



U.S. Environmental Protection Agency



U.S.  
Department of Justice

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**SUBJECT:** Interim Enforcement Discretion Policy Concerning “Windfall Liens” Under Section 107(r) of CERCLA

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## I. INTRODUCTION

This memorandum discusses the United States Environmental Protection Agency's ("EPA" or "Agency") and the Department of Justice's ("DOJ") implementation of new Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") Section 107(r), the "windfall lien" provision of the Small Business Liability Relief and Brownfields Revitalization Act ("Brownfields Amendments"), P.L. 107-118. This interim policy describes how EPA and DOJ will generally exercise their enforcement discretion in the context of the new CERCLA § 107(r) windfall lien provision. However, because each situation will be fact-specific, EPA does not intend to restrict Regional discretion to make case-specific determinations at variance with EPA's general approach described herein.

This interim policy memorandum does three things:

- First, it articulates factors that may lead EPA and DOJ to assert a windfall lien and provides examples of situations where EPA will generally not pursue a windfall lien.
- Second, this memorandum describes EPA's and DOJ's approach to settling windfall liens. EPA will generally seek only the increase in fair market value attributable to EPA's response action that occurs after a bona fide prospective purchaser acquires a property. In addition, this memorandum discusses how the Agency will generally address situations where a bona fide prospective purchaser acquires a property with an existing CERCLA § 107(*l*) lien.
- Third, this memorandum discusses comfort/status letters and agreements that EPA may, in its discretion, provide to a bona fide prospective purchaser in order to address the bona fide prospective purchaser's windfall lien concerns. Samples of these documents are provided as Attachments A and B.

EPA and DOJ are issuing this memorandum as an interim policy and, as they gain additional experience in implementing the windfall lien provision, they may revise or amend this policy. EPA and DOJ welcome comments on the policy and its implementation. Comments may be submitted to the contacts identified at the end of this document.

## II. BACKGROUND

In enacting the Brownfields Amendments, Congress intended to promote the redevelopment and beneficial reuse of Brownfield sites and other contaminated or potentially contaminated properties.<sup>1</sup> As part of that effort, Congress provided liability protection under

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<sup>1</sup> A "brownfield site" is defined as "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant." CERCLA § 101(39)(A). The brownfield site definition also provides certain exclusions and inclusions identified in CERCLA § 101(39)(B)-(D).

CERCLA for bona fide prospective purchasers to encourage the purchase and reuse of contaminated properties. New CERCLA § 107(r) provides that bona fide prospective purchasers 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. In order to qualify as a bona fide prospective purchaser, an entity must meet the specified criteria found at CERCLA § 101(40)(A)-(H).<sup>2</sup>

EPA has previously issued guidance explaining EPA's view that, in most cases, the Brownfields Amendments make Prospective Purchaser Agreements ("PPAs") from the federal government, which provide a CERCLA covenant not to sue, unnecessary for bona fide prospective purchasers. See, "Bona Fide Prospective Purchasers and the New Amendments to CERCLA," Memorandum from Barry Breen, Director, Office of Site Remediation Enforcement, U.S. EPA, May 31, 2002 (hereinafter "May 2002 Bona Fide Prospective Purchaser Memorandum"). However, that guidance recognized that EPA may enter into a windfall lien resolution agreement with a purchaser if there is likely to be a significant windfall lien needing resolution.

Windfall liens will only arise where there is federal involvement at a site. Congress recognized that while there may be as many as 450,000 Brownfield sites nationwide, at the vast majority of them, there will be no federal involvement. See, e.g., S. Rep. No. 107-2, 107<sup>th</sup> Cong., 1<sup>st</sup> Sess., at 3. Bona fide prospective purchasers may acquire most of the hundreds of thousands of Brownfield sites without concerns about being pursued by the United States under CERCLA for unrecovered response costs. For those sites where there has been, or will be, federal involvement that results in EPA incurring response costs, a windfall lien may arise.<sup>3</sup> The United States has a windfall lien on the property in an amount, capped by the amount of unrecovered response costs, not to exceed the increase in fair market value attributable to the United States' response action. CERCLA § 107(r)(4). The windfall lien provision reflects Congress' intent that bona fide prospective purchasers should not be unjustly enriched and reap a windfall where taxpayer dollars are spent cleaning up the property and those taxpayer dollars lead to an increase in the fair market value of the property. See S. Rep. No. 107-2, 107<sup>th</sup> Cong., 1<sup>st</sup> Sess., at 13

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<sup>2</sup> This guidance addresses only those situations where an entity satisfies bona fide prospective purchaser criteria; if an entity does not satisfy the bona fide prospective purchaser criteria, the entity may be subject to full CERCLA liability and the property may be subject to a CERCLA § 107(l) lien for all unrecovered response costs. EPA has issued other guidances discussing the bona fide prospective purchaser criteria. See "Bona Fide Prospective Purchasers and the New Amendments to CERCLA," Memorandum from Barry Breen, Director, Office of Site Remediation Enforcement, U.S. EPA, May 31, 2002; "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")," Memorandum from Susan E. Bromm, Director, Office of Site Remediation Enforcement, U.S. EPA, March 6, 2003. Today's guidance does not affect EPA's intent to recover response costs from CERCLA liable parties.

<sup>3</sup> As noted below in Section III.A.1.b(3), where the only federal involvement is the expenditure of Brownfield grant or loan monies, EPA will generally not seek to perfect a windfall lien.

(windfall lien provision “prevents [bona fide prospective purchasers] from reaping a windfall due to the increase in property’s value as a result of the Federal Government’s cleanup efforts.”)

### III. DISCUSSION

#### A. EPA’s Windfall Lien Enforcement Discretion Policy

EPA’s implementation of the new CERCLA § 107(r) windfall lien provision raises two important questions. First, under what circumstances will EPA perfect a windfall lien against a property? Second, how does EPA intend to value that lien? This memorandum explains below how the Agency generally intends to exercise its enforcement discretion in answering each of these questions.<sup>4</sup> In addition, EPA explains how the Agency generally intends to address situations where a bona fide prospective purchaser acquires a property that is subject to a preexisting CERCLA § 107(l) lien. Exercising enforcement discretion involves evaluating a number of factors, including the status of a particular matter, allocation of Agency resources, potential litigation risk, potential cost recovery, and equitable considerations.

##### 1. To Perfect, or Not to Perfect

This memorandum provides factors that may lead EPA to perfect a windfall lien, and examples of situations where EPA will generally not seek to perfect a windfall lien.

##### a. *Factors That May Lead EPA to Perfect a Windfall Lien*

Factors that may lead EPA to perfect a windfall lien include:

- EPA has substantial unreimbursed cleanup costs which EPA is unlikely to recover from liable parties;
- There is a likelihood that a bona fide prospective purchaser will reap a significant windfall as a direct result of EPA’s expenditure of response costs at a site (e.g., EPA conducts a cleanup at a site during a bona fide prospective purchaser’s ownership);
- A real estate transaction, or series of transactions, structured so as to permit:

(a) a bona fide prospective purchaser to retain an increase in fair market value resulting from EPA’s cleanup action (e.g., a liable owner sells property to bona fide prospective purchaser at below fair market value); or (b) a liable owner to sell property to avoid the consequences of CERCLA liability (e.g., sales that avoid EPA perfection of CERCLA § 107(l) lien against the property or during the process of EPA perfection of a CERCLA

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<sup>4</sup> This memorandum provides EPA’s enforcement discretion policy and may not represent the United States’ approach in cases where EPA is not involved, but a federal agency other than EPA (e.g., Department of Interior, Department of Defense) has unreimbursed response costs.

lien).<sup>5</sup>

Depending on an evaluation of these and other relevant factors, EPA may perfect a windfall lien. EPA does not intend the factors above to be comprehensive or applicable in each instance. There may be additional relevant factors in particular situations and Regional personnel should evaluate all relevant factors in making individual decisions regarding windfall liens.

As explained below the Agency will generally not perfect a CERCLA § 107(r) lien on a property if all of the increase in fair market value attributable to EPA's response action occurs before a bona fide prospective purchaser acquired the property at fair market value. However, even under that scenario, EPA may file a windfall lien on the property where there are substantial unreimbursed costs, EPA's response action results in a significant increase in the property's fair market value, there are no viable, liable parties from whom EPA could recover its costs, and a response action occurs while the property is owned by a person who is exempt (other than a bona fide prospective purchaser) from CERCLA liability. In these instances, EPA's cleanup can result in a windfall, at taxpayer expense, for the CERCLA-exempt party while EPA still has substantial unreimbursed cleanup costs. Whether EPA will perfect a CERCLA § 107(r) lien and prevent a potential windfall in such instances will be determined by site-specific circumstances and the equities of the particular situation. For example, if a secured creditor forecloses on a property, is exempt from CERCLA liability under CERCLA § 101(20)(E), and holds the property while EPA conducts a cleanup that substantially increases the property's fair market value, EPA may file a CERCLA § 107(r) lien on the property and seek the increase in fair market value attributable to EPA's cleanup. This would be particularly appropriate where the amount the secured creditor would receive upon sale of the property would exceed its security interest.

b. *Situations Where EPA Will Generally **Not** Seek to Perfect a Windfall Lien*

As noted above, EPA has not been and will not be involved at the vast majority of Brownfield sites. If EPA does not incur any response costs at a site, EPA will not have a windfall lien on the property. However, even at sites where EPA has been or is involved and has incurred response costs, the Agency may decide not to perfect a windfall lien. This section provides examples of situations where, in an exercise of its enforcement discretion, the Agency will generally not perfect a windfall lien, notwithstanding the incurrence of some response costs. An EPA decision to not perfect a windfall lien does not affect EPA's intent to recover costs from CERCLA liable parties.

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<sup>5</sup> If a property transfer is fraudulent or designed to avoid CERCLA liability, the United States reserves, and this policy does not limit, the United States' legal remedies provided under CERCLA or other federal statutes, including remedies provided under the Federal Debt Collection Procedures Act, 28 U.S.C. 3301 *et. seq.*, against the seller or purchaser. Notably, a person may not be "affiliated with" any potentially responsible party at the site and maintain bona fide prospective purchaser status. See, CERCLA § 101(40)(H).

### (1) Post-Cleanup Acquisitions

EPA will generally not perfect a windfall lien where a bona fide prospective purchaser acquires the property at fair market value after cleanup.<sup>6</sup> Under the Brownfields Amendments, the windfall lien is measured by the increase in fair market value attributable to EPA's cleanup. Where a bona fide prospective purchaser acquires a property at fair market value post-cleanup, and no EPA response action occurs during the bona fide prospective purchaser's ownership, there is no potential windfall to the bona fide prospective purchaser. EPA would generally consider a post-cleanup acquisition to be an acquisition after completion of all EPA response activities, including operation and maintenance. There may be situations where some EPA site response activities remain to be completed after the acquisition, but those remaining site activities are expected to have zero or minimal impact on the fair market value of the property. Such situations would also be considered post-cleanup acquisitions solely for purposes of this policy.<sup>7</sup>

### (2) Previous Full Resolution of Potential Windfall

EPA will not typically perfect a windfall lien if EPA has resolved the liability of an owner, who is liable under CERCLA § 107(a)(1), pursuant to a settlement or successful recovery of response costs that took into account the full value of the property as if cleanup were complete, including any potential windfall from EPA's cleanup activity. Under these circumstances, EPA will generally not perfect a windfall lien that might arise by virtue of a bona fide prospective purchaser's subsequent acquisition of that property.

### (3) Specific Types of Expenditures

EPA will generally not perfect a windfall lien where EPA only spends money on the following two types of activities at a site. First, where EPA's only expenditures at a site are Brownfield grants or loans (i.e., assessment, cleanup, revolving loan fund, and job training monies), EPA will generally not perfect a windfall lien on the property.

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<sup>6</sup> As noted in Section III.A.1.a above, one exception to this approach may arise where a response action occurs while the property is held by a CERCLA-exempt party, there are no viable PRPs, EPA has substantial unreimbursed response costs, and EPA's cleanup results in a significant increase in the property's fair market value resulting in the potential for a significant windfall to the CERCLA-exempt party at taxpayers' expense.

<sup>7</sup> If EPA has filed a CERCLA § 107(l) or 107(r) lien on the property prior to a post-cleanup acquisition by a bona fide prospective purchaser, EPA expects that the CERCLA lien would normally be resolved at or around the time of the real estate transaction between the seller and the purchaser. If not, the value of the CERCLA lien will presumably be reflected in a reduced acquisition price, and EPA may separately pursue recovery pursuant to that lien after the post-cleanup acquisition. EPA's general approach in these situations is described below in Section III.A.2.

Second, where EPA's only costs are preliminary site assessment or site investigation ("PA" or "SI") costs, and EPA does not anticipate undertaking removal or remedial actions at the site, EPA will generally not perfect a windfall lien on the property.<sup>8</sup> EPA recognizes that EPA's performance of some limited investigation activities at a site could lead to concerns about a windfall lien and could have a chilling effect on a property sale. EPA hopes to ameliorate any such chilling effect by articulating its policy of generally not seeking imposition of a windfall lien at a site where the Agency's only costs are PA or SI costs.

#### (4) Specific Property Uses

When a bona fide prospective purchaser acquires a property that will be put to one of the following uses, EPA will generally not perfect a windfall lien on the property. First, where a bona fide prospective purchaser acquires property and uses it for residential purposes, and both the seller and purchaser are nongovernmental and noncommercial entities (i.e., a homeowner-to-homeowner sale), EPA will not, as a general matter, file a windfall lien on the property. This policy is consistent with Congress's objectives and EPA's previous policies regarding residential owners.<sup>9</sup>

Second, where a bona fide prospective purchaser acquires a property for the creation or preservation of a public park or similar public purpose, EPA will generally not perfect a windfall lien. Congress has encouraged the use of Brownfield grants and loans at sites that involve "the creation of, preservation of, or addition to a park, a greenway, undeveloped property, recreational property, or other property used for nonprofit purposes." CERCLA § 104(k)(5)(c)(v). Moreover, if a bona fide prospective purchaser uses the property in this manner, it will not likely reap a significant windfall. Thus, where a bona fide prospective purchaser is acquiring the property for the creation or preservation of public greenspace or for public recreational purposes, EPA will generally not perfect a windfall lien at that property.<sup>10</sup> In

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<sup>8</sup> Where EPA performs, or anticipates performing, a removal or remedial action after the PA or SI, perfecting a windfall lien may be appropriate.

<sup>9</sup> Both EPA and Congress have sought to give special consideration to residential property owners that are confronted with potential CERCLA liability. EPA previously announced its policy of generally not pursuing enforcement actions against residential owners of contaminated property, who did not cause the contamination. See "Policy Towards Owners of Residential Property at Superfund Sites," Memorandum from Don Clay, Assistant Administrator, Office of Solid Waste and Emergency Response (OSWER), and Raymond Ludwiszewski, Acting Assistant Administrator, Office of Enforcement, July 3, 1991 ("Residential Property Owner Policy"). The Brownfields Amendments provide relief for bona fide prospective purchasers of residential property by providing a less stringent "all appropriate inquiry" standard for nongovernmental, noncommercial bona fide prospective purchasers of residential property. CERCLA § 101(35)(B)(v).

<sup>10</sup> As noted above, EPA will generally not perfect a windfall lien where EPA's only response costs at the site are Brownfield grant or loan expenditures.



appropriate cases, Regions may seek evidence of deed restrictions or other written assurances that ensure such future uses. If the use for public greenspace or public recreation is temporary, and the property is later converted to a different use, EPA may consider perfecting a windfall lien on the property.

(5) Full Cost Recovery From Potentially Responsible Parties (PRPs)

In appropriate circumstances, where there is a substantial likelihood that EPA will recover all of its cleanup costs from liable parties, the Agency will generally not perfect a windfall lien on the property. For example, where EPA has entered a consent decree or settlement agreement with PRPs that provides for full recovery of response costs and implementation of the remedy (e.g., an RD/RA consent decree), EPA will generally not perfect a windfall lien on the property.

(6) Applicability of Enforcement Discretion Policies

EPA has previously identified circumstances where the Agency will exercise its enforcement discretion and generally not pursue current landowners for CERCLA cleanup or cost recovery (e.g., Residential Property Owner Policy; “Policy Towards Owners of Property Containing Contaminated Aquifers,” Memorandum from Bruce M. Diamond, Director, Office of Site Remediation Enforcement, May 24, 1995 (“Contaminated Aquifers Policy”). Where one of these enforcement discretion policies would apply to a bona fide prospective purchaser, the Agency will generally not perfect a windfall lien against the property. For example, if a party meeting the bona fide prospective purchaser criteria acquires property that falls within EPA’s “Contaminated Aquifers Policy,” the Agency would generally not perfect a windfall lien against the property. Similarly, if the seller of the property had previously received a “No Current Superfund Interest” comfort/status letter explaining that EPA does not anticipate taking further response action at the site, then EPA would generally not seek to perfect a lien on the property.<sup>11</sup> Generally, acquisition of the property by a bona fide prospective purchaser, standing alone, should not change EPA’s enforcement approach with respect to the property.

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<sup>11</sup> EPA enforcement discretion policies and EPA comfort/status letters are typically conditional in that they are based on the information available at the time, and if such conditions change, then the Agency’s expectations may change as well. For example, if EPA spends significant amounts cleaning up a site during a bona fide prospective purchaser’s ownership - an occurrence not anticipated at the time a comfort/status letter was issued to the former owner - then EPA may pursue a windfall lien against the bona fide prospective purchaser.

## 2. Settling With Bona Fide Prospective Purchasers

This section discusses EPA's and DOJ's general approach to settling CERCLA § 107(r) windfall liens in those situations where EPA has filed or will file a windfall lien on a property. Unlike the CERCLA § 107(l) lien, the CERCLA § 107(r) windfall lien is not for the entirety of EPA's unrecovered response costs. Instead, the windfall lien is for "an amount not to exceed the increase in fair market value of the property attributable to the response action at the time of a sale or other disposition of the property." CERCLA § 107(r)(4)(A). A windfall lien arises "at the time at which costs are first incurred by the United States with respect to a response action at the facility." CERCLA § 107(r)(4)(B). The Agency's general conceptual approach to valuing the windfall lien and general approach to calculating the increase in fair market value attributable to EPA's cleanup are discussed below. EPA also discusses how the Agency will generally address situations where a bona fide prospective purchaser acquires a property subject to an existing CERCLA § 107(l) lien.

### a. *EPA's Windfall Lien Valuation Approach*

As an exercise of its enforcement discretion in settlement of CERCLA § 107(r) liens and consistent with the principles outlined in the prior section, EPA will generally seek only the increase in fair market value attributable to a response action that occurs after a bona fide prospective purchaser acquires the property at fair market value.<sup>12</sup> As noted above, in enacting the windfall lien provision, Congress sought to avoid windfalls at taxpayers' expense. By providing bona fide prospective purchasers with protection from CERCLA liability, Congress also sought to encourage beneficial reuse of contaminated properties. EPA believes an enforcement discretion settlement policy of generally seeking only the increase in fair market value that occurs after a bona fide prospective purchaser assumes ownership strikes the appropriate balance between these objectives. If there is not a CERCLA § 107(l) or 107(r) lien already filed on the property, bona fide prospective purchasers should be able to acquire property with the understanding that EPA will usually seek only the increase in value that results from EPA's expenditure of Superfund response costs on the property after a purchaser acquires the property. This approach should provide a level of certainty to bona fide prospective purchaser property transactions, and should also prevent bona fide prospective purchasers from reaping a windfall due to EPA's cleanup efforts. The following examples help illustrate this settlement approach.

EXAMPLE: EPA spends \$2,000,000 cleaning up a property, increasing its value from \$1,000,000 to \$2,000,000. A bona fide prospective purchaser then purchases the property, at fair market value, for \$2,000,000. After the bona fide prospective purchaser's purchase, EPA spends an additional \$1,000,000 cleaning up the site that results in a \$500,000 increase in the fair market value of the property.

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<sup>12</sup> EPA's policy of seeking only the increase in fair market value after a bona fide prospective purchaser acquires the property will not necessarily apply if EPA is required to litigate to enforce the CERCLA § 107(r) lien against the property.

EPA will, through the section 107(r) lien, generally seek only the \$500,000 increase attributable to EPA's response action that occurred after the bona fide prospective purchaser acquired the property.

If a bona fide prospective purchaser acquires property where a CERCLA § 107(r) lien has already been filed on the property, EPA expects that, in most instances, the CERCLA § 107(r) lien will be resolved directly with EPA as part of the transaction between the bona fide prospective purchaser and the seller. If the bona fide prospective purchaser does not resolve the existing lien when acquiring the property, EPA will generally seek the value of the unresolved lien from the bona fide prospective purchaser. For example, where the purchase price of the property is reduced to reflect an existing CERCLA § 107(r) lien on the property, a bona fide prospective purchaser could reap a windfall based on EPA's past cleanup activities at the site.

EXAMPLE: Prior to any EPA cleanup, bona fide prospective purchaser A buys a contaminated property for its fair market value of \$750,000. EPA subsequently spends \$500,000 on a cleanup that increases the fair market value of the property to \$1,000,000 and files a CERCLA § 107(r) lien on the property. Bona fide prospective purchaser A sells the property to bona fide prospective purchaser B at a reduced value of \$750,000, reflecting EPA's lien encumbrance.

Bona fide prospective purchaser B purchased at the reduced purchase price reflecting EPA's existing CERCLA § 107(r) lien. EPA would generally seek the \$250,000 reflecting the value of the pre-existing CERCLA § 107(r) lien on the property.

Consistent with preventing bona fide prospective purchaser windfalls at taxpayer expense, if a bona fide prospective purchaser acquires a property at below fair market value, then EPA may seek any windfall due to EPA's cleanup action at the site. Again, EPA's intent is to ensure that its policy does not unnecessarily restrict property transfers, but also avoids creating incentives for transactions that will result in windfalls at taxpayer expense.

EXAMPLE: EPA spends \$3,000,000 on a property, increasing its value from \$1,000,000 to \$2,000,000. A bona fide prospective purchaser then purchases the \$2,000,000 property for \$500,000. After the bona fide prospective purchaser assumes ownership, EPA spends an additional \$1,000,000 cleaning up the site that results in an additional \$500,000 increase in the fair market value of the property, bringing the property's fair market value up to \$2,500,000.

Because the bona fide prospective purchaser is reaping a windfall due to EPA's cleanup work that occurred both pre- and post-purchase, EPA may seek the \$1,500,000 increase in property value resulting from EPA's pre-purchase work (which produced a \$1,000,000 fair market value increase) and post-purchase work (which produced a \$500,000 fair market value increase).

As a general matter, the Agency will scrutinize property transactions that appear to be at

significantly less than fair market value or otherwise appear to not be arms length transactions. In particular, EPA will generally examine a transaction or series of transactions that appear to provide a windfall for the bona fide prospective purchaser, or appear structured to limit EPA's recourse against a liable seller (e.g., a transaction that limits the amount EPA can recover from a seller by disposing of one of the seller's most valuable assets: the property; or a transaction to evade CERCLA §107(l) or 107(r) lien perfection.)

EPA will generally exercise enforcement discretion in settling a CERCLA § 107(r) lien and not seek the increase in fair market value that occurs prior to acquisition by a bona fide prospective purchaser if that acquisition is at fair market value. However, as noted above at section III.A.1.a, EPA may file a CERCLA § 107(r) lien on a property where EPA has substantial unreimbursed response costs, there is no viable liable party from whom EPA could recover its costs, a response action occurs during ownership by a CERCLA-exempt party, and EPA's cleanup results in a significant increase in the property's fair market value. In this instance, EPA may, depending on the specific site circumstances and equities, seek the increase in fair market value that occurred prior to ownership by the bona fide prospective purchaser to avoid a potential windfall at taxpayer expense.

b. *Determining the Increase in Fair Market Value After A Bona Fide Prospective Purchaser Acquires the Property*

Where an EPA cleanup continues or occurs after the property is acquired by a bona fide prospective purchaser, EPA intends to calculate the increase in fair market value attributable to an EPA response action after that acquisition by comparing the fair market value of the property as if cleanup were complete to the fair market value of the property when acquired, presumably the bona fide prospective purchaser's acquisition price. EPA's general approach would consider the difference between those two values as representing the fair market value increase fairly attributable to future EPA response actions at the site. EPA recommends that bona fide prospective purchasers who believe there is a potential for a significant windfall obtain a reliable estimate of what the property's fair market value would be if the cleanup were complete. In most cases, this estimate should be based on a real estate appraisal by a trained professional.<sup>13</sup>

EPA understands that some bona fide prospective purchasers may want to resolve any potential windfall lien on the property at or around the time they acquire the property. As noted in the May 2002 Bona Fide Prospective Purchaser Memorandum, where there is the potential for a significant windfall lien and resolution of the lien is necessary for the transaction to go forward, EPA recognizes that a windfall lien resolution agreement with a bona fide prospective purchaser might be appropriate. Where this is the case, EPA strongly encourages resolving the windfall lien concerns associated with the property at or around the time the bona fide

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<sup>13</sup> In some circumstances, other credible mechanisms of the property's value as if clean might be appropriate (e.g., tax appraisal or information from neutral professional real estate brokers).

prospective purchaser acquires the property.<sup>14</sup> Resolving the potential windfall lien at this point should remove the cloud on the property's title and allow for free alienability in the future. To assist in resolving the amount of the windfall lien, a bona fide prospective purchaser should be prepared to provide EPA with a real estate appraisal prepared by a licensed appraiser, or similarly reliable estimate, of the fair market value of the property as if cleanup were complete.<sup>15</sup>

c. *Existing CERCLA § 107(l) Liens*

EPA generally seeks to limit the CERCLA § 107(r) lien exposure to the windfall a bona fide prospective purchaser might receive from EPA's cleanup. At the same time, EPA wants to avoid creating incentives for liable parties to structure transactions in such a way as to avoid their CERCLA liability. One mechanism to avoid creating such incentives is EPA's use of the CERCLA § 107(l) lien authority. Consistent with EPA's longstanding policies on the use of CERCLA § 107(l) liens, where EPA is concerned that a liable party may try to transfer its property to a bona fide prospective purchaser in an effort to avoid CERCLA liability, EPA should consider perfecting a CERCLA § 107(l) lien on the property.<sup>16</sup> Perfecting the CERCLA § 107(l) lien reduces the ability of a liable party to avoid its CERCLA liability for site response costs and helps protect bona fide prospective purchasers from acquiring property with substantial liabilities attached to it.<sup>17</sup>

Where a bona fide prospective purchaser acquires a property that is subject to an existing, perfected CERCLA § 107(l) lien, EPA expects that, in most instances, the CERCLA § 107(l) lien would be resolved directly with EPA as part of the transaction between the liable owner and the bona fide prospective purchaser. That is, EPA would be paid the value of the CERCLA § 107(l)

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<sup>14</sup> In order to qualify as a bona fide prospective purchaser, a person must conduct "all appropriate inquiry" under CERCLA § 101(35)(B) and should know of any prior EPA involvement at the site and the possibility of a windfall lien.

<sup>15</sup> As noted in an earlier EPA guidance, a valuation of the property as if cleanup were complete should take into account: costs to maintain the remedy, health and safety requirement compliance costs, limitations on future use during and after cleanup, and superior liens. See "Support of Regional Efforts to Negotiate Prospective Purchaser Agreements (PPAs) at Superfund Sites and Clarification of PPA Guidance," Memorandum from Barry Breen, Director, Office of Site Remediation Enforcement, U.S. EPA and Bruce Gelber, Chief, Environmental Enforcement Section, Environment and Natural Resources Division, U.S. Department of Justice, January 10, 2001.

<sup>16</sup> For CERCLA § 107(l) lien guidance, see "Guidance on Federal Superfund Liens," Memorandum from Thomas L. Adams, Jr., Assistant Administrator, Office of Enforcement and Compliance Monitoring, September 22, 1987; "Supplemental Guidance on Federal Superfund Liens," Memorandum from William A. White, Enforcement Counsel, Office of Enforcement/Superfund, and Bruce M. Diamond, Director, Office of Waste Programs Enforcement, July 29, 1993.

<sup>17</sup> While EPA could still maintain a CERCLA § 107 action against the seller, EPA's ability to collect from that party may be diminished if the seller's only and/or most valuable asset is the property.

lien when the bona fide prospective purchaser acquires the property from the seller. If the CERCLA § 107(l) lien is not resolved as part of the property sale, and if EPA has unreimbursed cleanup costs, EPA may subsequently seek enforcement of the CERCLA § 107(l) lien against the property during the bona fide prospective purchaser's ownership. Assuming the price of the property is reduced in recognition of EPA's existing lien on the property, absent enforcement of the CERCLA 107(l) lien, the bona fide prospective purchaser could reap a windfall based on EPA's past cleanup activities at the site. The following example illustrates EPA's approach where there is an existing CERCLA § 107(l) lien.

EXAMPLE: EPA spends \$1,000,000 cleaning up a property and increases the value of the property from \$2,000,000 to \$2,500,000. EPA perfects a CERCLA § 107(l) lien on the property. A current liable owner/operator then sells the property to a bona fide prospective purchaser at a reduced value of \$1,500,000, reflecting EPA's lien encumbrance.

Because the bona fide prospective purchaser bought at the reduced purchase price that reflects EPA's existing CERCLA § 107(l) lien, to avoid a windfall to the bona fide prospective purchaser, EPA could seek from the bona fide prospective purchaser the \$1,000,000 reflecting the value of the pre-existing CERCLA § 107(l) lien on the property through: (1) an *in rem* action against the property; or (2) settlement with the bona fide prospective purchaser.

## B. Vehicles for Addressing Windfall Lien Liability Concerns

### 1. Comfort/Status Letters for Situations Where EPA Will Generally Not Pursue a Windfall Lien

EPA intends this policy to limit the need for EPA involvement in private real estate transactions by setting forth the Agency's enforcement discretion approach to implementation of the windfall lien provision, CERCLA § 107(r). However, there may be situations where it will be appropriate for EPA to provide more site-specific information to interested parties. EPA's "Policy on Issuance of Comfort/Status Letters" identifies the circumstances where it is appropriate to provide a "comfort/status" letter to facilitate Brownfields redevelopment.<sup>18</sup> The Comfort/Status Letter policy recognizes that there are instances where concerns over Superfund liability can impede Brownfields redevelopment and that providing an interested party with such a letter can be appropriate if "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." 62 Fed. Reg. at 4,624. EPA developed four sample comfort/status letters for addressing some common

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<sup>18</sup> "Policy on the Issuance of Comfort/Status Letters," Memorandum from Steven A. Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance, November 8, 1996; reprinted at 62 Fed. Reg. 4,624 (Jan. 30, 1997) (hereinafter "Comfort/Status Letter policy").

inquiries regarding contaminated properties. Comfort/status letters have generally provided a quick and inexpensive method for facilitating property reuse.<sup>19</sup>

As noted above, EPA intends this policy, by identifying situations where EPA will generally not pursue a windfall lien, to greatly mitigate the need for site specific responses in most instances. However, there may be site-specific circumstances where it may be appropriate for Regions to provide a comfort/status letter consistent with EPA's Comfort/Status Letter policy. Of course, where there has been no federal response action at a site, there will be no windfall lien, and no need for a comfort/status letter or other document from EPA regarding the windfall lien provision in order to facilitate the sale of the property.<sup>20</sup>

For properties "that have been archived and removed from the CERCLIS inventory of Superfund sites," a "No Current Superfund Interest Letter" may be appropriate. 62 Fed. Reg. 4,625. This letter lets a party know that EPA does not anticipate taking any further response action, including enforcement action, and why.<sup>21</sup>

A "Federal Superfund Interest Letter" may be appropriate where EPA has incurred some response costs, but will most likely not seek to perfect a windfall lien (see Section III.A.1.b.(1)-(6), above). The Federal Superfund Interest Letter can be used to provide an interested party with EPA's view regarding the application of an EPA Superfund policy to "a party's particular set of circumstances." Id. at 4,626.<sup>22</sup> This type of comfort/status letter can be used for sites that are in CERCLIS, sites undergoing a federal removal or remedial action, and/or sites where EPA has or will incur response costs. To the extent a party falls under the circumstances identified in

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<sup>19</sup> See "U.S. EPA's Prospective Purchaser Agreements and Comfort/Status Letters: How Effective Are They? Findings, Benefits, and Suggested Improvements, Final Report," U.S. EPA, Office of Site Remediation Enforcement, Publication # 330R00002, September 29, 2000, at pp. 14, 17.

<sup>20</sup> EPA's Comfort/Status Letter policy does, however, identify a type of comfort/status letter for use in such situations (i.e., a "No Previous Federal Superfund Interest Letter"). Moreover, where a State has been or will be the lead for day-to-day activities and oversight of a response action, Regions should handle responses consistent with the Comfort/Status Letter policy (e.g., use of a "State Action" comfort/status letter).

<sup>21</sup> EPA archives a site if: " a) no contamination was found at the site; b) the site, while contaminated, neither met the criteria for inclusion on the NPL nor required any EPA response action; or c) contamination was removed quickly without the need to place the site on the NPL; **and** d) EPA has completed its cost recovery action for the site." 62 Fed. Reg. at 4,625.

<sup>22</sup> This memorandum does not supercede the Comfort/Status Letter policy, but merely identifies those circumstances where application of that policy may be appropriate in the windfall lien context. In issuing a comfort/status letter, EPA will continue to apply the guidelines provided in the Comfort/Status Letter policy and recommends review of that policy in instances where Regions are considering a comfort/status letter to address a party's windfall lien concerns.

this memorandum where EPA will generally not seek to perfect a windfall lien, a Federal Superfund Interest Letter could be provided, if appropriate, with a reference to this policy and language indicating EPA does not intend to file a windfall lien. Use of such letters should, however, be limited to:

situations where the requesting party provides information that 1) a project found to be in the public interest (e.g., an economic redevelopment project) is hindered or the value of a property is affected by the potential for Superfund liability, and 2) there is no other mechanism available to adequately address the party's concerns other than a letter from EPA with a statement regarding the applicability of a specific Superfund policy, statutory provision or regulation.

Id. EPA is providing a sample Federal Superfund Interest Letter for CERCLA § 107(r) Windfall Liens as Attachment A. Where a State has been or will be involved at a site, EPA should coordinate with the State prior to issuing such a Comfort/Status letter.

2. Windfall Lien Resolution Documents for Situations Where EPA is Likely to Pursue a Windfall Lien

The Agency anticipates that in those situations where EPA has or will have unrecovered cleanup costs, a bona fide prospective purchaser will reap a windfall, and EPA is likely to pursue a windfall lien, a bona fide prospective purchaser may want to satisfy any existing and potential future windfall lien prior to or relatively coincident with their acquisition. Congress specifically provided EPA with the authority to resolve windfall lien exposure. CERCLA § 107(r)(2) states that the United States “shall have a lien on the facility, or *may by agreement with the owner, obtain from the owner a lien on any other property or other assurance of payment satisfactory to the Administrator, for the unrecovered response costs.*” Thus, Congress explicitly recognized that EPA can address the potential windfall through an agreement with the bona fide prospective purchaser at or around the time of the transaction.<sup>23</sup> EPA and DOJ have developed a model document to facilitate resolution of windfall liens that is attached hereto as Attachment B.

#### IV. CONCLUSION

In identifying how EPA generally intends to exercise its enforcement discretion in deciding when and when not to perfect a windfall lien, as well as describing the Agency's approach to valuing a windfall lien when perfected, it is EPA's intent to achieve national

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<sup>23</sup> The Brownfield Amendments allow EPA to address the windfall after a purchase takes place, without the bona fide prospective purchaser becoming liable as an owner under CERCLA § 107(a)(1). Prior to the Brownfield Amendments, EPA addressed CERCLA liability concerns of purchasers through Prospective Purchaser Agreements (PPAs), which were not available after the purchase of the property. Thus, the Brownfield Amendments help alleviate the timing issues surrounding coordination of the real estate transaction with the signing of a PPA. See May 2002 Bona Fide Prospective Purchaser Memorandum.



consistency and provide an understanding of EPA's implementation approach. Consistent with past EPA policies and practices, EPA is also identifying mechanisms that can be used to resolve CERCLA liability concerns.

As noted at the outset, EPA and DOJ are issuing this memorandum as an interim policy and will use the experience gained in implementation to decide whether to revise or amend this policy in the future. Anyone interested in providing comments on this policy, or its implementation, is invited to do so by submitting comments to EPA or DOJ.

If you have any questions or comments regarding this policy, please contact, at EPA, Greg Madden at (202) 564-4229 or at [madden.gregory@epa.gov](mailto:madden.gregory@epa.gov); if you have site-specific implementation questions, please contact Helen Keplinger at (202) 564-4221 or at [keplinger.helen@epa.gov](mailto:keplinger.helen@epa.gov). You can also contact, at DOJ, Henry Friedman at (202) 515-5268 or at [henry.friedman@usdoj.gov](mailto:henry.friedman@usdoj.gov) or Alan Tenenbaum at (202) 514-5409 or at [alan.tenenbaum@usdoj.gov](mailto:alan.tenenbaum@usdoj.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 and DOJ will apply the guidance only to the extent appropriate based on the facts.

### Attachments

cc: Brownfields Amendments Implementation Steering Committee  
Paul Connor (OSRE)  
Sandra Connors (OSRE)  
Thomas Dunne (OSWER)  
Benjamin Fisherow (DOJ)  
Linda Garczynski (OSWER)  
Steve Luftig (OSWER)  
Earl Salo (OGC)  
EPA Brownfields Landowner Liability Protection Subgroup

## Attachment A

### Sample Federal Superfund Interest Letter for CERCLA § 107(r) Windfall Lien

[Insert Addressee]

Re: [Insert name or description of property]

Dear [Insert name of party]:

I am writing in response to your correspondence of [insert date] concerning the property referenced above. My response is based upon the facts presently known to the United States Environmental Protection Agency (“EPA”).

As you may know, the above-referenced property is located within or near the [insert name of CERCLIS site.] EPA is currently taking [insert description of any action that EPA is taking or plans to take and any contamination problem.]

**[For situations when a party provides information showing that 1) a project found to be in the public interest is hindered or the value of a property is affected by the potential for a CERCLA § 107(r) windfall lien, 2) there is no other mechanism available to adequately address the party's concerns, and 3) it falls within one of the circumstances identified in the Windfall Lien Policy where EPA would generally not perfect a windfall lien, insert the following]**

The [date] “EPA Interim Enforcement Discretion Policy Concerning “Windfall Liens” Under Section 107(r) of CERCLA” (“Windfall Lien Policy”), provides that EPA, in an exercise of its enforcement discretion, will generally not perfect a CERCLA § 107(r) windfall lien when the conditions and criteria described in the Windfall Lien Policy are met. Based upon the information currently available to EPA, EPA believes that the Windfall Lien Policy applies to [you/your situation]. Specifically, EPA believes that, consistent with the Windfall Lien Policy, your situation falls under the [insert reason set forth in the guidance] section of the guidance and EPA does not intend to file a windfall lien on the property [optional - depending on which reason for not filing windfall lien may want to include the following: unless new information not previously known to EPA is discovered]. I am enclosing a copy of the Windfall Lien Policy for your review.

EPA hopes that the above information is useful to you. [Optional--In addition, we have included a copy of our latest fact sheet for the (insert name of site.)] Further, we direct your attention to the [insert location of site local records repository] at which EPA has placed a copy of the Administrative Record for this site. This letter is provided solely for informational

purposes and does not provide a release from CERCLA liability. If you have any questions, or wish to discuss this letter, please feel free to contact **[insert EPA contact and address]**.

Sincerely,

Regional Contact

Enclosure

**Attachment B**

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION \_\_\_\_

IN THE MATTER OF: [name	)	
of Superfund Site]	)	
	)	[ Docket Number]
	)	Agreement for Release and Waiver
	)	of Lien, CERCLA § 107(r)
UNDER THE AUTHORITY OF THE	)	
COMPREHENSIVE RESPONSE,	)	[Insert Settling Purchaser's Name]
COMPENSATION, AND LIABILITY ACT,	)	
42 U.S.C. §§ 9601, <i>et seq.</i>	)	

**I. INTRODUCTION**

**[The purpose of this model is to provide a sample document which may be used to release and waive any windfall lien, arising under Section 107(r) of CERCLA with respect to a bona fide prospective purchaser, through the payment of cash or other appropriate consideration. This model assumes that in most cases a Section 107(r) lien has not been perfected. Where the Section 107(r) lien has been perfected, it will be necessary to execute an additional document to file in the recorder’s office where the lien was perfected. There may be a situation where it will also be appropriate to address a perfected Section 107(l) lien through this model, and additional language must be included for that purpose. The authority to enter Agreements for Release and Waiver of Lien, CERCLA § 107(r), has been delegated to the Regional Administrators. Exercise of this authority requires consultation with OECA/OSRE.]** This Release and Waiver of Lien Agreement (“Agreement”) is made and entered into by and between the Environmental Protection Agency (“EPA”) and \_\_\_\_\_

[insert name of the Settling Purchaser] (“Name”) (collectively, the “Parties”).

This Agreement is entered into pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”), 42 U.S.C. §§ 9601, *et seq.*

**[Provide introductory information, consistent with the Definitions and Statement of Facts, about the property to which the release and waiver of lien will be applicable (“Property”) including, name, address, location, and description of Property, and also provide information about the Settling Purchaser, including name, address and corporate status, if applicable. If Property is part of a larger, or smaller, Site (“Site”) explain the relationship of Property to Site and include size and description of each.]**

The Parties agree to undertake all actions required by the terms and conditions of this Agreement. The purpose of this Agreement is to settle and resolve, subject to Section VIII, Reservation of Rights, the lien against the Property under Section 107(r) of CERCLA, 42 U.S.C. § 9607(r).

The release and waiver of this lien, in exchange for provision by the Settling Purchaser to EPA of consideration satisfactory to the Administrator, is in the public interest.

## II. DEFINITIONS

1. “Bona Fide Prospective Purchaser” or “BFPP” shall mean a person as described in CERCLA § 101(40).

2. “EPA” shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

3. “Parties” shall mean EPA and \_\_\_\_\_.

4. "Property" shall mean the parcel, encompassing approximately \_\_ acres, located at

[address] in City, \_\_\_\_\_, State or Commonwealth of \_\_\_\_\_, which is described in Exhibit 1, and shown on the map included as Exhibit \_\_\_ to this Agreement.

5. "Settling Purchaser" shall mean \_\_\_\_\_.
6. "Site" shall mean the \_\_\_\_\_ Superfund Site.
7. "United States" shall mean the United States of America, including its departments, agencies, and instrumentalities.

### III. STATEMENT OF FACTS

7. **[Include only those facts relating to the Property that are relevant to the lien being released and waived, including how response costs incurred or to be incurred gave rise to a lien. Avoid adding information that relates only to actions or parties that are outside of this Agreement.]**

### IV. PAYMENT

8. In consideration of and in exchange for EPA's release and waiver of any lien it has or may have under Section 107(r) of CERCLA with respect to the Property, Settling Purchaser agrees, within \_\_\_\_ days of the effective date of this Agreement **[if EPA is resolving a perfected lien, payment may instead need to be made at the closing date]**, to pay to EPA the sum of \$ \_\_\_\_\_. Settling Purchaser shall make all payments required by this Agreement in the form of a certified check or checks made payable to "EPA Hazardous Substance Superfund," referencing the EPA Region, EPA Docket number, and Site/Spill ID# \_\_\_\_\_, [DOJ case number \_\_\_\_\_, **if applicable**] and name and address of Settling Purchaser. Payment shall be sent to [insert Regional Superfund Lockbox address where payment should be sent]. Notice of

payment shall be sent to the EPA Region \_\_\_\_ Financial Management Officer [insert address]<sup>1</sup>.

9. Amounts due and owing pursuant to the terms of this Agreement, but not paid in accordance with the terms of this Agreement, shall accrue interest at the rate established pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), compounded on an annual basis.

#### V. RELEASE AND WAIVER OF SECTION 107(r) LIEN

10. Subject to the Reservation of Rights in Section VIII of this Agreement, upon payment of the amount specified in Section IV, Payment, EPA agrees to release and waive any lien it may have on the Property now and in the future under Section 107(r) of CERCLA, 42 U.S.C. § 9607(r), for costs incurred or to be incurred by EPA in responding to the release or threat of release of hazardous substances that were disposed of at the Site before Settling Purchaser acquired ownership of the Property.

#### VI. ACCESS/NOTICE /INSTITUTIONAL CONTROLS

**11. [Whether or not to add this Section VI, Access/Notice/Institutional Controls, is within the Region’s discretion based upon site-specific considerations. Adding this Section gives the Region the option to go into more detail than is obtained by relying upon the statute alone. Once the cleanup is complete, the provisions requiring the Settling Purchaser to**

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<sup>1</sup> This model is written for payment of cash only, but there may be a situation where performing work or providing other assurance of payment satisfactory to the Administrator would be appropriate. If work or other assurance of payment is accepted as consideration, other sections of this model would also need to be revised as appropriate. Where the Section 107(r) lien is resolved prior to completion of site work, there may be situations where a Special Account should be established to help fund future work. Whether to establish a Special Account should be worked out in advance of receipt of any money. The following language may be added to the Section IV, **Payment:** [The total amount paid by [Settling Purchaser name] pursuant to this Agreement shall be deposited into [Site name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or transferred by EPA to the EPA Hazardous Substance Superfund.]

**“ensure” access may no longer be necessary and may be allowed to expire in appropriate situations. ]** Settling Purchaser agrees to provide EPA, its authorized officers, employees, representatives, and all other persons performing response actions under EPA oversight, an irrevocable right of access at all reasonable times to the Property and to any other property to which access is required for the implementation of response actions at the Property, to the extent access to such other property is controlled by Settling Purchaser, for the purposes of performing and overseeing response actions at the Property under federal law. EPA agrees to provide reasonable notice to Settling Purchaser of the timing of response actions to be undertaken at the Property. Notwithstanding any provision of this Agreement, EPA retains all of its access authorities and rights, including enforcement authorities related thereto, under CERCLA, and the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 U.S.C. § 6901(“RCRA”), *et seq.*

12. Settling Purchaser shall submit to EPA for review and approval a notice to be filed with the Recorder’s Office [**or Registry of Deeds or other appropriate office**], \_\_\_\_\_ County, State or Commonwealth of \_\_\_\_\_, which shall provide notice to all successors-in-title that the Property is part of the Site, [that EPA filed a lien under Section 107(r) of CERCLA, Instrument Number \_\_\_\_\_, on Date \_\_\_\_\_] [that EPA selected a remedy for the Site on \_\_\_\_\_, and that potentially responsible parties have entered a Consent Decree requiring implementation of the remedy] [that EPA is performing/ performed a response action at the Site], and that EPA has released and waived its Section 107(r) lien on the Property in this Agreement. [Such notice(s) shall identify the United States District Court in which the Consent Decree was filed, the name and civil action number of the case, and the



date the Consent Decree was entered by the Court.] The Settling Purchaser shall record the notice(s) within \_\_\_\_ days of EPA's approval of the notice(s). The Settling Purchaser shall provide EPA with a certified copy of the recorded notice(s) within \_\_\_\_ days of recording such notice(s).<sup>2</sup>

13. Settling Purchaser shall implement and comply with any land use restrictions and institutional controls on the Property in connection with a response action.<sup>3</sup>

14. For so long as the Settling Purchaser is an owner or operator of the Site, Settling Purchaser shall ensure that assignees, successors in interest, and any lessees, sublessees and other parties with rights to use the Property shall provide access and cooperation to EPA, its authorized officers, employees, representatives, and all other persons performing response actions under EPA oversight. Settling Purchaser shall ensure that assignees, successors in interest, and any lessees, sublessees, and other parties with rights to use the Property implement and comply with any land use restrictions and institutional controls on the Property in connection with a response action.

15. **[Any requirement concerning institutional controls must survive property transfer, unless the particular institutional control is for a specifically limited period of time.]** Upon sale or other conveyance of the Property or any part thereof, Settling Purchaser shall require that each grantee, transferee or other holder of an interest in the Property or any part thereof shall provide access and cooperation to EPA, its authorized officers, employees, representatives, and all

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<sup>2</sup> **Regions negotiating Lien Release and Waiver Agreements for Sites that may be owned by one person but controlled by another should discuss appropriate language for this Paragraph with Headquarters.**

<sup>3</sup> **Where appropriate, Regions should consider defining institutional controls, in particular at properties where institutional controls have been specifically set forth in, for example, a Record of Decision (ROD).**

other persons performing response actions under EPA oversight. Settling Purchaser shall ensure that each grantee, transferee or other holder of an interest in the Property or any part thereof shall implement and comply with any land use restrictions and institutional controls on the Property in connection with a response action.

16. The Settling Purchaser shall provide a copy of this Agreement to any current lessee, sublessee, and other party with rights to use the Property as of the effective date of this Agreement.

#### VII. BFPP STATUS

17. Settling Purchaser shall take and maintain all steps necessary to achieve and maintain status as a “Bona Fide Prospective Purchaser” as that term is defined in Section 101(40) of CERCLA 42 U.S.C. § 9601(40), for the Property which is the subject of this Agreement, by complying with all of the requirements for a Bona Fide Prospective Purchaser as set forth in Section 101(40), including, without limitation, the exercise of “appropriate care” by taking “reasonable steps” as set forth in Section 101(40)(D), 42 U.S.C. § 9601(40)(D), and the implementation of and compliance with any land use restrictions and institutional controls as set forth in Section 101(40)(F), 42 U.S.C. § 9601(40)(F) for so long as Settling Purchaser retains any ownership interest in the Property.

#### VIII. RESERVATION OF RIGHTS

18. This Agreement does not release and waive or compromise any right of EPA or the United States other than the release and waiver by EPA of its right to assert or perfect a windfall lien pursuant to Section 107(r) of CERCLA, 42 U.S.C. § 9607(r), for costs incurred or to be incurred by EPA in responding to the release or threat of release of hazardous substances that were disposed of at the Site before Settling Purchaser acquired ownership of the Property, subject to

receipt of the payment [work] from Settling Purchaser as provided in Section IV. EPA and the United States reserve, and this Agreement is without prejudice to, all rights against Settling Purchaser with respect to all other matters, including but not limited to, the following:

(a) claims based on a failure by Settling Purchaser, assignees, successors in interest or any lessees, sublessees or other parties with rights to use the Property to meet a requirement of this Agreement, including but not limited to Section IV, Payment, and Section VI, Access/Notice/Institutional Controls;

(b) liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessment incurred by federal agencies other than EPA;

(c) liability under CERCLA, including Sections 106 and 107, 42 U.S.C. §§ 9606 and 9607, which arises due to failure of Settling Purchaser or assignees, successors in interest or any lessees, sublessees, or other parties with rights to use the Property to comply with Section 101(40), 42 U.S.C. § 9601(40); and

(d) liability under CERCLA resulting from the release or threat of release of hazardous substances that were disposed of at the Site after the Settling Purchaser acquired ownership of the Property.

19. Nothing in this Agreement is intended as a release and waiver for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, other than the release and waiver of the Section 107(r) lien in Section V, which the United States may have against any person, firm, corporation or other entity not a party to this Agreement. The United States reserves the right to compel potentially responsible parties to perform or pay for response actions at the Site.

20. Nothing in this Agreement shall in any way restrict or limit the nature or scope of response actions which may be taken or be required by EPA in exercising its authority under federal law. Settling Purchaser acknowledges that it is purchasing Property where response actions may be required.

#### IX. PARTIES BOUND

21. This Agreement shall apply to and be binding upon EPA, and shall apply to and be binding upon the Settling Purchaser and Settling Purchaser's [heirs] successors and assigns. Each signatory of a Party to this Agreement represents that he or she is fully authorized to enter into the terms and conditions of this Agreement and to legally bind such Party. Any change in ownership or corporate status involving the Property addressed shall in no way alter the release and waiver of the lien under this Agreement.

#### X. WAIVER OF CLAIM FOR REIMBURSEMENT

22. Settling Purchaser waives and shall not assert any claim for reimbursement from the United States with respect to the payment required by Section IV, Payment, of this Agreement, including but not limited to any direct or indirect claim for reimbursement of such payment from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 107, 111, 112, 113, or any other provision of law, or from any department, agency or instrumentality of the United States under CERCLA Sections 107 or 113. Nothing in this Agreement shall be deemed to constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

#### XI. PAYMENT OF COSTS

23. If the Settling Purchaser fails to comply with the terms of this Agreement, including,

but not limited to, the provisions of Section IV, Payment, it shall be liable for all litigation and other enforcement costs incurred by the United States to enforce this Agreement or otherwise obtain compliance.

#### XII. DISCLAIMER

24. This Agreement in no way constitutes a finding by EPA as to the risks to human health and the environment which may be posed by contamination at the Property nor constitutes any representation by EPA that the Property is fit for any particular purpose.

#### XIII. EFFECTIVE DATE

25. The effective date of this Agreement shall be the date upon which EPA issues written notice to the Settling Purchaser that EPA has fully executed the Agreement.

#### XIV. ATTORNEY GENERAL APPROVAL

26. **[Where the United States' total site costs are under \$500,000, Regions need not seek pre-approval from the AG]** The Attorney General of the United States or his designee has issued prior written approval of the settlement embodied in this Agreement.

IT IS SO AGREED:

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BY:

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Regional Administrator

Date

Region \_\_

IT IS SO AGREED:

BY:

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Name

Date



