve Or settle An EPA lien?

EPA uses two types of liens that may affect site property: Superfund Liens and Windfall Liens. A "Superfund Lien" entitles EPA to recover cleanup costs that the Agency incurred from the property owner. A "Windfall Lien" is potentially applicable to a site property if the owner is a BFPP. The Windfall Lien is designed to prevent an entity from realizing an unfair windfall from the purchase of a property that has been cleaned up using taxpayer dollars. EPA's potential cost recovery under a Windfall Lien is limited to the increase in fair market value of the property attributable to cleanup or the United States' unrecovered response costs, whichever is less. BFPPs should contact their EPA Regional office regarding the existence of a lien or EPA's future intentions to perfect a lien on the property.



The MDI Site in Houston, Texas is located two miles east of downtown and is near an environmental justice community. EPA and the Department of Justice worked with the bankruptcy trustee to ensure that the purchaser of the site committed to perform the on-site cleanup work. This was the first settlement through which a BFPP agreed to perform the cleanup work at a Superfund site.

Both of these liens can be released or waived upon satisfaction before the purchase of the site. The satisfaction amount may be negotiated with EPA and would be embodied in a settlement agreement. EPA may seek cash consideration, performance of work, or a combination of such consideration in connection with the lien releases and waivers. Because EPA liens affect the total value of the property, lien settlement negotiations may need to include EPA, the current property owner, and the BFPP. Often the liens can be resolved or settled concurrently because both the Superfund Lien and the Windfall Lien draw from the same available equity in a property. In addition, EPA may also issue a status/comfort letter to prospective purchasers or their lenders to describe the status of any EPA liens.

EPA has issued guidance, a model settlement document, and a sample comfort/status letter on Windfall Liens that can be found on EPA's Web site at
http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-windfall-lien.pdf.

A FAQs fact sheet on Windfall Liens is available on EPA's Web site at
http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-windfall-lien-faq.pdf.

9. Could I Encounter Problems When I Try To Get Financing To Buy Site Property Or Borrow For Improvements And How Can EPA Help?

CHANGES TO THE FEDERAL SUPERFUND LAW ADDRESSED MANY LENDER CONCERNS, BUT PROSPECTIVE PURCHASERS MIGHT STILL EXPERIENCE PROBLEMS. In the past, lenders were reluctant to provide financing for the purchase of federal Superfund sites because of concerns about:

- lender liability
- potential liability of the owner affecting the owner's ability to repay the loan and
- the impact of the contamination on the value of the site property that secures the loan



The Town of Londonderry, New Hampshire has experienced an upsurge in economic activity with the redevelopment of the Tinkham Garage site.

These concerns are diminishing for several reasons. A 1996 amendment to the federal Superfund law protects lenders from federal Superfund liability when the lenders comply with certain statutory requirements. In particular, the lenders may not participate in the management of the facility.

Use of environmental insurance policies has increasingly alleviated lenders' concerns about financial risks at federal Superfund sites. The passage of time and increased reuse of brownfields and federal Superfund sites are demonstrating to lenders the significant financial value that these properties have and the potentially low risks of financing their purchase and redevelopment.

In addition, the 2002 amendments to the federal Superfund law which provide for BFPP status for new buyers may provide assurance to lenders because borrowers will not be liable and their ability to repay the lender will not be affected.

EPA has many tools to help alleviate lenders' concerns about financing contaminated properties, including guidance documents, comfort/status letters, BFPP work agreements, and Ready for Reuse Determinations. EPA's willingness to work with buyers and their lenders makes the acquisition of federal Superfund properties more feasible than ever before.

10. WHAT CAN EPA DO TO HELP A PROSPECTIVE PURCHASER DECIDE, AND CONVINCE LENDERS, TENANTS, AND OTHERS, THAT BUYING AND RE-USING A SUPERFUND SITE IS A GOOD IDEA?

EPA HAS TOOLS THAT CAN BE USED TO DEMONSTRATE THAT BUYING OR USING A FEDERAL SUPERFUND SITE CAN BE A GOOD OPPORTUNITY. Some of these tools include:

- **BFPP 'Doing Work' Agreements** - EPA may enter into a settlement agreement with a BFPP who wishes to perform part or all of a cleanup. The agreement provides for EPA oversight and may satisfy part or all of any windfall lien.
- **Lien Settlements** - EPA is willing to enter into negotiations and settlement agreements to resolve lien issues and facilitate reuse.
- **Status/Comfort Letters** - EPA may issue status letters or comfort letters that address the following:
  - status of the site
  - future anticipated actions at the site
  - available liability protections



The Town of Arlington, Tennessee acquired the Arlington Blending & Packaging site in 2004 after EPA issued a comfort letter and Ready for Reuse Determination. Today the site is an active neighborhood park.

  - reasonable steps that a purchaser should take to stop any on-going releases and prevent future releases at sites where EPA has enough information about the site to make suggestions as to such steps and
  - the status of EPA liens

- **Ready for Reuse Determinations** - EPA may also issue a Ready for Reuse Determination to affirm that the site's conditions are protective of human health and the environment for specified uses.
- **Discussions** - EPA Regional staff are often willing to talk with or meet with a prospective purchaser, sellers, lenders, and other stakeholders to discuss the issues critical to the successful purchase and reuse of a federal Superfund site. Providing examples of other federal Superfund sites that were successfully redeveloped and are now in reuse can also reassure local citizens and stakeholders of revitalization opportunities.
- **Partial Deletions** – While total cleanup of a site may take many years, many sites on the National Priorities List include portions that have been cleaned up and may be available for productive use. These portions may be partially deleted from the National Priorities List if EPA makes a determination that no further response work is required, the state concurs, and necessary institutional controls are in place. Any person, including individuals, businesses, entities, states, local governments, and other Federal agencies, may submit a petition requesting a partial deletion. A partial deletion of a portion of a site from the National Priorities List can help to increase the site's marketability. **Please note:** EPA Superfund liens may still apply to the deleted parcel. For more information on partial deletions visit http://www.epa.gov/superfund/action/postconstruction/deletion.htm.
- **Site Reuse Fact Sheets** – The Superfund Redevelopment Initiative Web site at http://www.epa.gov/superfund/programs/recycle/ provides summary information about federal Superfund sites that have been reused. Detailed fact sheets for some sites are also available and may include data on economic impacts and environmental and social benefits resulting from the reuse of federal Superfund sites.

Information about many of these tools can also be found on EPA's Cleanup Enforcement Web site at http://www.epa.gov/compliance/cleanup/redevelop/landowner.html.

Disclaimer: This document is provided solely as general information to highlight certain aspects of a more comprehensive program. It does not provide legal advice, have any legally binding effect, or expressly or implicitly create, expand, or limit any legal rights, obligations, responsibilities, expectations, or benefits for any person. This document is not intended as a substitute for reading the statute or the guidances described above. It is the prospective purchaser's sole responsibility to ensure that its proposed use does not interfere with or impede the site's remedy or protectiveness. EPA does not offer any guarantees or warranties as to the compatibility of a proposed use with the cleanup remedy. It is also the purchaser's sole responsibility to maintain liability protection status as a bona fide prospective purchaser.

Appendix C

CERCLA Liability and Local Government Acquisitions and Other Activities

United States Environmental Protection Agency
Office of Enforcement and Compliance Assurance
March 2011
EPA-330-F-11-003

United States Environmental Protection Agency

CERCLA Liability and Local Government Acquisitions and Other Activities

Office of Site Remediation Enforcement

Local governments can play an important role in facilitating the cleanup and redevelopment of properties contaminated by hazardous substances. In particular, by acquiring contaminated properties, local governments have an opportunity to evaluate and assess public safety needs and promote redevelopment projects that will protect and improve the health, environment, and economic well-being of their communities.

One impediment to local government acquisition of contaminated property is concern about potential liability for the cleanup costs under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, also known as "Superfund" or "CERCLA," 42 U.S.C. §§ 9601-9675.

This fact sheet addresses CERCLA liability issues for local governments and summarizes key statutory provisions and requirements.[1] It is intended to assist local governments by identifying CERCLA liability issues and protections that may be applicable to local governments as they consider involvement at contaminated properties.

The U.S. Environmental Protection Agency (EPA) recommends that local governments refer to the statutory language of CERCLA, the regulations at 40 C.F.R. Part 300 (known as the "National Contingency Plan"), and relevant EPA guidance (referenced at the end of this document) for more detail. EPA's Regional offices[2] also may be able to provide information and assistance to local governments considering acquisition of contaminated properties. EPA also encourages local governments to consult with their state environmental protection agency and legal counsel prior to taking any action to acquire, cleanup, or redevelop contaminated property.

What is CERCLA?

CERCLA outlines EPA's authority for cleaning up properties contaminated with hazardous substances regardless of whether the properties are in use or abandoned. Additionally, CERCLA establishes a strict liability system for determining who can be held liable for the costs of cleaning up contaminated properties. CERCLA also provides EPA with robust enforcement

[1] A local government also may have obligations and/or be potentially liable under other environmental statutes such as the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992 (RCRA) or state laws.

[2] For contact information, see http://www.epa.gov/aboutepa/postal.html#regional.

authorities to compel cleanups and recover EPA's response and enforcement costs incurred at these properties. Properties addressed under CERCLA authorities are commonly known as "Superfund sites."

CERCLA also includes authority for EPA to provide grant funding for the assessment and cleanup of brownfield sites. CERCLA § 101(39)(A) defines a brownfield site as "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant." Many of the properties that local governments may be interested in acquiring may qualify as brownfield sites.

For more general information about, and an overview of, CERCLA, please see EPA's website at http://www.epa.gov/superfund/policy/cercla.htm.

What are the various ways local governments become involved at contaminated properties?

Local governments may become involved with contaminated properties in a number of ways, many of which present opportunities to facilitate cleanup or redevelopment. The ways include:

- Providing incentives to promote redevelopment (*i.e.*, zoning, tax increment financing, etc.);
- Responding to an emergency on the property;
- Transferring of tax liens;
- Collaborating with the current property owner;
- Leasing of the property by the municipality;
- Acquiring the property and "simultaneously" transferring it to a third party;
- Acquiring the property with subsequent transfer to a third party;
- Acquiring the property and managing it through a "land bank"; or
- Acquiring the property for long-term use.

Can a local government be liable under CERCLA?

Yes. CERCLA is a strict liability statute that holds potentially responsible parties (PRPs) jointly and severally liable, without regard to fault, for cleanup costs incurred in response to the release or threatened release of hazardous substances. Under CERCLA § 107, a person, including a local government, may be considered a PRP[3] if the person:

- Is the current owner or operator of the contaminated property;
- Owned or operated the property at the time of the disposal of the hazardous substance;
- Arranged for the hazardous substances to be disposed of or treated, or transported for disposal or treatment; or
- Transported the hazardous substances to the property.

[3] According to CERCLA, federally recognized tribes are not included as PRPs.

A local government that falls into one of the classes of PRPs described above may be potentially liable under CERCLA. Fortunately, CERCLA includes liability exemptions, affirmative defenses, and protections that may apply to local governments. Additionally, EPA has enforcement discretion guidance and site-specific tools that may address concerns about potential CERCLA liability.

Is a local government liable under CERCLA if it responds to an emergency on a contaminated property?

Local units of government, especially fire, health, and public safety departments, are often the first responders to emergencies and other dangerous situations at contaminated properties in their communities. So as not to interfere with these activities, CERCLA § 107(d)(2) provides that state or local governments will not be liable for "costs or damages as a result of actions taken in response to an emergency created by a release or threatened release of a hazardous substance by or from property owned by another party." *Note: This protection does not apply in cases where the local government is grossly negligent or intentionally engages in misconduct.* CERCLA § 107(d)(2). *Negligence and intentional misconduct are fact-specific determinations.*

In addition, CERCLA § 123 authorizes EPA to reimburse local governments for the costs of temporary emergency measures taken in response to releases within their jurisdiction. These temporary measures must be "necessary to prevent or mitigate injury to human health or the environment associated with the release or threatened release of any hazardous substance, pollutant, or contaminant." This reimbursement is to give financial assistance to government entities that do not have a budget allocated for emergency response and cannot otherwise provide adequate response measure. The amount of the reimbursement may not exceed $25,000 for a single response.

For more information on CERCLA § 123 reimbursements, please see EPA's website at http://www.epa.gov/ceppo/web/content/lawsregs/lgrover.htm.

What CERCLA liability protections are available to local governments if they acquire contaminated property?

CERCLA contains liability exemptions, affirmative defenses, and protections which may apply to a local government when it:

- Acquires contaminated property involuntarily by virtue of its function as a sovereign, CERCLA § 101(20)(D);
- Qualifies for a third party defense or innocent landowner liability protection, CERCLA §§ 107(b)(3), 101(35)(A);
- Qualifies as a bona fide prospective purchaser (BFPP) when it acquires the contaminated property, CERCLA §§ 101(40), 107(r)(1); or
- Is conducting or has completed a cleanup of a contaminated property in compliance with a state cleanup program, CERCLA § 128(b).

Each of these is discussed below in further detail.

Key CERCLA Provisions ● ***– Could apply to local governments*** ○ ***– Could apply to local governments under certain circumstances***	**Methods of Property Acquisition**							
	Tax Foreclosure	**Bankruptcy**	**Escheat**	**Eminent Domain**	**Purchase**	**Inheritance or Bequest**	**Abandonment**	**Gift/Donation**
Involuntary Acquisition *§ 101(20)(D)*	●	●	●	○			●	
Bona Fide Prospective Purchaser Protection *§§ 101(40) and 107(r)(1)*	●	●	●	●	●	●	●	●
Third Party and Innocent Landowner Defenses *§§ 107(b)(3) and 101(35)(A)*			●	●	○	●		
Enforcement Bar *§ 128(b)*	●	●	●	●	●	●	●	●

The method or type of property acquisition by a local government will play a critical role in the application of liability exemptions, affirmative defenses, or protections. Although most often applied in the purchase and gift/donation context, BFPP status is available for the majority of property acquisitions. *Note: In cases where it is unclear whether the involuntary acquisition exemption, affirmative defenses, or liability protections are sufficient, EPA encourages the local government to achieve and maintain BFPP status to increase certainty that it will not be liable under CERCLA.*

What is the meaning of "involuntary acquisition"?

CERCLA § 101(20)(D)[4] provides that a unit of state or local government will not be considered an owner or operator of contaminated property (and thus is exempt from potential CERCLA liability as a PRP) if the state or local government acquired ownership or control involuntarily. This provision includes a non-exhaustive list of examples of involuntary acquisitions, including obtaining property through bankruptcy, tax delinquency, abandonment, or "other circumstances in which the government entity involuntarily acquires title by virtue of its function as sovereign." However, it is important to note that this exemption will not apply to any state or local government that caused or contributed to the release or threatened release of a hazardous substance from the facility.

For purposes of EPA enforcement, EPA considers an involuntary acquisition or transfer to include situations "in which the government's interest in, and ultimate ownership of, a specific asset exists only because the conduct of a non-governmental party…gives rise to a statutory or common law right to property on behalf of the government."[5] Moreover, EPA acknowledges that tax foreclosure and other acquisitions by government entities often require some affirmative or volitional act by the local government.[6] Therefore, a government entity does not have to be completely passive during the acquisition in order for the acquisition of property to be considered involuntary under CERCLA.[7] Instead, EPA considers an acquisition to be involuntary if the government's interest in, and ultimate ownership of, the property exists only because the actions of a non-governmental party give rise to the government's legal right to control or take title to the property. For example, although a local government might be required to engage in certain discretionary or volitional actions to acquire title to a property through tax delinquency foreclosure or abandonment per state statute, EPA would consider the acquisition involuntary.[8]

For more information on state and local government involuntary acquisition, please see EPA's website at http://www.epa.gov/compliance/cleanup/revitalization/local-acquis.html.

How does a local government become a bona fide prospective purchaser (BFPP)?

A local government, whose potential liability is based solely on the fact that it knowingly purchased a contaminated property and is, therefore, considered the current owner or operator, will not be liable under CERCLA if it achieves and maintains BFPP status. BFPP status may be

[4] CERCLA § 101(35)(A)(ii) also discusses involuntary acquisitions for a unit of state or local government in the context of the innocent landowner defense pursuant to CERCLA § 101(35)(A).

[5] Municipal Immunity from CERCLA Liability for Property Acquired through Involuntary State Action (EPA/OSRE/OSWER, 10/20/1995) at 3.

[6] *Id.* at 4.

[7] *Id.*

[8] *Id.*

achieved even when the buyer has knowledge of the contamination on the property at the time of purchase. Moreover, EPA encourages local governments to achieve and maintain BFPP status in cases where it is unclear whether involuntary acquisition, affirmative defenses, or other liability protections may be sufficient to avoid CERCLA liability.

CERCLA §§ 101(40) and 107(r)(1) provide that a BFPP is a person or tenant of a person who acquired the property after January 11, 2002 and meets the following threshold criteria:

- All Appropriate Inquiries (AAI) were performed prior to purchase of the property pursuant to CERCLA § 101(35)(B);
- All disposal of hazardous substances occurred before the party acquired the property; and
- The party has "no affiliation" with a liable or potentially liable party.

CERCLA §§ 101(40)(C)-(G) provide additional criteria for maintaining BFPP status. These continuing obligations that must be met after acquisition of the property include:

- Complying with land use restrictions and not impeding the effectiveness of the institutional controls;
- Taking "reasonable steps" to prevent the release of hazardous substances. These obligations are site-specific, but may include preventing threatened future releases and/or limiting exposure to earlier hazardous substance releases. Institutional controls, discussed further below, may play a critical role in complying with reasonable steps;
- Providing full cooperation, assistance and access;
- Complying with information requests and administrative subpoenas; and
- Providing legally-required notices.

To remain protected from CERCLA liability for the existing contamination while it owns the property, a local government must maintain its BFPP status for as long as the potential for liability exists. Potential liability exists for as long as contamination remains on the property and/or the statute of limitations on CERCLA cost recovery actions is not in effect. It is important to note that a local government may become liable for any new contamination that may occur, even if the statute of limitations has run on existing contamination.

Although a BFPP is not liable for the cost of cleaning up the property, the property itself could be subject to a "windfall lien"[9] if EPA has spent money cleaning up the property after the BFPP acquires it and EPA's cleanup efforts have increased the fair market value of the property. CERCLA § 107(r)(2). The windfall lien is limited to the lesser of EPA's unrecovered response costs or the increase in fair market value attributable to EPA's cleanup. EPA may be able to file a windfall lien on the property if:

- EPA spent money cleaning up the property before acquisition by a BFPP if certain requirements are met (*i.e.*, where there are substantial unreimbursed costs);
- EPA's response action results in a significant increase in the property's fair market value;
- There are no viable, liable parties from whom EPA could recover its costs; and

[9] CERCLA contains two sections which discuss the ability of the federal government to impose liens. This fact sheet addresses the windfall provision of CERCLA § 107(r), but will not discuss liens provided under CERCLA § 107(l).

- A response action occurs while the property is owned by a person who is exempt (other than a BFPP) from CERCLA liability.

Whether EPA will perfect a windfall lien and prevent a potential windfall in such instances will be determined by site-specific circumstances and the equities of the particular situation.

For more information on AAI, please see EPA's website at http://www.epa.gov/brownfields/aai/index.htm. For more information on the BFPP liability protection and/or windfall liens, please see EPA's website at http://www.epa.gov/compliance/cleanup/revitalization/bfpp.html.

What are the requirements for the third party defense or innocent landowner defense?

CERCLA § 107(b)(3) provides a "third party" affirmative defense to CERCLA liability for any owner, including local governments, that can prove, by the preponderance of the evidence, that the contamination was caused solely by the act or omission of a third party whose act or omission did not occur "in connection with a contractual relationship." Moreover, an entity asserting the CERCLA § 107(b)(3) defense must show that: a) it exercised due care with respect to the contamination; and b) it took precautions against foreseeable acts or omissions, and the consequences thereof by the third party that caused the contamination.

Congress enacted the Brownfields Amendments[10] and expanded the third party defense by creating exclusions to the definition of a contractual relationship. Previously, the deed transferring title between a PRP and the new landowner was a "contractual relationship" that prevented the new landowner from raising the traditional CERCLA § 107(b)(3) third party defense. To promote redevelopment and provide more certainty, Congress also clarified the "innocent landowner defense," which requires an entity to meet the criteria set forth in CERCLA § 101(35), in addition to the requirements of CERCLA § 107(b)(3). CERCLA § 101(35)(A) distinguishes three types of innocent landowners:

- Purchasers who acquire property without knowledge of contamination, CERCLA § 101(35)(A)(i);
- Governments "which acquired the facility by escheat, or through any other involuntary transfers or acquisition, or through the exercise of eminent domain authority by purchase or condemnation," CERCLA § 101(35)(A)(ii); and
- Inheritors of contaminated property, CERCLA § 101(35)(A)(iii).

For more information on qualifying for the innocent landowner defense where the purchaser acquired property without knowledge of the contamination, please see EPA's *Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchasers, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability* (Common Elements Guidance) available at http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf.

[10] Small Business Liability Relief and Brownfields Revitalization Act (Pub. L. No. 107-118)(hereinafter the "Brownfields Amendments").

How do state response programs interact with CERCLA's enforcement bar?

Many states have established state-specific response programs (for example, State Superfund, brownfields, and voluntary cleanup programs). These programs play a critical role in assessing and cleaning up the vast majority of our nation's brownfields and other lower-risk sites. EPA supports state response programs through:

- Grant funding to establish and enhance state programs; and
- Non-binding Memoranda of Agreement with individual states that provide general enforcement assurances to encourage assessments and cleanups pursuant to a state response program.

CERCLA § 128(b) protects local governments and other parties from EPA enforcement, subject to specific exceptions, when they comply with a state response program and are conducting or have completed a cleanup of an eligible response site, as defined by CERCLA § 101(41). This protection is known as the "enforcement bar." EPA has entered into non-binding Memoranda of Agreement with over 20 states which clarify EPA enforcement intentions under CERCLA at sites addressed in compliance with state response programs. It is important to note that while CERCLA § 128(b) may prohibit EPA from taking an enforcement action; it does not preclude third party litigation.

For more information about state voluntary cleanup programs and Memoranda of Agreement, please see EPA's website at http://www.epa.gov/compliance/cleanup/revitalization/state.html.

What should a local government do if it obtains contaminated property from a land bank or redevelopment authority?

EPA recognizes the importance and increased use of land banks and redevelopment agencies as a tool to address abandoned or vacant properties, promote smart growth, improve existing land use practices, and support local community development. In an effort to make greater use of these tools, an increasing number of states and local governments are passing legislation creating land banks or redevelopment authorities to acquire, redevelop, and reuse abandoned properties.

While many abandoned properties that are of interest to land banks and redevelopment authorities are not likely to be contaminated, local governments should be aware that contamination and potential CERCLA liability may exist. A local government may increase the likelihood that the land bank or redevelopment authority is eligible for CERCLA liability protection by ensuring that the land bank or redevelopment authority conducts AAI prior to acquiring the property. Not only is AAI a critical requirement for obtaining most CERCLA landowner liability protections, but it also aids local governments in making informed property acquisition decisions. When acquiring abandoned contaminated properties, EPA encourages local governments to obtain BFPP status prior to acquisition if it is unclear whether other exemptions, affirmative defenses, or liability protections may apply.

How does CERCLA liability affect eligibility for federal brownfields grant funding?

EPA brownfields grant money is available to eligible entities as defined by CERCLA § 104(k)(1). However, these funds cannot be used to pay response costs at a brownfield site for which the grantee is potentially liable under CERCLA § 107. If an applicant for brownfields grant money may be potentially liable at the site for which they are seeking funds, they must document that they qualify for one of CERCLA's liability protections. Therefore, one benefit of being covered by a CERCLA liability protection is that it enables certain non-liable entities to be potentially eligible for federal brownfields grant funding. If a local government intends to protect itself against CERCLA liability and compete for federal brownfields grant funding, it is advisable for the local government to evaluate whether it is eligible for a grant or become eligible through a liability protection before acquiring a brownfield site.

TYPES OF BROWNFIELDS FUNDING OPPORTUNITIES

CERCLA §§ 104(k)(4) and (6) authorize EPA's Brownfields Program to provide funding in a variety of ways:

- Assessment Grants
- Cleanup Grants
- Revolving Loan Fund Grants
- Job Training Grants
- Training, Research, and Technical Assistance Grants
- Targeted Brownfields Assessments
- Area-Wide Planning Pilot Program

For more information about obtaining an EPA brownfields grant, grant guidelines, and discussions about the various types of grants that are available, please see EPA's website at http://www.epa.gov/brownfields/grant_info/index.htm.

What protections exist when municipal solid waste is disposed of at a contaminated property?

Prior to the Brownfield Amendments, entities that disposed of municipal solid waste at contaminated properties argued that they should not be liable for the cleanup of contamination that was originally and primarily caused by industrial polluters. To address this issue, the Brownfield Amendments included CERCLA § 107(p) to create a qualified exemption from CERCLA liability for certain residential, small business, and non-profit generators of municipal waste at sites on CERCLA's National Priorities List. However, this exemption does not apply to municipalities who owned or operated a site.

For more information on the municipal solid waste exemption and EPA's guidance on the exemption, please see EPA's website at http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-msw-exempt.pdf.

What steps might a local government take at a contaminated property to protect human health and the environment and ensure the integrity of a cleanup?

When contamination remains on a property during or after cleanup activities, institutional controls may be used alone or in combination with engineered controls to ensure protection of human health and the environment. Generally, institutional controls are designed to limit land or resource use (*e.g.*, prohibitions on residential use or extraction of ground water) and to ensure the integrity of engineered controls (*e.g.*, restrictions on excavating soils on or in the vicinity of a landfill cap).

As with engineered controls, institutional controls must be maintained, monitored, and evaluated for as long as contamination remains on the property at levels that do not allow for unrestricted use and unlimited exposure.

WHAT IS AN INSTITUTIONAL CONTROL?

An institutional control is a legal or administrative restriction on the use of, or access to, a contaminated property to protect:

1) the health of both humans and the environment; and

2) ongoing cleanup activities and to ensure viability of the engineered controls.

There are four categories of institutional controls:

- Proprietary Controls (*e.g.*, easement, real covenant, statutory covenant)
- Governmental Controls (*e.g.*, zoning, building permit, land use ordinance)
- Enforcement and Permit Tools (*e.g.*, consent decree, permit, order)
- Informational Devices (*e.g.*, deed notice, government advisory, state registry)

Whether or not a local government asserts BFPP status, it may play a key role in implementing, monitoring, and enforcing certain institutional controls – particularly for those it has the legal authority to implement or enforce. A local government also may work proactively with developers, prospective buyers and tenants, and other parties to ensure that institutional control requirements are understood and properly integrated into the planning and future reuse of the property.

If institutional controls are already in place on a particular property, it is important for local governments to understand the obligations the institutional controls impose and to consider how those obligations might be viewed by future owners, developers and property users. In some situations, EPA or the state may be willing to modify existing institutional controls to facilitate the appropriate reuse of the property as long as the engineered controls component of the cleanup will not be compromised and remains protective of human health and the environment.

For more information about institutional controls issues, please see EPA's website at http://www.epa.gov/superfund/policy/ic/index.htm.

CERCLA Liability and Local Government Acquisition of Contaminated Property: Key Documents

Local Government Issue	CERCLA Provision	Relevant EPA Documents or Guidance (if any)
Involuntary Acquisition	§ 101(20)(D)	• Policy on Interpreting CERCLA Provisions Addressing Lenders and Involuntary Acquisitions by Government Entities (EPA/OSRE, 6/30/1997) • Policy on CERCLA Enforcement Against Lenders and Government Entities that Acquire Property Involuntarily (EPA/DOJ, 9/22/2005) • Municipal Immunity from CERCLA Liability for Property Acquired through Involuntary State Action (EPA/OSRE/OSWER, 10/20/1995) • Fact Sheet: The Effect of Superfund on Involuntary Acquisitions of Contaminated Property by Government Entities (EPA/OSRE, 12/31/1995)
Third Party and Innocent Landowner Defenses	§§ 107(b)(3), 101(35)(A)(ii)	• Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchasers, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability ("Common Elements") (EPA/OSRE, 3/6/2003)
Bona Fide Prospective Purchaser	§ 101(40) and § 107(r)	• Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchasers, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability ("Common Elements") (EPA/OSRE, 3/6/2003) • Issuance of CERCLA Model Agreement and Order on Consent for Removal Action by a Bona Fide Prospective Purchaser (OSRE/USDOJ, 11/27/2006) • Enforcement Discretion Guidance Regarding the Applicability of the Bona Fide Prospective Purchaser Definition in CERCLA § 101(40) to Tenants (OSRE/OSWER, 1/19/2009) • Enforcement Discretion Guidance Regarding the Applicability of the Bona Fide Prospective Purchaser Definition in CERCLA Section 101(40) to Tenants: Frequently Asked Questions (OSRE, 11/1/2009)
Windfall Liens	§ 107(r)	• Interim Enforcement Discretion Policy concerning Windfall Liens Under Section 107(r) of CERCLA (EPA/DOJ, 7/16/2003) • Windfall Lien Guidance: Frequently Asked Questions (OSRE, 4/1/2008) • Windfall Lien Administrative Procedures (OSRE, 1/8/2008)

Local Government Issue	CERCLA Provision	Relevant EPA Documents or Guidance (if any)
Brownfield Grants	§ 104(k)(4) and (6)	• Brownfields Assessment Pilot/Grants at http://epa.gov/brownfields/assessment_grants.htm • Revolving Loan Fund Pilot/Grants at http://epa.gov/brownfields/rlflst.htm • Cleanup Grants at http://epa.gov/brownfields/cleanup_grants.htm • Area-Wide Planning Pilot Program at http://www.epa.gov/brownfields/areawide_grants.htm • Brownfield Grant Guidelines Frequently Asked Questions at http://www.epa.gov/brownfields/proposal_guides/faqpguid.htm
Institutional Controls	§§ 101(40)(F), 107(q)(1)(A)(V)	• Institutional Controls: A Citizen's Guide to Understanding Institutional Controls at Superfund, Brownfields, Federal Facilities, Underground Storage Tank, and Resource Conservation and Recovery Act Cleanups (EPA/OSWER, 2/2005) • Institutional Controls: A Guide to Implementing, Maintaining, and Enforcing Institutional Controls at Contaminated Sites (EPA Interim Final Draft 11/2010) • Institutional Controls: A Site Manager's Guide to Identifying, Evaluating and Selecting Institutional Controls at Superfund and RCRA Corrective Action Cleanups (EPA/OSWER, 9/2000)
State Voluntary Cleanups and Memoranda of Agreement	§§ 101(41), 128	• To see state-specific voluntary cleanup programs Memoranda of Agreement, please see http://www.epa.gov/brownfields/state_tribal/moa_mou.htm

Contact Information

If you have any questions about this fact sheet, please contact Cecilia De Robertis of EPA's Office of Site Remediation Enforcement at 202-564-5132 or derobertis.cecilia@epa.gov.

Disclaimer: This document is provided solely as general information to highlight certain aspects of a more comprehensive program. It does not provide legal advice, have any legally binding effect, or expressly or implicitly create, expand, or limit any legal rights, obligations, responsibilities, expectations, or benefits for any person. This document is not intended as a substitute for reading the statute or the guidance documents described in this document. It is the local government's sole responsibility to ensure that it obtains and retains liability protections. EPA does not offer any guarantees or warranties for or related to acquisition of a contaminated property or formerly contaminated property. It is also the local government's sole responsibility to maintain liability protection status as a contiguous property owner, bona fide prospective purchaser, or innocent land owner.

Appendix D

Brownfields Enforcement and Land Revitalization Policy and Guidance Documents

Appendix D

Brownfields Enforcement and Land Revitalization Policy and Guidance Documents

The following documents are available on the cleanup enforcement website at **http://www.epa.gov/compliance/cleanup/revitalization/index.html.**

ALL APPROPRIATE INQUIRIES

Standards and Practices for All Appropriate Inquiries; Final Rule, November 1, 2005

Final rule detailing the standards and practices for all appropriate inquiries (AAI). The rule establishes specific regulatory requirements and standards for conducting AAI into the previous ownership and uses of a property for the purposes of meeting the AAI provisions necessary to qualify for certain landowner liability protections under Superfund. The standards and practices also will be applicable to persons conducting site characterization and assessments with the use of grants awarded by EPA.

To access online: **http://www.epa.gov/brownfields/aai/index.htm**.

BONA FIDE PROSPECTIVE PURCHASER (BFPP)

Enforcement Discretion Guidance Regarding the Applicability of the Bona Fide Prospective Purchaser Definition in CERCLA 101(40) to Tenants, January 14, 2009

Provides guidance on how EPA intends to exercise its enforcement discretion with regard to the bona fide prospective purchaser provision. Specifically, it recognizes the important role that leasehold interests play in facilitating the cleanup and reuse of brownfields and other contaminated properties.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/bfpp-tenant-mem.pdf**

Interim Guidance Regarding Criteria Landowners Must Meet in Order to Quality for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability ("Common Elements"), March 6, 2003

Provides general information regarding the common elements of the landowner liability protections contained in the 2002 Brownfields Amendments to Superfund. These common elements include the requirements of "all appropriate inquiry" (AAI), demonstrating no affiliation with a liable party, and continuing obligations.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf**

"Common Elements" Guidance Reference Sheet, March 6, 2003

Highlights the main points made in EPA's March 2003 "Common Elements" guidance document concerning the conditional liability provided to bona fide prospective purchasers, contiguous property owners, and innocent landowners by the 2002 Brownfield Amendments. The document focuses on the shared factors required to qualify for the above Superfund liability protections.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-ref.pdf**

Issuance of CERCLA Model Agreement and Order on Consent for Removal Action by a Bona Fide Prospective Purchaser, November 27, 2006

Provides a model agreement and order on consent for those bona fide prospective purchasers (BFPP) who are required to perform a removal action. This model addresses those situations where there is a federal interest or where the work is complex or significant in extent, such as where EPA will oversee the removal action or where the removal work will exceed the "reasonable steps to prevent releases" obligation upon which BFPP status depends.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/bfpp-ra-mem.pdf**

Bona Fide Prospective Purchases and the New Amendments to CERCLA, May 31, 2002

Describes when EPA will consider providing a bona fide prospective purchaser (BFPP) with a liability limitation despite having knowledge of contamination pursuant to changes made to the Superfund statute by the 2002 Brownfield Amendments. The Amendments list certain requirements that must be met to achieve BFPP status, dispense with the prior need for Prospective Purchaser Agreements (PPA) (except in limited circumstances), and provide for EPA's recovery of any windfall that a purchaser may receive.

To access online: **http://www.epa.gov/compliance/resources/ policies/cleanup/superfund/bonf-pp-cercla-mem.pdf**

BROWNFIELDS GRANTS

Regional Determinations Regarding Which Sites are Not "Eligible Response Sites" under CERCLA Section 101(41)(C)(i), as Added by the Small Business Liability Relief and Brownfields Revitalization Act, March 6, 2003

Provides background information on the definition of an eligible response site, how the regions make a determination of whether a site fits this definition, and what the implications of this determination are. This document also provides the regions with guidance for making these determinations in conjunction with future site assessment decisions and for sites with past site assessment determinations.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/reg-determ-small-bus-mem.pdf**

COMFORT LETTERS

Interim Enforcement Discretion Policy Concerning "Windfall Liens" Under Section 107(r) of CERCLA, July 16, 2003

Discusses EPA and the Department of Justice's (DOJ) interim policy implementation of the new CERCLA 107(r) windfall lien provision contained in the 2002 Brownfields Amendments. This document lists the factors that EPA will use to determine whether to file a lien, in addition to discussing how EPA will settle the liens and the possibility of EPA issuing comfort letters to or making agreements with bona fide prospective purchaser (BFPPs).

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-windfall-lien.pdf**

Interim Guidance Regarding Criteria Landowners Must Meet in Order to Quality for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability ("Common Elements"), March 6, 2003

Provides general information regarding the common elements of the landowner liability protections contained in the 2002 Brownfields Amendments to Superfund. These common elements guidance includes a discussion of the reasonable steps letter.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf**

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-ref.pdf**

Comfort/Status Letters for RCRA Brownfields Properties, February 5, 2001

Addresses the use of comfort/status letters at Resource Conservation and Recovery Act (RCRA) properties, where the letters may facilitate the cleanup and reuse of brownfield sites, where there exists a real probability or perception that EPA may initiate a cleanup, or where there is no other adequate mechanism to assuage a party's concerns. This document also includes four sample letters.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/rcra/comfort-rcra-brwn-mem.pdf**

Policy on the Issuance of Comfort/Status Letters, November 8, 1996

Discusses EPA's policy on the use of comfort/status letters to provide the recipient party with any releasable information that EPA has pertaining to a property, as well as interpret what the information means and the likelihood or current plans for EPA to undertake any Superfund action. A letter is used in order to facilitate the cleanup and redevelopment of a brownfield site if there is a realistic perception or probability of incurring liability or if there is no other mechanism available to address the recipient's concerns. This document also contains four sample comfort/status letters.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/comfort-let-mem.pdf**

CONTAMINATED AQUIFERS

Final Policy Toward Owners of Property Containing Contaminated Aquifers, May 24, 1995

Details EPA's position concerning owners of property that contains an aquifer that has become contaminated as a result of subsurface migration. In certain circumstances, EPA will not take enforcement action against a landowner whose property has become contaminated through subsurface migration through no fault of their own, their agent, or their employee. In addition, EPA may consider de minimis settlements which would protect the landowner from contribution suits.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/contamin-aqui-rpt.pdf**

CONTIGUOUS PROPERTY OWNERS

Memorandum transmitting Model CERCLA Section 107(q)(3) Contiguous Property Owner Assurance Letter, November 9, 2009

This memorandum discusses and transmits a model contiguous property owner assurance letter to be used in accordance with a January 2004 interim guidance regarding contiguous property owners.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/cpo-assure-mod-ltr-mem.pdf**

Contiguous Property Owner Guidance Reference Sheet, February 5, 2004

The reference sheet summarizes the important points and requirements of the January 13, 2004 guidance document "Interim Enforcement Discretion Guidance Regarding Contiguous Property Owners," which addresses liability limitations.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/contig-prop-faq.pdf**

Interim Enforcement Discretion Guidance Regarding Contiguous Property Owners, January 13, 2004

Addresses the addition of liability protection to contiguous property owners to Superfund by the 2002 Brownfields Amendments. The document discusses the criteria property owners need to meet, how the Amendments apply to current and former owners, the relationship between the Amendments and EPA's Residential Homeowner Policy and Contaminated Aquifers Policy, and mechanisms that EPA may use to resolve landowner liability concerns.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/contig-prop.pdf**

Interim Guidance Regarding Criteria Landowners Must Meet in Order to Quality for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability ("Common Elements"), March 6, 2003

Provides general information regarding the common elements of the landowner liability protections contained in the 2002 Brownfields Amendments to Superfund. These common elements include the requirements of "all appropriate inquiry" (AAI), demonstrating no affiliation with a liable party, and continuing obligations.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf**

"Common Elements" Guidance Reference Sheet, March 6, 2003

Highlights the main points made in EPA's March 2003 "Common Elements" guidance document concerning the conditional liability provided to bona fide prospective purchasers, contiguous property owners, and innocent landowners by the 2002 Brownfield Amendments. The document focuses on the shared factors required to qualify for the above Superfund liability protections.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-ref.pdf**

DE MICROMIS

Revised Settlement Policy and Contribution Waiver Language Regarding Exempt De Micromis and Non-Exempt De Micromis Parties, November 6, 2002

Provides a revision to EPA and DOJ's policy regarding settlements with de micromis parties at Superfund sites in light of the codification of this policy in the 2002 Brownfields Amendments. This document also revises the model contribution waiver language that has been used in CERCLA agreements to waive private contribution claims against parties that contributed only very small amounts of waste. In addition, this document contains five attachments of model language.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/wv-exmpt-dmicro-mem.pdf**

ENVIRONMENTALLY RESPONSIBLE, REDEVELOPMENT & REUSE

Environmentally Responsible, Redevelopment & Reuse ("ER3") Frequently Asked Questions and Answers, December 31, 2005

Provides a list of frequently asked questions and answers regarding EPA's Environmentally Responsible, Redevelopment and Reuse (ER3) Initiative. This program seeks to encourage redevelopment in a sustainable way that prevents future environmental hazards through incentives, assistance, and education.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/er3-faqs-05.pdf**

INNOCENT LANDOWNERS

Interim Guidance Regarding Criteria Landowners Must Meet in Order to Quality for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability ("Common Elements"), March 6, 2003

Provides general information regarding the common elements of the landowner liability protections contained in the 2002 Brownfields Amendments to Superfund. These common elements include the requirements of "all appropriate inquiry" (AAI), demonstrating no affiliation with a liable party, and continuing obligations.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf**

"Common Elements" Guidance Reference Sheet, March 6, 2003

Highlights the main points made in EPA's March 2003 "Common Elements" guidance document concerning the conditional liability provided to bona fide prospective purchasers, contiguous property owners, and innocent landowners by the 2002 Brownfield Amendments. The document focuses on the shared factors required to qualify for the above Superfund liability protections.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-ref.pdf**

INVOLUNTARY ACQUISITION

CERCLA Liability and Local Government Acquisitions and Other Activities, March 2011

This fact sheet is intended to be a resource for local governments concerned about incurring potential CERCLA liability as a result of activities to facilitate cleanup and redevelopment of contaminated properties. Among other topics, this document addresses involuntary acquisition issues.

To access online: **http://www.epa.gov/oecaerth/cleanup/revitalization/local-acquis.html.**

Municipal Immunity from CERCLA Liability for Property Acquired through Involuntary State Action, October 20, 1995

Sets forth EPA and DOJ policy regarding the government's enforcement of Superfund against lenders and against governmental entities that acquire property involuntarily.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/immunity-cercla-mem.pdf**

Policy on CERCLA Enforcement Against Lenders and Government Entities that Acquire Property Involuntarily, updated version of September 22, 1995 memorandum, October 23, 1995

Provides EPA and DOJ's policy to adhere to the 1992 "Lender Liability Rule" as official enforcement policy in order to appropriately contend with those lenders and governmental entities who have acquired contaminated property involuntarily.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/cercla-enfinvol-mem.pdf**

Policy on Interpreting CERCLA Provisions Addressing Lenders and Involuntary Acquisitions by Government Entities, June 30, 1997

Sets forth EPA's policy on lender and governmental entity involuntary acquisition of contaminated property in light of the amendments to Superfund as a result of the passage of the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996. In addition, this document discusses how these amendments affect EPA's application of the Lender Liability Rule.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/lendr-aquis-mem.pdf**

The Effect of Superfund on Involuntary Acquisitions of Contaminated Property by Government Entities, December 31, 1995

Sets forth EPA's policy on Superfund enforcement against government entities that involuntarily acquire contaminated property. Also describes some types of government actions that EPA believes qualify for a liability exemption or a defense to Superfund liability.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/fs-involacquprty-rpt.pdf**

MUNICIPAL SOLID WASTE

Interim Guidance on the Municipal Solid Waste Exemption Under CERCLA Section 107(p), August 20, 2003

Discusses the qualified liability exemption added to Superfund by the 2002 Brownfields Amendments and provided to certain residential, small business and non-profit generators of municipal solid waste (MSW) at sites on the National Priorities List (NPL). This document discusses the criteria to qualify for this exemption, the provisions in the Amendments meant to deter litigation against exempt parties, and the interaction between this exemption and existing policies.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-msw-exempt.pdf**

PROSPECTIVE PURCHASER AGREEMENTS AND PROSPECTIVE LESSEE AGREEMENTS

Prospective Purchaser Agreements and Other Tools to Facilitate Cleanup and Reuse of RCRA Sites, April 8, 2003

Discusses three useful tools for EPA to overcome obstacles in cleanup and reuse of Resource Conservation and Recovery Act (RCRA) sites:

- Prospective Purchaser Agreements (PPA),
- the February 2003 "Final Guidance on Corrective Action Activities at RCRA Facilities," and
- comfort/status letters. This document also includes the factors used by EPA to evaluate a request for a PPA.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/rcra/memoppa.pdf**

Guidance on Agreements with Prospective Purchasers of Contaminated Property, May 24, 1995

Provides guidance to prospective purchasers of contaminated Superfund property, specifically concerning the expanded circumstances by which purchasers can enter into covenants not to sue with EPA. This document also provides a model agreement.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/prosper-cont-mem.pdf**

READY FOR REUSE DETERMINATION

Guidance for Preparing Superfund Ready for Reuse (RfR) Determinations, February 12, 2004

Provides guidance to EPA employees in preparing Ready for Reuse Determinations (RfR) in order to encourage the reuse of Superfund sites by informing the real estate market of the status of the site subject to the determination. RfR is an environmental status report that documents a technical determination by EPA, in consultation with the States, Tribes, and local governments, that all or a portion of a Superfund site can support specified types of uses and remain protective of human health and the environment.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/rfr-deter-mpt.pdf**

RESIDENTIAL PROPERTIES

Policy Towards Owners of Residential Property at Superfund Sites, July 3, 1991

Sets forth EPA's policy to not require an owner of residential property to undertake response actions or pay cleanup costs, unless the owner has caused the contamination. This policy does not apply when the owner fails to cooperate with EPA or a state's response actions, meet CERCLA obligations, or uses the property inconsistently with a residential use depiction.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/policy-owner-rpt.pdf**

SUPPLEMENTAL ENVIRONMENTAL PROJECTS

Brownfields Sites and Supplemental Environmental Projects (SEPs), November 30, 2006

Provides background information on the use of supplemental environmental projects (SEPs), in addition to questions and answers on the complementary role of SEPs at brownfield sites. This document supersedes the 1998 guidance document "Using Supplemental Environmental Projects to Facilitate Brownfields Redevelopment."

To access online:
http://www.epa.gov/compliance/resources/publications/cleanup/brownfields/brownfield-seps.pdf

Transmittal of "Supplemental Environmental Projects: Green Building on Contaminated Properties," July 24, 2004

Contains a fact sheet on supplemental environmental projects to promote redevelopment on contaminated properties. EPA issued this fact sheet to improve the environmental performance of redevelopment that follows clean up at any contaminated property.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/brownfields/sep-redev-fs.pdf**

WINDFALL LIENS

Interim Enforcement Discretion Policy Concerning "Windfall Liens" Under Section 107(r) of CERCLA, July 16, 2003

Discusses EPA and the Department of Justice's (DOJ) interim policy implementation of the new CERCLA 107(r) windfall lien provision contained in the 2002 Brownfields Amendments. This document lists the factors that EPA will use to determine whether to file a lien, in addition to discussing how EPA will settle the liens and the possibility of EPA issuing comfort letters to or making agreements with bona fide prospective purchaser (BFPPs).

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-windfall-lien.pdf**

"Windfall Liens" Guidance Frequently Asked Questions, July 16, 2003

Provides questions and answers regarding Superfund's windfall lien section, including what properties it applies to, the factors that EPA uses to determine whether EPA will file a windfall lien, and how the windfall lien interacts with a § 107(l) lien.

To access online: **http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-windfall-lien-faq.pdf**

Appendix E

Contact Information

Appendix E
Contact Information

HEADQUARTERS

U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, N.W., Washington, DC 20460-0001

Office of Site Remediation Enforcement:
http://www.epa.gov/compliance/cleanup/revitalization/index.html

Office of Brownfields and Land Revitalization:
http://www.epa.gov/brownfields/

Office of Superfund Remediation and Technology Innovation:
http://www.epa.gov/superfund/partners/osrti/index.htm

Office of Resource Conservation and Recovery
http://www.epa.gov/osw/hazard/index.htm

Office of Underground Storage Tanks:
http://www.epa.gov/oust/

Federal Facilities Restoration and Reuse Office
http://www.epa.gov/fedfac/

REGIONAL CONTACTS

Regional Brownfields Coordinators: http://epa.gov/brownfields/corcntct.htm