

Appendix A

The “Common Elements Guidance” Issued March 6, 2003

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U.S. Environmental Protection Agency
Washington, D.C. 20460
Office of Enforcement and Compliance Assurance
March 6, 2003

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”)

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To: Director, Office of Site Remediation and Restoration, Reg. I
Director, Emergency and Remedial Response Division, Reg. II
Director, Hazardous Site Cleanup Division, Reg. III
Director, Waste Management Division, Reg. IV
Directors, Superfund Division, Regs. V, VI, VII and IX
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Director, Office of Environmental Stewardship, Reg. I
Director, Environmental Accountability Division, Reg. IV
Regional Counsel, Regs. II, III, V, VI, VII, IX, and X
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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”).

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 element 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-specifics 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 pur-

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

chaser, 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.

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

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).

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 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 guid-

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 purchase, as long as he meets the criteria set forth in CERCLA § 101(40).

ance 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 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).

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

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.

⁵ *The bona fide prospective purchaser provision provides, in pertinent part:* 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 provides provisions, 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).

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

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).

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 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 disrupt-

tion 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.

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, 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.

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).

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 List¹² or is undergoing active cleanup under an EPA or State 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

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).

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

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 a 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.

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 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.

¹²The 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).

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

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.

1. 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 facil-

ity 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).

2. *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.

3. *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)
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Linda Garczynski (OSWER)
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Steve Luftig (OSWER)
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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 Amend- ments Landowner Provisions	Bona Fide Prospective Purchaser	Contiguous Property Owner	Section 101 (35)(A)(i) Innocent Landowner
All Appropriate Inquiry	√	√	√
No affiliation demonstration	√	√	*
Compliance with land use restrictions and institutional controls	√	√	√
Taking reasonable steps	√	√	√
Cooperation, assistance, access	√	√	√
Compliance with information requests and administrative subpoenas	√	√	**
Providing legally required notices	√	√	***

* 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).

** 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.

*** 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.¹

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

¹ 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.”

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.

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
Responsible 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 requestor]**:

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

Brownfields Enforcement and Land Revitalization Policy and Guidance Documents

The following documents, in alphabetical order, are available on the cleanup enforcement Web site and contained within the Superfund, Brownfields, and RCRA Cleanup policy and guidance document databases, all accessible from the Information Resources section of the cleanup enforcement Web site at <http://www.epa.gov/compliance/resources/policies/cleanup/index.html>.

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 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>

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>

“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-lem-ref.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>

**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>

**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>

**Guidance for Preparing Superfund Ready for Reuse 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-cmpt.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>

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 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 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>**

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”)
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>**

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>**

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>

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>

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>

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/swerosps/rcrabf/pdf/memoppa.pdf>

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>

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>

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>

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/swerosps/bf/aai/aai_final_rule.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-involacqurty-rpt.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 C

Online Resources to Cleanup Enforcement, Brownfields, and Land Revitalization Information and Documents

I. Superfund Redevelopment Program

Superfund Redevelopment Web site

This Web site acts as a central resource for the Superfund Redevelopment program, providing basic information about the program, as well as information about individual Superfund sites. This Web site also provides links to necessary redevelopment tools and policy and guidance documents to facilitate the cleanup process.

<http://www.epa.gov/superfund/programs/recycle/index.htm>

Superfund Redevelopment Tools

The Web site provides an overview and access to the wide array of tools, resources, and services that Superfund Redevelopment has identified and made available for a broad range of audiences - to help in better understanding the status and characteristics of a site as well as to explore opportunities for redevelopment.

<http://epa.gov/superfund/programs/recycle/tools/index.html>

“Reusing Superfund Sites” (PDF) - October 2006

This report provides an overview of the Superfund Redevelopment Initiative (SRI), a coordinated national effort to facilitate the return of the country’s most hazardous sites to productive use. This report details the successful attempt of communities to reclaim and reuse thousands of acres of idle land in partnership with SRI.

<http://epa.gov/superfund/programs/recycle/pdf/reusingsites.pdf>

Superfund Reuse Policy and Guidance Web site

Web site provides access to EPA policy on tools for the redevelopment of Superfund sites, including incorporating future land use considerations into the discussion of appropriate contamination remedies and in making Ready for Reuse (RfR) determinations.

<http://www.epa.gov/superfund/programs/recycle/policy/reuse.html>

Community Reinvestment Act Fact Sheet

This fact sheet discusses the interaction between the 1977 Community Reinvestment Act (CRA) and environmental cleanup or redevelopment. The CRA requires banks, thrifts, and other lenders to make capital available in low- and moderate-income urban neighborhoods. In 1995, Congress revised the regulations so that lenders subject to the CRA can now claim community development loan credits for loans made to help finance environmental cleanup or redevelopment when it is part of a revitalization effort in low- and moderate-income community.

<http://www.epa.gov/swerosps/bf/html-doc/cra.htm>

II. Brownfields and Land Revitalization

Brownfields and Land Revitalization Web site

Web site contains information about EPA's brownfields program including the Brownfields Law, EPA brownfields grants, technical tools and resources as well as information on brownfields projects across the country.

<http://www.epa.gov/swerosps/bf/index.html>

Interim Approaches for Regional Relations with State Voluntary Cleanup Programs - November 14, 1996

Sets forth the baseline criteria which EPA will employ to evaluate the adequacy of a state's application for funding of a Voluntary Cleanup Program (VCP). These criteria will also be used during negotiation of Memoranda of Agreements (MOAs) which can constitute a planning mechanism for division of labor at sites between EPA and the states.

<http://www.epa.gov/swerosps/bf/html-doc/vcp.htm>

Technical Approaches to Characterizing and Redeveloping Brownfields Sites: Municipal Landfills and Illegal Dumps (PDF) - January 2002

Provides guidance to decision-makers, such as city planners, private sector developers, and others, to achieve a better understanding of the common technical issues involved in assessing and cleaning up brownfield sites.

<http://www.epa.gov/ORD/NRMRL/pubs/625r02002/625r02002.pdf>

Anatomy of Brownfields Redevelopment - October 2006

Provides an overview of the brownfield redevelopment process. In addition, this document discusses the brownfields real estate redevelopment process, along with key challenges, critical participants, and example redevelopment scenarios.

http://www.epa.gov/swerosps/bf/anat_bf_redev_101106.pdf

All Appropriate Inquiries Web site

Web site Provides a link to the final rule establishing specific regulatory requirements for conducting all appropriate inquiries (AAI) into previous ownership, uses, and environmental conditions of a property for the purposes of qualifying for certain landowner liability protections under CERCLA. The final rule went into effect on November 1, 2006. Parties may also comply with the final rule by following the standards set forth in the ASTM E1527-05 Phase I Environmental Site Assessment Process.

<http://www.epa.gov/swerosps/bf/regneg.htm>

Brownfields Federal Programs Guide (2005 Edition) - August 2005

The guide outlines the technical and financial federal resources that can be leveraged for brownfields cleanup and redevelopment. This document also offers tips on how to successfully apply for these resources.

http://www.epa.gov/swerosps/bf/partners/2005_fpg.pdf

III. RCRA Brownfields Prevention Initiative

RCRA Brownfields Prevention Initiative Web site

Web site provides descriptions, official documents and links concerning the RCRA Brownfields Prevention Initiative, a program 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.

<http://www.epa.gov/swerosps/rcrabf/index.html>

Results-Based Approaches to Corrective Action Guidance Web page - September 2000

Web site Provides guidance to EPA, State regulators, and owner/operators of how to incorporate results-based approaches where appropriate in their cleanups. Results-based approaches are intended to help identify releases and risks, and increase efficiency of facility cleanup. These approaches encourage technical and administrative innovation to achieve environmentally protective cleanups on a facility-specific basis

http://www.epa.gov/correctiveaction/resource/guidance/gen_ca/results.htm

Results-Based Approach and Tailored Oversight Guidance (for Facilities Subject to Corrective Action Under Subtitle C of the Resource Conservation and Recovery Act)

Provides guidance to help State and EPA regulators, owners and operators of facilities subject to RCRA corrective action, and members of the public better understand EPA's results-based strategy for RCRA corrective action.

http://www.epa.gov/correctiveaction/resource/guidance/gen_ca/reslt-bse.pdf

IV. Underground Storage Tanks

Underground Storage Tanks Web site

Web site providing information relevant to the federal underground storage tank (UST) program. This site includes questions and answers about the UST Program, in addition to acting as a gateway to other helpful sites

<http://www.epa.gov/OUST/index.htm>

Underground Storage Tanks—Lender Liability; Final Rule - September 7, 1995

Final rule that limits the regulatory obligations of lending institutions and other persons who hold a security interest in a petroleum underground storage tank (UST) or in real estate containing a petroleum UST, or that acquire title or deed to a petroleum UST or facility or property on which an UST is located. This final rule specifies conditions under which these security interest holders may be exempted from a RCRA corrective action, technical, and financial responsibility regulatory requirements that apply to an UST owner and operator. This rule should result in additional capital availability for UST owners, many of whom are small businesses, and will assist them in meeting environmental requirements by improving their facilities.

<http://www.epa.gov/OUST/fedlaws/sept0795.htm>

V. Office of Solid Waste

Office of Solid Waste Web site

Web site provides information regarding the Office of Solid Waste's (OSW) regulation of wastes under RCRA. This site also serves as a gateway to additional helpful sites regarding solid waste.

<http://www.epa.gov/epaoswer/osw/index.htm>

RCRA Public Participation Manual (1996 Edition) - 1996

Serves as a “users manual” that explains how public participation works in the RCRA permitting process (including corrective action), and how citizens, regulators, and industry can cooperate to make it work better. It also describes a wide assortment of activities to enhance public participation, and includes several appendices that provide lists of contacts, sources of information, and examples of public participation tools and activities.

<http://www.epa.gov/epaoswer/hazwaste/permit/pubpart/manual.htm>

V. Other Non-EPA Sources

National Association of Local Government Environmental Professionals (NALGEP)

Web site for the National Association of Local Government Environmental Professionals (NALGEP), a not-for-profit organization representing local government personnel responsible for ensuring environmental compliance and developing and implementing environmental policies and programs.

<http://www.nalgep.org/default.cfm>

International City/County Management Association (ICMA)

Web site for the International City/County Management Association (ICMA), a non-profit organization that provides technical and management assistance, training, and information resources in the areas of performance measurement, ethics education and training, community and economic development, environmental management, technology, and other topics to its members and the broader local government community. ICMA cosponsors the bi-annual Brownfields conference with EPA.

<http://icma.org/main/sc.asp>

U.S. Green Building Council

Web site for the U.S. Green Building Council (USGBC), a non-profit organization committed to expanding sustainable building practices.

<http://www.usgbc.org/>

Appendix D Brownfields Contacts

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