

# UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

OFFICE OF  
ENFORCEMENT AND  
COMPLIANCE ASSURANCE

March 1, 2006

## MEMORANDUM

**SUBJECT:** Identification of Superfund Sites and RCRA Facilities for the Environmentally Responsible Redevelopment and Reuse (ER3) Pilot Program

**FROM:** Granta Y. Nakayama /s/  
Assistant Administrator

**TO:** Waste Management Division Directors, Region I-X  
Director, Office of Environmental Stewardship, Region 1  
Regional Counsel, Regions II, III, IV, V, VI, VII, IX, and X  
Assistant Regional Administrator, Office of Enforcement, Compliance and Environmental Justice, Region VIII

The purpose of this memorandum is to request your assistance in identifying Superfund sites and RCRA facilities at which the Agency can implement the Environmentally Responsible Redevelopment and Reuse initiative. As the Agency continues to integrate the concepts of cleanup, revitalization and reuse of abandoned, inactive, and formerly contaminated waste sites, we must continue to encourage the use of sustainable redevelopment of these properties. On September 17, 2004, OECA's Acting Assistant Administrator Skinner issued a memorandum requesting your assistance in the implementation of an innovative initiative to promote the cleanup and Environmentally Responsible Redevelopment and Reuse (ER3) of contaminated properties. ER3 is designed to provide incentives to developers of contaminated sites to "begin with the end in mind" by incorporating sustainable concepts into their cleanup and redevelopment activities.

The Agency's mission and strategic plan calls for us to cleanup and restore communities and the ecological systems that support them by preserving and restoring the land through the most effective waste management and cleanup methods available. As we continue our work to control the risks to human health and the environment at contaminated properties or sites, we should incorporate the principles of ER3 to ensure that redevelopment of these properties will not become tomorrow's environmental problems. The built environment has a tremendous impact on the natural environment through the use of materials, waste production, energy and water consumption, and reduction of open space. Sustainable development minimizes impacts to the natural environment, reduces long-term costs for developers, and increases the quality of life of a community.

To accomplish the goal of facilitating ER3, we should utilize enforcement related incentives to accommodate redevelopment that is consistent with superior environmental performance. One example of an ER3 enforcement incentive is the use of Prospective Purchaser Agreements (PPAs) where EPA may consider negotiating with an entity if the entity commits to developing a property with significant environmental benefit. Another example of an ER3 enforcement incentive is the issuance of comfort/status letters.

As a first step, the Agency needs to identify Superfund and RCRA sites at which ER3 can be piloted and evaluated. In general, we are looking for sites where: 1) there is a potential developer; 2) the site is at the beginning of the development process; and 3) the developer is willing to work with the Agency to incorporate sustainable development concepts into the project.<sup>1</sup> EPA would also discuss the potential incentives with the applicable state to facilitate any liability assurance needed from the state to move the pilot project forward. Attached are frequently asked questions (“FAQs”) which provide additional information regarding ER3.

ER3 team members in my office have arranged for an initial conference call with some of your staff on March 2, 2006 from 2:00 pm to 3:00 pm EST to discuss any questions they may have concerning this project and/or any questions they may have concerning any possible pilot sites. The call-in number is 1-866-299-3188, access code 2025644281.

Using the information in this memorandum and the attached FAQs as a guideline, each Region should identify one site best suited for the project by March 31, 2006. Thereafter, a member of the ER3 Team will contact each Region to set up a date and time to discuss your Region’s pilot proposal. Ideally, we hope to have at least one pilot site per Region. For each site identified, we request that you fill out the ER3 Information Request Form (see footnote 2 for internet location of form). Please include on the form the current status of any CERCLA or RCRA actions at the site (technical and legal), the make-up of and current relations with EPA, the state and the affected community, *and any potential enforcement incentives* that may be appropriate.

Please direct any questions about the pilot and site nomination proposals to any member of the Headquarters ER3 Team listed below.

Headquarters ER3 Team Members

Peter Neves (ER3 Team Leader), 202-564-6072

Carlos Evans, 202-564-6331

Elisabeth Freed, 202-564-5117

Phil Page, 202-564-4211

Kenneth Schefski, 202-564-8213

Erin Smith, 202-564-2038

Arati Tripathi, 202-564- 2044

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<sup>1</sup> Regions will be required to submit an ER3 Information Request Form (in Microsoft Word format) located at <http://www.epa.gov/compliance/cleanup/redevelop/er3/er3form.html> to any member of the Headquarters ER3 Team. Once submitted, Headquarters will work with the Region and the potential developer to discuss possible enforcement incentives and timing.

Yolaanda Walker, 202-564-4281

Attachment

cc: Superfund Regional Program Branch Chiefs  
Superfund Regional Counsel Branch Chiefs  
Ann Pontius, OSRE/PPED  
Ken Patterson, OSRE/RSD  
Neilima Senjalia, OSRE/PPED  
Karin Leff, OSRE/RSD  
Helena Healy, OSRE/PPED  
Bruce Kulpan, OSRE/RSD  
Peter Neves, OSRE/PPED



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

December 2005

### Environmentally Responsible, Redevelopment & Reuse ("ER3") Frequently Asked Questions and Answers

*"Sustainable Development: Facilitating Environmentally  
Responsible Redevelopment and Reuse of Contaminated Properties"*

EPA's Environmentally Responsible, Redevelopment and Reuse (ER3) Initiative, developed by the Office of Site Remediation Enforcement (OSRE), encourages sustainable redevelopment of contaminated sites through

- (1) Enforcement and other Agency-wide incentives;
- (2) An internal EPA network and an external network of resources to assist entities with incorporating sustainable development concepts into their projects; and
- (3) Education and outreach to regulators, the regulated community, and other interested parties on the benefits of sustainable development.

By providing incentives, assistance and education to developers and others, OSRE helps ensure that redevelopment of contaminated sites does not contribute to environmental problems in the future. For additional information on ER3, please refer to the background documents on OSRE's intranet site at <http://intranet.epa.gov/oeca/osre/workgroup/er3.html>.

#### **Q1: Why is the ER3 initiative housed in an EPA enforcement office?**

**A:** For several years, OSRE has developed policies and enforcement tools such as prospective purchaser agreements (PPAs) and comfort letters to address liability issues associated with redevelopment of contaminated sites. ER3 continues and expands this effort. Specifically, ER3 is OSRE's response to a challenge issued in a June 2003 memorandum by then EPA Administrator Christine Todd Whitman. Specifically, the Administrator directed each EPA office to take steps to address the additional impacts property development has on the environment. ER3 was also the first initiative endorsed by the Office of Enforcement and Compliance Assurance's Creativity and Innovations Change Board. In a memorandum dated September 17, 2004, Tom Skinner, the former Assistant Administrator for the Office of Enforcement and Compliance Assurance, acknowledged the importance of the initiative and OSRE's effort to encourage developers of contaminated sites to "begin with the end in mind."

Sustainable development is not a new concept; organizations both within EPA and outside the Agency specifically dedicated to promoting environmentally sensitive development have been around for years. ER3 allows OSRE to use its enforcement tools to join this ongoing effort. OSRE's primary goal is to ensure that contaminated sites are cleaned up promptly with

maximum participation by responsible parties, and in a manner that protects human health and the environment. Recently, EPA has focused on encouraging the assessment, cleanup, reuse, and redevelopment of formerly contaminated sites (or sites with perceived contamination) as a way to revitalize underused or abandoned areas while helping to preserve greenspace. Because of its unique relationship to contaminated sites, OSRE is in a position to work with existing programs within EPA to help further promote sustainable redevelopment at these sites through ER3. OSRE also understands that enforcement incentives may not be appropriate for every contaminated site, but developers may still be willing to consider sustainable development in exchange for other incentives. To address this possibility, OSRE is developing as part of ER3 a network of internal EPA and external partners so that developers have easy access to other incentives, resources, and assistance.

**Q2: How does ER3 further EPA's mission and strategic plan to protect human health and the environment?**

**A:** ER3 principles of sustainable reuse and redevelopment help ensure that today's development does not become tomorrow's environmental problem. The built environment has considerable impact on the natural environment through the use of materials, waste production (both hazardous and non-hazardous solid waste, air emissions, and stormwater runoff), energy and water consumption, and reduction of open space. Sustainable development minimizes these impacts by encouraging the use of post-consumer materials, waste reduction, increased efficiency in industrial processes, and preservation or creation of greenspace, and can be achieved in a manner that reduces long-term costs for developers and increases quality of life for the community. By encouraging developers to minimize environmental impacts of a development project from the start, OSRE is ensuring that communities and the environment are protected from any adverse environmental impacts down the road.

Through Agency-wide incentives, partnerships, education, and outreach, ER3 can also help meet many of the objectives outlined in EPA's Strategic Plan. Under Goal 3: Land Preservation and Restoration, EPA's cleanup programs have set a national goal of returning formerly contaminated sites to long-term, sustainable, and productive use. Goal 4: Healthy Communities and Ecosystems outlines a strategy to ensure that EPA sustain, clean up, and restore communities and the ecological systems that support them. The strategy includes ensuring that national policies and programs support comprehensive, integrated local resource management and partnerships to create incentives for integrated environmental management. Goal 5: Compliance and Environmental Stewardship emphasizes the protection of human health and the environment by encouraging innovation and by providing incentives for governments, businesses, and the public that promote environmental stewardship. Finally, the Strategic Plan highlights the cross-goal strategy of Innovation. ER3 is an innovative approach that helps EPA and communities ensure the sustainability of formerly contaminated sites.

**Q3: What enforcement incentives are available for a developer that wants to build “green”?**

**A:** In the past, OSRE has provided relief, where appropriate, from CERCLA liability to developers through tools such as prospective purchaser agreements (PPAs) and comfort letters. In 2001, Congress amended CERCLA and allowed bona fide prospective purchasers to avoid liability if they meet certain criteria. Because of these amendments, the tools OSRE provided in the past to limit liability are no longer necessary. However, OSRE may nevertheless be willing to provide a developer with a PPA or comfort letter for a site where the developer agrees to incorporate sustainable development concepts into the project. In addition, other laws requiring cleanup, such as the RCRA corrective action and underground storage tank (UST) cleanup provisions, do not have liability defenses for prospective purchasers like those found in CERCLA. Accordingly, EPA again may be willing to enter into PPAs or provide comfort letters at sites undergoing RCRA corrective action or cleanups from UST releases to promote sustainable development. Finally, it may be possible for developers to arrange for a third party subject to a penalty action to conduct a “green” supplemental environmental project (SEP) on the property. For more information on green building SEPs, please refer to OSRE’s guidance entitled “Transmittal of Supplemental Environmental Projects—Green Building on Contaminated Properties,” available on EPA’s Web site at <http://www.epa.gov/compliance/resources/policies/cleanup/brownfields/sep-redev-fs.pdf>.

**Q4: Aren’t these the same incentives EPA has always offered?**

**A:** As noted above, the new liability protections in the 2001 amendments to CERCLA make it unnecessary for EPA to expend the resources to provide tools such as PPAs and comfort letters. However, some developers may want additional comfort from EPA regarding liability at a site, and EPA is willing to consider providing comfort in certain circumstances. One such circumstance is when a project exceeds usual development standards by including sustainable development concepts. In addition, other laws such as the UST liability provisions in RCRA do not contain the same protections as CERCLA. At these sites, EPA may also be willing to enter into PPAs or provide comfort letters for sustainable development. Finally, through the ER3 network, EPA may coordinate with other federal and states agencies to provide a developer with comprehensive liability relief.

**Q5: Other than potential enforcement incentives, what are other reasons a developer may want to build “green”?**

**A:** Despite common perceptions, sustainable development has many benefits (besides protecting the environment):

- High performance buildings cost on average less than 2% more than conventional buildings (and the owner gets a better building), and this cost is decreasing as builders become more familiar with green building concepts.
- High performance buildings provide a healthier and more productive work environment (case studies indicate productivity increases ranging from 4-8%).

- Return on investment from lower operating costs, increased employee productivity, reduced liability risk, and increased property value.
- An initial investment of less than 2% over normal costs yields life-cycle savings of 10 times the initial investment (\$5 million project = \$100,000 additional costs = \$1 million return on investment).
- A developer may be eligible for tax savings as a result of a sustainable development project.

These benefits, along with decreased impact on the environment and improved community relations make it worthwhile for a developer to consider a sustainable development project.

**Q6: What does OSRE consider a potential ER3 site?**

**A:** Any contaminated site that will undergo development may be a candidate for ER3.

Examples include:

1. EPA is overseeing the cleanup of a site and is approached by a potential developer that is concerned about liability and would like assurances from the Agency that it will not initiate an enforcement action. Usually, a developer can take advantage of the bona fide prospective purchaser liability limitation in CERCLA. However, the developer may want additional assurances from EPA and/or the applicable state. Generally, EPA will not provide a PPA or comfort letter to the developer in this circumstance because of the existing CERCLA liability protections; however, if the developer plans to incorporate sustainable development concepts into the project, the Agency may be willing to provide a comfort letter or PPA to the developer and in addition, work with the applicable state to obtain state liability assurances as well.
2. A developer plans to redevelop several gas station sites and is concerned about federal and state liability for releases from USTs. If the developer is willing to incorporate sustainable development principles into the projects, EPA could provide a PPA and encourage the applicable state to provide liability relief as well.
3. A developer is not concerned about liability, but would like other potential incentives and assistance for building “green.” Through the ER3 internal and external networks, OSRE could provide the developer with information on other Agency resources and incentives that might be available (*e.g.*, grants or green building assistance), and provide information on other external resources the developer could utilize.

**Q7: Once I identify a possible site for the ER3 initiative, what happens next?**

**A:** After you identify a possible site, you should fill out and submit the short ER3 information request form, available on EPA's Web site at <http://www.epa.gov/compliance/cleanup/redevelop/er3/er3form.html>. After you submit the form, a Headquarters ER3 Team Member will contact you to discuss next steps. Ideally, Headquarters, the Region and the developer will have a conference call to discuss possible incentives, the developer's plans for the project, the timing of the development, and assistance the developer needs with respect to the "green" aspect of the project. In addition, if appropriate information from the form will be shared with the ER3 external partners who then may offer assistance or provide ideas about sustainable development uses and concepts for the site.

**Q8: What criteria will OSRE use to select or identify potential sites?**

**A:** OSRE will accept generally recognized "green" industry or state standards (*e.g.*, LEEDs, Energy Star, etc.) for sustainable development components covered by the standards (standards generally exist for green buildings and energy efficiency). Otherwise, the developer will need to demonstrate that the proposed sustainable aspect of the project will significantly mitigate the impacts of the development on the natural environment. Other areas a developer could focus on include wildlife habitat restoration or creation of greenspace, use of recycled materials, carpooling and other low impact transportation incentives, and reuse of existing infrastructure. OSRE is willing to consider other proposals as well.

**Q9: What are some examples of projects that incorporate principles of sustainable development?**

**A:** Sustainable development projects can take many forms, ranging from developing habitat to constructing energy-efficient buildings. Below are some examples of projects that have a "green" component. For an excellent example of a development that has embraced multiple sustainable development concepts, please refer to [http://www.atlanticstation.com/concept\\_greenstar.php](http://www.atlanticstation.com/concept_greenstar.php). Also for more information please refer to EPA's Web site on sustainability (<http://www.epa.gov/sustainability>), or contact one of the ER3 Headquarters contacts.

Examples include:

1. A developer may create or enhance existing wildlife habitat at a site and establish a program to involve employees and/or the community in habitat preservation.
2. To reduce runoff from a development, a developer may install a "green" parking lot using permeable materials to absorb rainwater.
3. A developer may construct "green" buildings at a site in accordance with generally recognized industry or state green building performance standards. Green buildings often incorporate site planning to minimize environmental



impact, water and energy efficiency, conservation of materials, and indoor environmental quality considerations. Examples of common ways to achieve these goals include such things as toilets that use reclaimed water, incentives for low impact transportation such as bicycling, carpools, and electric vehicle charging stations, high-efficiency and/or natural lighting, and the utilization of existing or recycled infrastructure.

**Q10: Who should I contact if I have more questions or a potential ER3 project?**

**A:** If you would like additional information on ER3 or have a potential ER3 project, please feel free to contact any of the following ER3 team members:

Peter Neves, team leader	(202) 564-6072	Carlos Evans	(202) 564-6331
Elizabeth Freed	(202) 564-5117	Phil Page	(202) 564-4211
Kenneth Schefski	(202) 564-8213	Erin Smith	(202) 564-2038
Arati Tripathi	(202) 564-2044	Yolaanda Walker	(202) 564-4281