II. Statutory and Enforcement Tools 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 the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (CERCLA, commonly known as Superfund) and the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992 (RCRA) Corrective Action and underground storage tank programs, as well as aspects of the Oil Pollution Act (OPA). In this capacity, OSRE began to develop a comprehensive approach in the early 1990s to defining liability issues and providing appropriate liability relief under these statutes to assist with the redevelopment and revitalization of contaminated property. More specifically, OSRE began developing guidance documents to provide liability clarity, if not liability relief, to those who were interested in redeveloping and revitalizing contaminated sites.

Partly in response to EPA's efforts, Congress enacted the Small Business Liability Relief and Brownfields Revitalization Act of 2002 (Public Law 107-118) (the Brownfields Amendments), amending the Superfund statute, to clarify landowner liability concerns and provide funding for grants for the assessment and cleanup of contaminated property.

OSRE continues to promote site cleanup by potentially responsible parties (PRPs) and private parties and revitalization through the issuance of enforcement discretion guidance documents, model enforcement documents, frequently asked questions, fact sheets, and other documents that provide liability certainty or relief to potential developers and owners of contaminated land. All of these documents, along with all current Superfund en-

forcement and brownfield policy and guidance documents, are available on EPA's Web site at http://www.epa.gov/compliance/resources/policies/cleanup/. Those enforcement discretion documents that are relevant to revitalization are summarized in Appendix B and are available on the CD accompanying this handbook.

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

The following is a discussion of certain categories of parties that may be concerned about CERCLA liability, and the statutory protections and EPA tools that may be available to address such concerns.

A. Owners and Purchasers of Contaminated Property

As discussed in the previous chapter, owners of contaminated property are liable under CERCLA for any costs associated with addressing the contamination. The following are statutory liability protections for owners and prospective purchasers of contaminated property, and associated EPA tools.

1. Innocent or "Unknowing" Purchasers

Entities that acquire property and had no knowledge of the contamination at the time of purchase may be eligible for CERCLA's third-party defense for certain purchasers of contaminated property. CERCLA §§ 107(b)(3), 101(35)(A)(i). This defense, added to CERCLA in the Superfund Amendments and Reauthorization Act of 1986 (Public Law 99-499), provides entities with an affirmative defense to liability if they conducted all appropriate inquiries prior to purchase and complied with other pre- and post-purchase require-

ments. The 2002 Brownfields Amendments partially amended the innocent purchaser defense by elaborating on the all appropriate inquiry requirement. *See* the "All Appropriate Inquiries" text box on page 17.

The innocent purchaser defense may provide liability protection to some owners of contaminated property -- especially those that purchased property prior to January 1, 2002, and are therefore ineligible for the bona fide prospective purchaser protection -- but generally most post-2002 prospective purchasers will not rely on this defense because of the requirement that the purchaser have no knowledge of contamination at the site.

Several of EPA's guidance documents discuss the innocent purchaser third-party defense, including the Common Elements guidance, discussed below in Section II.A.5 beginning on page 21.

2. Bona Fide Prospective Purchasers

The 2002 Brownfields Amendments created a new liability protection for a bona fide prospective purchaser (BFPP). Prior to 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 prior to 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.

The BFPP provision found in CERCLA § 107(r) dramatically changed the CERCLA liability landscape. 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).

Unlike the innocent purchaser defense, persons may now 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.

BFPPs must meet the threshold criteria of performing "all appropriate inquiry" prior to acquiring the property, and demonstrating "no affiliation" with a liable party. BFPPs must also satisfy the following obligations which are ongoing:

- 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;
- Complying with information requests and administrative subpoenas; and
- Providing legally required notices.

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. For more discussion of windfall liens, please refer to Section II.A.5.iv on page 28.

All Appropriate Inquiries

All Appropriate Inquiry (AAI) is required under CERCLA § 101(35)(B) and is the first step that BFPPs, CPOs and innocent purchasers must undertake to achieve the protected status. 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") 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.

3. Owners of Property Impacted by Contamination from an Offsite Source (Contiguous Property Owners)

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 groundwater contamination. Protection from liability for contiguous landowners can be found in EPA guidance prior to the Brownfields Amendments, as well as in those Amendments.

In May 1995, OSRE developed the *Final Policy Toward Owners of Property Containing Contaminated Aquifers* in response to this concern. Not only did EPA state 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 is protected by this policy if **all** of the following criteria 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 groundwater 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 as they apply to particular landowners including, among others, whether a well on the property may affect the migration of contaminants, or the existence of a contractual relationship between the landowner and the person causing the off-site contamination. In addition, the policy required that, to be covered by the policy, the landowner must not be liable based on some other connection to the site, such as being a generator or transporter.

In addition, 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 meet the threshold criteria of performing "all appropriate inquiry" prior to acquiring the property, and demonstrating that it is not affiliated with a liable party. Persons who know, or have reason to know, prior to 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 enforcement discretion derived from 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). 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 Resi-

dential 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*.

4. 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, a residential owner's knowledge of the contamination was deemed irrelevant. The residential owner policy applies to residents as well as their lessees, so long as the activities 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 after acquisition are consistent with the policy.

Residential property owners that purchase contaminated property after January 2002, can take advantage of the statutory BFPP protection. The Brownfields Amendments addressed residential property owners by clarifying the type of pre-purchase investigation (*i.e.*, all appropriate inquiry) 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 satisfy 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 is protected 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 the Agency's response action.

5. Specific EPA Tools for Owners (E.g., Prospective Purchasers) of Contaminated Property

i. Common Elements Guidance

In March 2003, EPA issued its "Common Elements" guidance for the three property owner classes -- BFPP, CPO and innocent purchaser -- 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 high-

lights 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 for the Common Elements guidance. Included with the Common Elements 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 purchasers must meet to assert these liability protections.

The first threshold requirement is that the landowner conduct "all appropriate inquiries" (AAI) prior to purchasing the property. CERCLA §§ 101(40)(B), 107(q)(1)(A)(viii), 101(35)(A)(i), (B)(i). 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 purchaser protection, 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 person does not have an employment, agency, or contractual relationship. CERCLA §§ 107(b)(3), 101(35)(A).

Second, 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 clarify the different liability protections that may be available, and their requirements.

ii. Prospective Purchaser Agreements

EPA has long recognized the value of redeveloping contaminated land and the need to provide liability relief to encourage prospective purchasers of such land.

Long before the BFPP liability protection was available, EPA developed tools for prospective purchasers of contaminated property, including prospective purchaser agreements (PPAs). PPAs are agreements between a liable party and EPA whereby EPA provides the party with liability relief in exchange for payment and/or cleanup work. The first EPA policy dealing with prospective purchasers of contaminated property was published in June 1989 and titled *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*. Models attached to the 1989 guidance were for settlements with *de minimis* landowners under § 122(g)(1)(B).

After the Agency gained experience with developing and issuing PPAs, it expanded the circumstances under which it would consider

a PPA and issued guidance titled *Guidance on Agreements with Prospective Purchasers of Contaminated Property* (May 24, 1995). This guidance, and the criteria contained therein, allows EPA greater flexibility in considering agreements with covenants not to sue. Such agreements encourage the reuse or redevelopment of contaminated property that would have substantial benefits to the community (*e.g.* through job creation or productive use of abandoned property), but also would be safe, consistent with remediation, and provide direct benefits to EPA. Attached to the 1995 guidance is a model prospective purchaser agreement.

EPA further enhanced and expedited the PPA process in its October 1, 1999 guidance, *Expediting Requests for Prospective Purchaser Agreements*, and continued to build on the success achieved in issuing PPAs by clarifying threshold criteria and providing a common framework of analysis for entering into PPAs in its January 10, 2001 guidance, *Support of Regional Efforts to Negotiate Prospective Purchaser Agreements (PPAs) at Superfund Sites and Clarification of PPA Guidance*.

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 of the legislatively created BFPP and EPA's use of PPAs. In that policy, EPA stated that in most circumstances, PPAs will no longer be needed for a party to enjoy liability relief under CERCLA as a present owner. There will continue to be, however, limited circumstances under which EPA will consider entering into a PPA, such as:

- 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;

- Unique, site-specific circumstances when a significant public interest will be served.

Despite the liability relief assurances to BFPPs which the above-referenced guidance documents provide, many prospective purchasers of contaminated property wanted further protection from EPA for cleanup work performed by them under EPA supervision. As a result of this need and to further encourage reuse and redevelopment on contaminated sites, EPA, jointly with the Department of Justice (DOJ), issued a model administrative order titled *Issuance of CERCLA Model Agreement and Order on Consent for Removal Action by a Bona Fide Prospective Purchaser*, for use as an agreement with a BFPP who intends to perform removal work at its property. 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 to prevent releases" which 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 is also provided. The model is for use at sites of federal interest where the work is more significant and complex than other contaminated sites.

iii. Comfort/Status Letters

Under certain circumstances, a prospective purchaser can proceed in the cleanup and redevelopment of a contaminated site based on a "comfort/status" letter issued by EPA. 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. The "comfort" comes from realizing what EPA knows about the

property and what its intentions are in terms of a response. Comfort/status letters are not "no action" assurances, that is, they are not assurances by the Agency that it will not take an enforcement action at a particular site.

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 the realistic perception or probability of incurring CERCLA liability; and
- There is no other mechanism available to adequately address the party's concerns.

- ***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.

Private 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 shield another from liability. Indemnification provisions provide prospective buyers, lenders, insurers, and developers with a means of assigning responsibility for cleanup costs, and encourage negotiations between 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, however, many factors affect their utility including the types of coverage available, the dollar limits on claims, the policy time limits, site assessment requirements, and costs for 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.

- ***RCRA Comfort/Status Letters***

  RCRA Treatment, Storage, and Disposal (TSD) facilities also offer unique challenges in terms of cleanup and reuse, but may also provide opportunities for revitalization. Recognizing that analogous situations existed at RCRA facilities as at Superfund sites, EPA developed guidance for issuing comfort/status letters for RCRA 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 use of RCRA comfort/status letters was reiterated and highlighted in the April 8, 2003 guidance *Prospective Purchaser Agreements and Other Tools to Facilitate Cleanup and Reuse of RCRA Sites*. That guidance also recognizes that RCRA PPAs as well as the February 23, 2003 *Final Guidance on Completion of Corrective Action Activities at RCRA Facilities* were valuable tools to help revitalize RCRA sites. The guidance provides examples where RCRA PPAs have been successfully used and identifies certain factors that should be considered before issuing a RCRA PPA.

iv. Windfall Lien Guidance, Comfort Letters, and Settlements

The Brownfields Amendments also acknowledged the possibility of a windfall lien for BFPPs who may benefit in the purchase of a contaminated property where the fair market value of the property is increased due to a cleanup using Superfund money. That is, the United States, after spending Superfund money for cleanup at a prop-

erty, 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 is a new lien provision that does not supplant the lien provision found in CERCLA § 107(l).

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. In addition to explaining how EPA intends to use the new windfall lien, and when EPA will seek to enforce or will not seek to enforce, there are two attachments to the guidance: a sample "comfort letter" that explains to the recipient whether EPA believes there is a possible windfall lien applicable to the property, and a model settlement document, whereby a party to whom the windfall lien provision applies may settle with EPA in exchange for release of the windfall lien both now and in the future.

The windfall lien, unlike the lien under CERCLA § 107(l), has no applicable statute of limitations and is most likely to be filed and recorded only after a BFPP comes into possession of the property. Additionally, the model settlement document for releasing the windfall lien does not provide a covenant not to sue. 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 after acquisition by a BFPP and the EPA administrative procedures that should accompany filing a windfall lien notice.

B. Lenders and Local Governments

1. CERCLA Liability Protections for Lenders and Local Governments

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. However, a federal court ruling vacated the Lender Liability Rule on the grounds 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*, American 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.

i. 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*. But lenders were concerned 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 (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, CERCLA §§ 101(20)(E)-(G) elaborate 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*

"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;
- 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
- All, or substantially all, of the operational (as opposed to financial or administrative) functions of the facility other than environmental compliance.

Continued next page...

"Participation in Management" Defined *(cont'd)*

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 prior to 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 CERCLA § 107(d)(1) or 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.

Interpreting CERCLA Provisions Addressing Lenders and Involuntary Acquisitions by Government Entities (1997) and subsequent fact sheets. EPA's subsequent lender policy explains that when interpreting the amended secured creditor exemption, EPA will treat the Lender Liability Rule and its preamble as authoritative guidance.

ii. Local Governments

Section 2504 of the Lender Liability Act validates 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). CERCLA § 101(20)(D). There is also a third-party 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).

EPA's 1995 enforcement policy on involuntary acquisition by lenders and local governments was followed with the guidance memorandum, *Municipal Immunity from CERCLA Liability for Property Acquired through Involuntary State Action* (October 20, 1995). These two policy memoranda clarified some of the issues surrounding involuntary municipal acquisition of properties. EPA provided further clarification on these issues in a fact sheet, *The Effect of Superfund on Involuntary Acquisitions of Contaminated Property by Government Entities* issued in December 1995. EPA continues to follow as guidance the Lender Liability Rule and the two 1995 guidance documents and subsequent fact sheets when addressing local government liability.

State or local government entities that acquire property after the enactment of the 2002 Brownfields Amendments and that are concerned about potential contamination may want to seek the advice of

counsel before taking title to ensure that they will have a 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 prior to purchase and comply with the other BFPP requirements. Conducting proper AAI prior to purchase is also important for state and local government entities relying on the BFPP protection for brownfield grant eligibility.

2. Underground Storage Tanks (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 Tanks (UST) Lender Liability Rule* (40 C.F.R. § 280.200-.300) is an example of how 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 Web site at http://www.epa.gov/oust/fedlaws/280_i.pdf.