
U.S. Environmental Protection Agency
CONTIGUOUS PROPERTY OWNER GUIDANCE
REFERENCE SHEET

INTRODUCTION

This reference sheet highlights the main points made in EPA's January 13, 2004 guidance entitled "Interim Enforcement Discretion Guidance Regarding Contiguous Property Owners," available at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/contig-prop.pdf>.

The 2002 Brownfields Amendments to CERCLA added Section 107(q) to provide liability protection to landowners who own property that is or may be contaminated, but is not the original source of the hazardous substance contamination. Congress intended the provision to protect such "contiguous property owners" who are, in Congress' view, "essentially victims of pollution incidents caused by their neighbor's actions."

EPA's Contiguous Property Owner Guidance discusses:

- | Statutory criteria to qualify as a contiguous property owner
- | The application of Section 107(q) to current and former owners of property
- | The relationship between section 107(q) and EPA's Residential Homeowner Policy and Contaminated Aquifers Policy
- | Discretionary mechanisms EPA may provide to resolve remaining liability concerns

Statutory Criteria of a Contiguous Property Owner

A landowner must meet several statutory criteria in order to be eligible for liability protection as a contiguous property owner.

Many of these criteria also apply to bona fide prospective purchasers and innocent landowners, and are discussed in EPA's March 6, 2003 "Common Elements" Guidance, available at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf>. Regions analyzing whether a landowner meets the criteria of section 107(q) should consult the Common Elements Guidance.

The Statutory Criteria Discussed in EPA's Common Elements Guidance

Threshold Criteria:

- ▶ made all appropriate inquiry
- ▶ has no affiliation with a liable party

Continuing Obligations:

- ▶ complies with land use restrictions and institutional controls
- ▶ takes reasonable steps with respect to hazardous substances on property
- ▶ cooperates, assists and gives access
- ▶ complies with information requests and administrative subpoenas
- ▶ provides legally required notices

In addition to meeting the statutory criteria discussed in EPA’s Common Elements Guidance, contiguous property owners:

- | own property that is contiguous to, or otherwise similarly situated with respect to, the property from which there is a release or threat of release
- | cannot cause, contribute or consent to the release or threatened release

Contiguous to, or otherwise similarly situated with respect to, the property from which there is a release or threat of release

EPA believes Congress’ intent in enacting Section 107(q) was to protect persons who own property that is or may be contaminated as a result of migration from another property that they do not own or operate, *even if the property is not located immediately next door*. As a result, in exercising its enforcement discretion and implementing Section 107(q), EPA will analyze a number of case-specific facts, including whether the landowner’s property has been impacted by a release from a contaminated property at a distance in the same or a similar way that it would have been impacted by a release from a contaminated property adjoining the landowner’s property.

Cause, contribute or consent to the release or threatened release

The contamination on the contiguous property owner’s land giving rise to the incurrence of response costs must come from a release or threat or release from a different property; i.e., property that is not owned by the contiguous property owner. If the landowner bears some responsibility for the release, he cannot meet the statutory criteria of Section 107(q).

If there are multiple, discrete (i.e., not commingled) releases on a landowner’s property, some of which originated on the landowner’s property, and others the landowner did not cause or contribute to as they migrated from another property not owned or operated by the landowner, EPA may exercise its enforcement discretion and not pursue the landowner with respect to the release(s) that migrated from the other property.

Application of Section 107(q) to Current and Former Owners of Property

The liability protection of Section 107(q) clearly applies to current owners of property who meet the criteria of that section. In exercising its enforcement discretion, EPA may treat *former landowners* as contiguous property owners, as long as those landowners met the statutory criteria of Section 107(q) while they owned the property.

Relationship Between Section 107(q) and EPA’s Residential Homeowner Policy and Contaminated Aquifers Policy

The new contiguous property owner provision protects many landowners that EPA did not generally pursue, through the exercise of its enforcement discretion, prior to the passage of the

Brownfields Amendments. See the 1991 Residential Homeowner Policy and 1995 Contaminated Aquifers Policy. These policies are still in effect. Many of the considerations for exercising enforcement discretion laid out in the Residential Homeowner and Contaminated Aquifers Policies are the same as, or similar to, the contiguous property owner criteria in Section 107(q).

In some ways, EPA's Residential Homeowner Policy and Contaminated Aquifers Policy may be broader (apply to more landowners) than the contiguous property owner liability protection in new Section 107(q). To the extent that the Residential Homeowner Policy and the Contaminated Aquifers Policy are broader than Section 107(q), EPA may still apply these policies through the exercise of its enforcement discretion.

Example: EPA's Policies May Be Broader

Under the Residential Homeowner Policy and, in certain circumstances, the Contaminated Aquifers Policy, landowners may purchase with knowledge or reason to know that contamination was present on the site and still be covered by the policies, whereas Section 107(q) requires contiguous property owners to purchase *without knowledge* that the property is or could be contaminated.

On the other hand, section 107(q) may be broader in some respects than EPA's Residential Homeowner and Contaminated Aquifers Policies. To the extent that a landowner qualifies as a contiguous property owner, his statutory protection from liability should obviate the need to rely on EPA's Residential Homeowner or Contaminated Aquifers enforcement discretion policies.

Example: Section 107(q) May Be Broader

The Residential Homeowner Policy applies only to owners of residential property, whereas Section 107(q) applies to owners of any type of property; the Contaminated Aquifers Policy applies only to groundwater contamination, whereas section 107(q) is not limited to groundwater contamination.

Discretionary Mechanisms EPA May Provide to Resolve Remaining Liability Concerns

Section 107(q)(3) provides that EPA may, in its discretion, issue an "assurance" that no enforcement action under CERCLA will be initiated against a contiguous property owner, and may grant protection against a cost recovery or contribution action. EPA believes these mechanisms should be used sparingly, because they are not necessary in order to confer liability protection on parties who meet the statutory criteria of a contiguous property owner.

Generally, EPA may provide a Section 107(q)(3) no action assurance letter when:

- | EPA receives a written request for such a letter from a landowner who demonstrates to the Agency that it meets the statutory criteria of a contiguous property owner; and
- | EPA has been involved at the landowner's property and/or the property from which there is a release or threat of release (EPA has conducted a response action there).

EPA may provide a Section 107(q)(3) settlement when:

- | the two assurance letter criteria listed above are met, and
- | the landowner has been sued under CERCLA by third parties, or can demonstrate a real and substantial threat of such litigation.

The authority to provide no action assurance letters or settlements under Section 107(q)(3) is delegated to the Regional Administrators, subject to the concurrence of the Assistant Administrator for Enforcement and Compliance Assurance.

QUESTIONS

Questions regarding this reference sheet or EPA's Contiguous Property Owner guidance should be directed to Cate Tierney in OSRE's Regional Support Division (202-564-4254, Tierney.Cate@EPA.gov) or to the Landowner Liability Protection Subgroup contacts listed by Region below.

Landowner Liability Protection Subgroup Regional Contacts

Region 1:	Joanna Jerison	617-918-1781
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Region 7:	Denise Roberts	913-551-7559
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This reference sheet is intended for 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. This reference sheet provides some highlights of EPA's "Interim Enforcement Discretion Guidance Regarding Contiguous Property Owners." It is not intended as a substitute for reading the statute or the guidance itself.