



Revitalizing Contaminated Sites: Addressing Liability Concerns



The Revitalization Handbook

May 2008

U.S. Environmental Protection Agency
Office of Site Remediation Enforcement



Cover photo capturing revitalized area provided by the Office of Superfund Remediation and Technology Innovation, Office of Solid Waste and Emergency Response, U.S. EPA. The Davie Landfill is now the Vista View Park, which includes walking trails, bike trails, horse trails, picnic shelters, and a catch-and-release fishing pond. Visit <http://www.epa.gov/superfund/programs/recycle/index.html> for more information on Superfund Redevelopment.

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Office of Enforcement and Compliance Assurance
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Preface

The U. S. Environmental Protection Agency's (EPA) Office of Site Remediation Enforcement (OSRE) implements the enforcement of EPA's hazardous waste cleanup laws, including Superfund (also known as the Comprehensive Environmental Response, Compensation, and Liability Act, or CERCLA), the corrective action and underground storage tank cleanup provisions of the Resource Conservation and Recovery Act (RCRA), and the Oil Pollution Act (OPA). The main objective of the cleanup enforcement program is to ensure prompt site cleanup and the participation of liable parties in performing and paying for cleanups in a manner that ensures protection of human health and the environment.

Congress passed the Small Business Liability Relief and Brownfields Revitalization Act of 2002 (Public Law 107-118) (hereinafter, the Brownfields Amendments), which modified Superfund and further promoted the cleanup, reuse and redevelopment of sites by addressing liability concerns associated with unused or under-utilized property. One important mission of OSRE is to provide guidance on the liability protections available to property owners and other categories of potentially liable parties as a result of the Brownfields Amendments and other provisions of the hazardous waste cleanup laws. OSRE has played, and continues to play, a key role in the reuse and revitalization of contaminated sites, including brownfield sites, by providing such guidance and developing tools that will assist parties seeking to clean up, reuse or redevelop contaminated properties.

Over the years, OSRE has highlighted these efforts through a series of handbooks, most recently the *Brownfields Handbook: How to Manage Federal Environmental Liability Risks* (2002). This 2008 edition of the handbook,

Revitalizing Contaminated Sites: Addressing Liability Concerns (The Revitalization Handbook) is a compilation of enforcement tools, guidance, and policy documents that are available to help promote the cleanup and revitalization of contaminated sites.

While OSRE intends this handbook to be useful for years to come, it recognizes that developments in the brownfields area will yield new policy and guidance documents. Please refer to the Agency's Web site (<http://www.epa.gov/compliance/cleanup/revitalization>) for new and updated documents.

OSRE looks forward to the challenge of protecting human health and the environment through the cleanup and subsequent revitalization of contaminated property.

Purpose and Use of This Handbook

This handbook summarizes the statutory and regulatory provisions of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (CERCLA, commonly known as Superfund) and the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992 (RCRA), as well as the policy and guidance documents most useful in managing environmental cleanup liability risks associated with the revitalization of contaminated sites. It is designed for use by parties involved in the assessment, cleanup, and revitalization of sites, and provides a basic description of the tools parties can use to address liability concerns.

There are a number of things a party may want to consider before revitalizing contaminated property. For example, a party should determine the end use of the property, and should collect and consider information on past uses and potential contamination. In particular, if the party intends to purchase the property, it should consider whether it needs to conduct certain inquiries to take advantage of CERCLA liability protections, such as the bona fide prospective purchaser protection. Should the party need information or have concerns about cleanup or liability protection, it should identify the most appropriate level of government to consult about cleanup and liability protection. Some parties will find that they can proceed directly to their reuse activities. Others may want to pursue private mechanisms such as indemnification or insurance tools (*see Private Tools text box on page 27*), or work at the state level and make use of existing state tools, programs, or incentives such as the state voluntary cleanup program. If contamination on the property warrants EPA's attention under CERCLA or RCRA, the party should first determine if EPA or the state is

taking or plans to take action at the property. After determining where the property fits in the federal or state cleanup pipeline, a party may use this handbook to help decide which tool or tools are most appropriate for addressing potential CERCLA or RCRA liability risks.

Both CERCLA and RCRA are designed to protect human health and the environment from the dangers of hazardous waste, though these two programs address different parts of the hazardous waste problem. The RCRA programs focus on how wastes should be managed to avoid potential threats to human health and the environment. CERCLA, on the other hand, applies primarily when mismanagement has already occurred, resulting in releases of hazardous substances to the environment.

Though many prospective purchasers, developers, and lenders report hesitation about getting involved with brownfield properties because they fear that they might be held liable under CERCLA or RCRA, the vast majority of brownfield properties will never require EPA's attention under CERCLA, RCRA, or any other federal law. Accordingly, parties' fears of federal involvement -- to the extent that they impact an entity's decision to get involved with a brownfield site -- rather than actual EPA practice, are the primary obstacles to the redevelopment and reuse of brownfields. EPA hopes that this handbook will assist in eliminating or reducing any such fears.

I. Overview of CERCLA and RCRA

A. CERCLA

1. General Information

In 1980, in response to public concern about abandoned hazardous waste sites such as Love Canal, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675. CERCLA, commonly referred to as Superfund, authorizes the federal government to assess and/or clean up contaminated sites and provides authority for emergency response to hazardous materials incidents.

CERCLA provides the federal government with a source of funds, the Hazardous Substance Trust Fund (the Fund), and the legal authority to respond to actual and threatened releases of hazardous substances, pollutants and contaminants. CERCLA also establishes a comprehensive liability scheme to hold certain categories of parties liable to conduct and/or pay for cleanup of such releases.

EPA may exercise its response authority through removal or remedial actions. A removal action generally is a short-term and/or emergency action intended to stabilize or clean up an incident or site which poses an imminent threat to human health or the environment. CERCLA § 101(23). A remedial action generally addresses long-term threats to human health and the environment caused by more persistent contamination sources. CERCLA § 101(24). Fund-financed remedial responses are undertaken only at sites on EPA's National Priorities List (NPL). The National Contingency Plan (NCP), 40 C.F.R. Part 300, provides the "blueprint" for conducting removal and remedial actions under CERCLA.

2 CERCLA's Liability Scheme

CERCLA's "polluter pays" liability scheme ensures that parties who caused the contamination, rather than the general public, pay for cleanups. To be held liable for the costs or performance of a cleanup under CERCLA, a party must be a "potentially responsible party" (PRP) as described in CERCLA § 107(a), which includes:

- (1) The owner or operator of a facility;
- (2) An owner or operator at the time of disposal;
- (3) A person who arranged for the disposal or treatment of hazardous substances ("generator"); and
- (4) A person who accepted hazardous substances for transport and selected the site to which the substances were transported ("transporter").

Under CERCLA's comprehensive liability scheme, a PRP's liability for cleanup is:

- **Strict** - A party is liable if it falls within one of the above categories in CERCLA § 107(a), even if it did not act negligently or in bad faith.
- **Joint and several** - If two or more parties are responsible for the contamination at a site, any one or more of the parties may be held liable for the entire cost of the cleanup, regardless of their share of the waste contributed, unless a party can show that the injury or harm at the site is divisible.
- **Retroactive** - A party may be held liable even if the hazardous substance disposal occurred before CERCLA was enacted in 1980.

Additionally, EPA has adopted an “enforcement first” policy throughout the Superfund cleanup process to compel those responsible for hazardous waste sites to take the lead in cleanup, thus conserving the resources of the Fund. Using the enforcement authorities provided by Congress, EPA may enter into settlements with or compel PRPs to implement a cleanup at a site where a release of hazardous substances has occurred. When the Agency spends Fund monies to finance a removal or remedial action, EPA may seek reimbursement from responsible parties.

3. Traditional CERCLA Liability Protections

CERCLA includes several defenses to liability or liability protections. The traditional defenses -- those found in the statute prior to the Brownfields Amendments -- include an act of God, an act of war, or what is commonly known as the third-party or “innocent landowner” defense. *See* CERCLA § 107(b).

A party may qualify as an innocent landowner if it meets the criteria set forth in CERCLA §§ 107(b)(3) and 101(35). CERCLA §101(35)(A) distinguishes between three types of innocent landowners:

- (1) Purchasers who acquire property without knowledge of the contamination;
- (2) Governments who acquire contaminated property by escheat, other involuntary transfers or acquisitions, or the exercise of eminent domain authority by purchase or condemnation; and
- (3) Inheritors of contaminated property.

CERCLA also excludes from the definition of owner/operator a unit of state or local government that acquired ownership of the property involuntarily. *See* CERCLA § 101(20)(D). Discussed below are the

liability protections addressed in the Brownfields Amendments, such as the bona fide prospective purchaser protection.

4. EPA's Brownfields Program and the Brownfields Amendments

There are many different types of contaminated property in the United States. Some may be “Superfund sites”-- sites where the federal government is or plans to be involved in cleanup efforts, many of which are listed on the NPL. Other contaminated properties may be “brownfields”-- properties that are unused or underutilized because of fears about actual or possible contamination from past uses. Often, the federal government is not involved in cleanups at brownfield sites. Rather, state and tribal response programs play a significant role in cleaning up and helping to revitalize these sites. Other contaminated properties may be “RCRA brownfields” -- RCRA facilities where reuse or redevelopment is slowed due to real or perceived concerns about requirements imposed by RCRA or actual or potential contamination.

EPA launched the Brownfields Initiative in the mid-1990's and developed tools within the Superfund program and the enforcement office to help further the Initiative's goals of empowering states, communities, and other stakeholders in redevelopment to assess, safely clean up, and sustainably reuse brownfields, and to prevent future brownfield sites.

Congress codified many of these practices, policies, and guidances that had been adopted to promote the redevelopment and revitalization of brownfields when it passed the Small Business Liability Relief and Brownfields Revitalization Act of 2002 (Public Law 107-118) (Brownfields Amendments). The Brownfields Amendments define a brownfield site 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). The Brownfields Amendments also include provisions to address the liability concerns of certain landowners, provide statutory authority for EPA’s site-specific brownfields grant program, and authorize EPA to provide grants to states and tribes to develop response programs.

As noted above, under CERCLA’s liability scheme, the owner of a contaminated property is responsible for the property’s cleanup based solely on its ownership status, even if it did not contribute to the contamination. As a result, entities that want to purchase contaminated properties are often concerned about incurring CERCLA liability once they acquire the property. To address these liability concerns, the Brownfields Amendments included new liability protections for landowners who acquire property and meet certain criteria. The three landowner liability protections addressed in the Brownfields Amendments are:

- Bona fide prospective purchasers (BFPPs);
- Contiguous property owners (CPOs); and
- Innocent landowners (ILOs) (specifically innocent or unknowing purchasers).

The BFPP liability protection applies to an entity that purchases property after January 11, 2002, even with knowledge of contamination at the site, so long as the entity complies with certain pre- and post-purchase obligations.

The CPO provision protects owners of contaminated property where the contamination originated from a contiguous or similarly-situated property not owned by the entity asserting CPO status. This liability protection also has pre- and post-purchase obligations, and notably, unlike the BFPP liability protection, the person cannot have knowledge of the contamination at the time of purchase.

The ILO provision, as discussed above, excludes from CERCLA liability unknowing purchasers of contaminated property where the contamination was caused by a third party, the unknowing purchaser made all appropriate inquiry but did not discover the contamination, and the purchaser meets certain statutory conditions. The Brownfields Amendments clarified the all appropriate inquiry aspect of this protection. This liability protection also has pre- and post-purchase obligations.

For more information on these liability protections and related cleanup enforcement policy and guidance, please see Section II.

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

B. RCRA

In 1976, Congress enacted the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992k, which authorizes EPA to establish programs to regulate solid waste (Subtitle D), hazardous waste (Subtitle C), and underground storage tanks (Subtitle I). RCRA's goals include:

- Protecting human health and the environment from the potential hazards of waste disposal;
- Conserving energy and natural resources;
- Reducing the amount of waste generated; and
- Ensuring that wastes are managed in an environmentally sound manner.

Congress gave EPA the authority through RCRA to control hazardous waste from “cradle to grave.” The regulatory program includes procedures to facilitate the proper identification and classification of hazardous waste. The program also includes standards for facilities that generate, transport, treat, store or dispose of hazardous waste, and requires that certain persons managing waste obtain a permit. Unlike CERCLA, RCRA does not contain a bona fide prospective purchaser or similar liability protection, as the Brownfields Amendments only addressed CERCLA.

Since waste management at RCRA facilities may result in spills or releases into the environment, Subtitle C of the statute also includes provisions governing the cleanup of contaminated soil, groundwater, and air resulting from such management, also known as “corrective action.” As a condition of a RCRA permit, owners/operators are required to clean up contamination caused by the mismanagement of wastes.

Elements of the RCRA Corrective Action Enforcement Program

- Conduct investigations;
- Conduct a thorough cleanup of the hazardous release; and
- Monitor the cleanup to make sure it complies with applicable state and federal requirements.

States are an integral part of the RCRA program. Under Subtitle C, EPA reviews state programs that consist of requirements for the generation, transportation, treatment, storage, and disposal of hazardous wastes for facilities within that state. If the state program is deemed to be at least as stringent as the federal requirements, EPA authorizes that state to administer the state program in lieu of the federal program and facilities must then comply with the authorized state requirements rather than the corresponding federal requirements. After authorization, both the state and EPA have the authority to enforce those requirements. Currently, 50 states and territories have been granted authority to implement the base, or initial, program. Many are also authorized to implement additional parts of the RCRA program, such as corrective action. More information on the RCRA state authorization program is available on EPA's Web site at www.epa.gov/epaoswer/hazwaste/state. More information on the RCRA cleanup enforcement program is available on EPA's Web site at <http://www.epa.gov/compliance/cleanup/rcra/index.html>.

II. Statutory and Enforcement Tools for the Cleanup, Reuse, and Revitalization of Contaminated Sites

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

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

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

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

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

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

A. Owners and Purchasers of Contaminated Property

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

1. Innocent or "Unknowing" Purchasers

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

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

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

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

2 Bona Fide Prospective Purchasers

The 2002 Brownfields Amendments created a new liability protection for a bona fide prospective purchaser (BFPP). Prior to the passage of the Brownfields Amendments, prospective purchasers of contaminated property could not avoid the liability associated with being the current owner if they purchased with knowledge of contamination, unless they entered into a prospective purchaser agreement (PPA) with EPA prior to acquisition that included covenants not to sue under CERCLA §§ 106 and 107. Now, however, as a result of the Brownfields Amendments, a party can achieve and maintain status as a BFPP without entering into a PPA with EPA, so long as that person meets the statutory criteria.

The BFPP provision found in CERCLA § 107(r) dramatically changed the CERCLA liability landscape. Section 107(r) protects from owner/operator liability a BFPP who acquires property after January 11, 2002, and meets the criteria in CERCLA § 101(40) and § 107(r).

Unlike the innocent purchaser defense, persons may now acquire property *knowing, or having reason to know*, of contamination on the property and not be liable under CERCLA as long as they meet the statutory criteria.

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

- Complying with land use restrictions and not impeding the effectiveness or integrity of institutional controls;
- Taking “reasonable steps to prevent releases” with respect to hazardous substances affecting a landowner’s property;
- Providing cooperation, assistance and access;
- Complying with information requests and administrative subpoenas; and
- Providing legally required notices.

BFPPs also must not impede the performance of a response action or natural resource restoration. CERCLA § 107(r).

BFPPs are not liable as owner/operators for CERCLA response costs, but the property they acquire may be subject to a windfall lien where an EPA response action has increased the fair market value of the property. For more discussion of windfall liens, please refer to Section II.A.5.iv on page 28.

All Appropriate Inquiries

All Appropriate Inquiry (AAI) is required under CERCLA § 101(35)(B) and is the first step that BFPPs, CPOs and innocent purchasers must undertake to achieve the protected status. CERCLA § 101(35)(B) required EPA to publish a regulation to “establish standards and practices for the purpose of satisfying the requirement to carry out [AAI]” EPA’s *All Appropriate Inquiries Rule* (“AAI Rule”) became final on November 1, 2006 (70 FR 66070). Parties affected by the AAI Rule are those purchasing commercial or industrial real estate who wish to take advantage of CERCLA’s new liability protections, and those persons conducting a site characterization or assessment with funds provided by certain federal brownfields grants.

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

Owners of property above aquifers contaminated from an off-site source may be concerned about CERCLA liability even though they did not cause and could not have prevented the groundwater contamination. Protection from liability for contiguous landowners can be found in EPA guidance prior to the Brownfields Amendments, as well as in those Amendments.

In May 1995, OSRE developed the *Final Policy Toward Owners of Property Containing Contaminated Aquifers* in response to this concern. Not only did EPA state that it would not require cleanup or the payment of cleanup costs if the landowner did not cause or contribute to the contamination, it also stated that if a third party sued or threatened to sue, EPA would consider entering into a settlement with the landowner covered under the policy to prevent third-party damages being awarded.

Threshold Criteria for EPA's Contaminated Aquifer Guidance

*A landowner is protected by this policy if **all** of the following criteria are met:*

- The hazardous substances contained in the aquifer are present solely as the result of subsurface migration from a source or sources outside the landowner's property;
- The landowner did not cause, contribute to, or make the contamination worse through any act or omission on his part;
- The person responsible for contaminating the aquifer is not an agent or employee of the landowner, and was not in a direct or indirect contractual relationship with the landowner (exclusive of conveyance of title); and
- The landowner is not considered a liable party under CERCLA for any other reason such as contributing to the contamination as a generator or transporter.

This policy may not apply in cases where:

- The property contains a groundwater well that may influence the migration of contamination in the affected aquifer; or
- The landowner acquires the property, directly or indirectly, from a person who caused the original release.

The policy identifies certain exceptions as they apply to particular landowners including, among others, whether a well on the property may affect the migration of contaminants, or the existence of a contractual relationship between the landowner and the person causing the off-site contamination. In addition, the policy required that, to be covered by the policy, the landowner must not be liable based on some other connection to the site, such as being a generator or transporter.

In addition, the Brownfields Amendments provide statutory protection for contiguous property owners (CPOs). Specifically, CERCLA § 107(q) excludes from the definition of “owner or operator” a person who owns property that is “contiguous,” or otherwise similarly situated to, a facility that is the only source of contamination found on the person’s property. Like the contaminated aquifer policy, this provision protects parties that are victims of pollution caused by a neighbor’s actions.

To qualify as a statutory CPO, a landowner must meet the criteria set forth in CERCLA § 107(q)(1)(A). A CPO must meet the threshold criteria of performing “all appropriate inquiry” prior to acquiring the property, and demonstrating that it is not affiliated with a liable party. Persons who know, or have reason to know, prior to purchase, that the property is or could be contaminated, cannot qualify for the CPO liability protection under the Brownfields Amendments, although such parties may still be entitled to rely on enforcement discretion derived from EPA’s 1995 contaminated aquifer guidance. Like BFPPs, CPOs must also satisfy ongoing obligations after purchase.

On January 13, 2004, EPA issued its *Interim Enforcement Discretion Guidance Regarding Contiguous Property Owners* (Contiguous Property Owner Guidance), which discusses CERCLA §107(q). The guidance addresses (1) the statutory criteria; (2) the application of CERCLA §107(q) to current and former owners of property; (3) the relationship between section 107(q) and EPA’s Resi-

dential Homeowner Policy and Contaminated Aquifers Policy; and (4) discretionary mechanisms EPA may provide to resolve remaining liability concerns of contiguous property owners. The guidance document was followed by a *Contiguous Property Owner Reference Sheet*.

4. Residential Property Owners

In 1991, EPA issued its *Policy Towards Owners of Residential Properties at Superfund Sites*, an enforcement discretion policy, the goal of which was to relieve residential owners of the fear that they might be subject to an enforcement action involving contaminated property, even though they had not caused the contamination on the property.

Under this policy, a residential owner's knowledge of the contamination was deemed irrelevant. The residential owner policy applies to residents as well as their lessees, so long as the activities are consistent with the policy. The policy also applies to residential owners who acquire property through purchase, foreclosure, gift, inheritance, or other form of acquisition, as long as the activities after acquisition are consistent with the policy.

Residential property owners that purchase contaminated property after January 2002, can take advantage of the statutory BFPP protection. The Brownfields Amendments addressed residential property owners by clarifying the type of pre-purchase investigation (*i.e.*, all appropriate inquiry) that a residential property owner must conduct to obtain BFPP status. Specifically, an inspection and title search that reveal no basis for further investigation will satisfy all appropriate inquiry for a residential purchaser. CERCLA § 101(40)(B)(iii).

Threshold Criteria for Residential Property Owners Under EPA Guidance

An owner of residential property located on a CERCLA site is protected if the owner:

- Has not and does not engage in activities that lead to a release or threat of release of hazardous substances, resulting in EPA taking a response action at the site;
- Cooperates fully with EPA by providing access and information when requested and does not interfere with the activities that either EPA or a state is taking to implement a CERCLA response action;
- Does not improve the property in a manner inconsistent with residential use; and
- Complies with institutional controls (e.g., property use restrictions) that may be placed on the residential property as part of the Agency's response action.

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

i. Common Elements Guidance

In March 2003, EPA issued its “Common Elements” guidance for the three property owner classes -- BFPP, CPO and innocent purchaser -- addressed in the Brownfields Amendments. *See Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability (‘Common Elements’)*.

The guidance was accompanied by the *Common Elements’ Guidance Reference Sheet*, also issued on March 6, 2003, which high-

lights the significant points of the guidance. Both of these documents are available in Appendix A of this handbook.

The Brownfields Amendments identify threshold criteria and ongoing obligations that these types of landowners must meet to obtain the liability protections afforded by the statute. Many of these obligations are overlapping and thus the shorthand name for the Common Elements guidance. Included with the Common Elements guidance are three documents:

- (1) A chart laying out the common statutory obligations;
- (2) A questions and answers document pertaining to the “reasonable steps” statutory criteria; and
- (3) A model comfort/status letter for providing site-specific suggestions as to reasonable steps.

The Common Elements guidance first discusses the threshold criteria BFPPs, CPOs and innocent purchasers must meet to assert these liability protections.

The first threshold requirement is that the landowner conduct “all appropriate inquiries” (AAI) prior to purchasing the property. CERCLA §§ 101(40)(B), 107(q)(1)(A)(viii), 101(35)(A)(i), (B)(i). Second, the BFPP and CPO protections require that the purchaser not be “affiliated” with a liable party, CERCLA §§ 101(40)(H), 107(q)(1)(A)(ii), and for the innocent purchaser protection, the act or omission that caused the release or threat of release of hazardous substances and the resulting damages must have been caused by a third party with whom the person does not have an employment, agency, or contractual relationship. CERCLA §§ 107(b)(3), 101(35)(A).

Second, the Common Elements guidance discusses the common ongoing obligations for each type of landowner liability protection identified as follows:

- Complying with land use restrictions and not impeding the effectiveness or integrity of institutional controls;
- Taking “reasonable steps to prevent releases” with respect to hazardous substances affecting a landowner’s property;
- Providing cooperation, assistance, and access to the property;
- Complying with information requests and subpoenas; and
- Providing legally required notices.

Prospective purchasers or owners of contaminated property may want to use the Common Elements guidance to clarify the different liability protections that may be available, and their requirements.

ii. Prospective Purchaser Agreements

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

Long before the BFPP liability protection was available, EPA developed tools for prospective purchasers of contaminated property, including prospective purchaser agreements (PPAs). PPAs are agreements between a liable party and EPA whereby EPA provides the party with liability relief in exchange for payment and/or cleanup work. The first EPA policy dealing with prospective purchasers of contaminated property was published in June 1989 and titled *Guidance on Landowner Liability under Section 107(a)(1) of CERCLA, De Minimis Settlements under Section 122(g)(1)(B) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property*. Models attached to the 1989 guidance were for settlements with *de minimis* landowners under § 122(g)(1)(B).

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

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

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

After the enactment of the Brownfields Amendments, EPA issued a policy on May 31, 2002, *Bona Fide Prospective Purchasers and the New Amendments to CERCLA*, which discusses the interplay of the legislatively created BFPP and EPA's use of PPAs. In that policy, EPA stated that in most circumstances, PPAs will no longer be needed for a party to enjoy liability relief under CERCLA as a present owner. There will continue to be, however, limited circumstances under which EPA will consider entering into a PPA, such as:

- Significant environmental benefits will be derived from the project in terms of cleanup;
- The facility is currently involved in CERCLA litigation such that there is a very real possibility that a party who buys the facility would be sued by a third party;

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

Despite the liability relief assurances to BFPPs which the above-referenced guidance documents provide, many prospective purchasers of contaminated property wanted further protection from EPA for cleanup work performed by them under EPA supervision. As a result of this need and to further encourage reuse and redevelopment on contaminated sites, EPA, jointly with the Department of Justice (DOJ), issued a model administrative order titled *Issuance of CERCLA Model Agreement and Order on Consent for Removal Action by a Bona Fide Prospective Purchaser*, for use as an agreement with a BFPP who intends to perform removal work at its property. The purpose of the model is to promote land reuse and revitalization by addressing liability concerns associated with acquisition of contaminated property. In particular, the removal work to be performed under the model must be of greater scope and magnitude than the “reasonable steps to prevent releases” which must be performed by BFPPs if they are to maintain their protected status under the statute.

The model provides a covenant not to sue for “existing contamination” and requires the person performing the removal work to reimburse EPA’s oversight costs. Contribution protection is also provided. The model is for use at sites of federal interest where the work is more significant and complex than other contaminated sites.

iii. Comfort/Status Letters

Under certain circumstances, a prospective purchaser can proceed in the cleanup and redevelopment of a contaminated site based on a “comfort/status” letter issued by EPA. Comfort/status letters provide a prospective purchaser with the information EPA has about a particular property and EPA’s intentions with respect to the property. The “comfort” comes from realizing what EPA knows about the

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

Evaluation Criteria for Superfund Comfort/Status Letters

EPA may issue a comfort letter upon request if:

- The letter may facilitate cleanup and redevelopment of potentially contaminated property;
- There is the realistic perception or probability of incurring CERCLA liability; and
- There is no other mechanism available to adequately address the party’s concerns.

- ***Superfund Comfort/Status Letters***

On November 8, 1996, EPA issued its *Policy on the Issuance of Comfort/Status Letters*. The letters provide a party with relevant releasable information EPA has pertaining to a particular piece of property, what that information means, and the status of any ongoing, completed or planned federal Superfund action at the property. Comfort/status letters may be considered when they may facilitate the cleanup and redevelopment of brownfields; where there is a realistic perception or probability of incurring Superfund liability; and where there is no other mechanism available to adequately address a party’s concerns.

Private Tools

Various private tools can be used to manage environmental liability risks associated with brownfields and other properties. These tools may include:

- **Indemnification Provisions** -These are private contractual mechanisms in which one party promises to shield another from liability. Indemnification provisions provide prospective buyers, lenders, insurers, and developers with a means of assigning responsibility for cleanup costs, and encourage negotiations between private parties without government involvement.
- **Environmental Insurance Policies** -The insurance industry offers products intended to allocate and minimize liability exposures among parties involved in brownfields redevelopment. These products include cost cap, pollution legal liability, and secured creditor policies. Insurance products may serve as a tool to manage environmental liability risks, however, many factors affect their utility including the types of coverage available, the dollar limits on claims, the policy time limits, site assessment requirements, and costs for available products. Parties involved in brownfields redevelopment considering environmental insurance should always secure the assistance of skilled brokers and lawyers to help select appropriate coverage.

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

RCRA Treatment, Storage, and Disposal (TSD) facilities also offer unique challenges in terms of cleanup and reuse, but may also provide opportunities for revitalization. Recognizing that analogous situations existed at RCRA facilities as at Superfund sites, EPA developed guidance for issuing comfort/status letters for RCRA facilities. *Comfort/Status Letters for RCRA Brownfield Properties*, issued on February 5, 2001, limited the use of such letters to those situations that could facilitate the cleanup and reuse of brownfields; where there was a realistic perception or probability of EPA initiating a RCRA cleanup action; and where there was no other mechanism to adequately address the party's concern.

The use of RCRA comfort/status letters was reiterated and highlighted in the April 8, 2003 guidance *Prospective Purchaser Agreements and Other Tools to Facilitate Cleanup and Reuse of RCRA Sites*. That guidance also recognizes that RCRA PPAs as well as the February 23, 2003 *Final Guidance on Completion of Corrective Action Activities at RCRA Facilities* were valuable tools to help revitalize RCRA sites. The guidance provides examples where RCRA PPAs have been successfully used and identifies certain factors that should be considered before issuing a RCRA PPA.

iv. Windfall Lien Guidance, Comfort Letters, and Settlements

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

erty, may have a windfall lien on the property for the lesser of the unrecovered response costs or the increase in fair market value at the property attributable to the Superfund cleanup. The windfall lien provision is found in CERCLA § 107(r), and is a new lien provision that does not supplant the lien provision found in CERCLA § 107(l).

EPA and DOJ jointly issued guidance on the windfall lien provision, *Interim Enforcement Discretion Policy Concerning “Windfall Liens” Under Section 107(r) of CERCLA*, on July 16, 2003. In addition to explaining how EPA intends to use the new windfall lien, and when EPA will seek to enforce or will not seek to enforce, there are two attachments to the guidance: a sample “comfort letter” that explains to the recipient whether EPA believes there is a possible windfall lien applicable to the property, and a model settlement document, whereby a party to whom the windfall lien provision applies may settle with EPA in exchange for release of the windfall lien both now and in the future.

The windfall lien, unlike the lien under CERCLA § 107(l), has no applicable statute of limitations and is most likely to be filed and recorded only after a BFPP comes into possession of the property. Additionally, the model settlement document for releasing the windfall lien does not provide a covenant not to sue. This guidance was also accompanied by a *Windfall Lien Frequently Asked Questions* fact sheet issued on July 16, 2003.

In January 2008, EPA issued another windfall lien guidance, titled *Windfall Lien Administrative Procedures* and the associated *Model Notice of Intent to File a Windfall Lien Letter*. These documents provide guidance on the timing for filing notice of a windfall lien on a property after acquisition by a BFPP and the EPA administrative procedures that should accompany filing a windfall lien notice.

B. Lenders and Local Governments

1. CERCLA Liability Protections for Lenders and Local Governments

In the 1990s, it became apparent to EPA and DOJ that liability concerns and fears of enforcement were discouraging financial institutions from lending money to developers of contaminated land, and municipalities from exercising their governmental involuntary acquisition rights and performing cleanup functions on such properties.

EPA initially tried to address the concerns of lenders and municipalities through the Lender Liability Rule promulgated in 1992. However, a federal court ruling vacated the Lender Liability Rule on the grounds that “EPA lacked authority to issue” the rule as a binding regulation. Kelly v. EPA, 15 F.3d 1100 (D.C. Cir. 1994), *reh. denied*, 25 F.3d 1088 (D.C. Cir. 1994), *cert. denied*, American Bankers Ass’n v. Kelly, 115 S.ct. 900 (1995). After the court decision, EPA and DOJ issued the *Policy on CERCLA Enforcement Against Lenders and Government Entities that Acquire Property Involuntarily* on September 22, 1995, which stated that EPA and DOJ were not precluded from following the provisions of the rule as enforcement policy.

i. Lenders

On August 1, 1996, EPA issued a fact sheet summarizing EPA’s position on lender liability titled *The Effect of Superfund on Lenders That Hold Security Interests in Contaminated Property*. But lenders were concerned that EPA’s 1995 enforcement policy did not apply to contribution actions brought by third parties attempting to recover their CERCLA response costs from lenders. Partly in response to these concerns, Congress enacted the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996 (Lender Liability Act). Section 2502 of the Lender Liability Act amended

CERCLA’s secured creditor exemption contained in CERCLA §101(20)(E). Using language very similar to the language of the CERCLA Lender Liability Rule, CERCLA §§ 101(20)(E)-(G) elaborate on the original exemption by defining key terms and listing activities that a lender may undertake without forfeiting the exemption. Under the statute, a lender is not an “owner or operator” under CERCLA if, “without participating in the management” of a vessel or facility, it holds indicia of ownership primarily to protect its security interest. CERCLA § 101(20)(E)(i). “Participation in management” is further defined in the statute in § 101(20)(F). Additional information is available in the “Participation in Management” text box below.

After the enactment of the Lender Liability Act, EPA issued guidance to further clarify the circumstances in which EPA will apply the provisions of the Lender Liability Rule and its preamble in its interpretation of CERCLA’s secured creditor exemption. *See Policy on*

“Participation in Management” Defined

A lender “participates in management” (and will not qualify for the exemption) if the lender:

- Exercises decision-making control over environmental compliance related to the facility, and in doing so, undertakes responsibility for hazardous substance handling or disposal practices;
- Exercises control at a level similar to that of a manager of the facility, and in doing so, assumes or manifests responsibility with respect to day-to-day decision-making on environmental compliance; or
- All, or substantially all, of the operational (as opposed to financial or administrative) functions of the facility other than environmental compliance.

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“Participation in Management” Defined (*cont’d*)

The term “participate in management” does not include certain activities such as when the lender:

- Inspects the facility;
- Requires a response action or other lawful means to address a release or threatened release;
- Conducts a response action under CERCLA § 107(d)(1) or under the direction of an on-scene coordinator;
- Provides financial or other advice in an effort to prevent or cure default; or
- Restructures or renegotiates the terms of the security interest; provided the actions do not rise to the level of participating in management.

After foreclosure, a lender who did not participate in management prior to foreclosure is not an “owner or operator” if the lender:

- Sells, releases (in the case of a lease finance transaction), or liquidates the facility;
- Maintains business activities or winds up operations;
- Undertakes CERCLA § 107(d)(1) or under the direction of an on-scene coordinator; or
- Takes any other measure to preserve, protect, or prepare the facility for sale or disposition; provided the lender seeks to divest itself of the facility at the earliest practicable, commercially reasonable time, on commercially reasonable terms. EPA considers this test to be met if the lender, within 12 months of foreclosure, lists the property with a broker or advertises it for sale in an appropriate publication.

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

ii. Local Governments

Section 2504 of the Lender Liability Act validates the portion of the CERCLA Lender Liability Rule that addresses involuntary acquisitions by government entities. State or local governments that acquire property by involuntary means such as bankruptcy, tax delinquency, or abandonment are excluded from the definition of "owner or operator" in CERCLA, and therefore are not liable under CERCLA Section 107(a). CERCLA § 101(20)(D). There is also a third-party affirmative defense available for government entities that acquire property "by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation." CERCLA § 101(35)(A)(ii).

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

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

counsel before taking title to ensure that they will have a liability protection (e.g., BFPP status or protection under the involuntary acquisition provision or third-party defense). State or local government entities should note that to achieve BFPP status, an entity must conduct AAI prior to purchase and comply with the other BFPP requirements. Conducting proper AAI prior to purchase is also important for state and local government entities relying on the BFPP protection for brownfield grant eligibility.

2 Underground Storage Tanks (UST) Lender Liability Rule

Local communities often struggle with what to do about polluted, abandoned gas stations and other petroleum-contaminated properties, generally referred to as petroleum brownfields, which can be eyesores and blight communities. Often, citizens and businesses shy away from the reuse potential of these properties, fearing the potential liability of environmental contamination under Subtitle I of RCRA. The *Underground Storage Tanks (UST) Lender Liability Rule* (40 C.F.R. § 280.200-.300) is an example of how EPA has addressed fears of potential liability to encourage the reuse of abandoned gas station sites.

While developing the UST Lender Liability Rule, EPA recognized that many security interest holders were abandoning the UST properties they held as collateral instead of foreclosing on those properties and risking potential liability for cleanup costs.

The UST Lender Liability Rule exempts certain classes of “owners” and “operators” (i.e., holders of security interests as described in the rule) from identified RCRA regulatory requirements including corrective action, technical requirements, and financial responsibility, provided that specified criteria are met.

By allowing security interest holders to market their foreclosed properties without incurring RCRA liability, the UST Lender Liability Rule encourages the reuse of gas stations that may otherwise end up abandoned. The rule also protects human health and the environment by requiring security interest holders to empty any tanks they acquire through foreclosure, thus preventing future releases. Additional information on the UST Lender Liability Rule is available on EPA's Web site at http://www.epa.gov/oust/fedlaws/280_i.pdf.

III. Other Considerations for Entities Seeking to Clean Up, Reuse and Revitalize Contaminated Property

A. Long-Term Stewardship

The success of the Brownfields program in responding to and even bolstering market demand for properties with known or suspected contamination has led to increased demand for contaminated properties that are cleaned up under the other EPA programs. The demand for and use of such sites includes those properties where some contamination remains, but is controlled on site and therefore long-term stewardship activities are needed to ensure the continued protection of the remedy and human health and the environment.

Long-term stewardship generally refers to the activities and processes used to control and manage residual contamination, limit inappropriate exposures, control land and resource uses, and ensure the continued protectiveness of “engineering” controls and “institutional” controls at sites. Long-term stewardship also takes on greater importance with the increased demand for the reuse of properties, especially properties where cleanup does not result in unrestricted uses or unlimited exposures.

Physical or “engineering” controls are the engineered physical barriers or structures designed to monitor and prevent or limit exposure to the contamination. Certain engineered cleanups will involve ongoing Operation and Maintenance (O&M), monitoring, evaluation, periodic repairs, and sometimes replacement of remedy components.

Examples of Engineering Controls

- Landfill soil caps
- Impermeable liners
- Other containment covers
- Underground slurry walls
- Fences
- Bioremediation
- Groundwater pump-and-treat and monitoring systems

Legal or “institutional” controls are non-engineered instruments, such as administrative and/or legal controls, intended to minimize the potential for human exposure to contamination by limiting land or resource use. Institutional controls may be used to supplement engineering controls and also must be implemented, monitored, and evaluated for effectiveness as long as the risks at a site are present. Informational devices, such as signs, state registries and deed notices, are commonly used informational, non-enforceable tools. In February 2005, to further explain the requirements of Institutional Controls, EPA published a guidance document titled, *Institutional Controls: A Citizen’s Guide to Understanding Institutional Controls at Superfund, Brownfields, Federal Facilities, Underground Storage Tanks, and Resource Conservation and Recovery Act Cleanups*. EPA has also developed two cross-program guidances addressing the entire lifecycle of institutional controls, from evaluation to implementation and enforcement. These and other institutional controls guidance is available on the EPA institutional controls Web page at <http://www.epa.gov/superfund/policy/ic/index.htm>.

Examples of Institutional Controls

- Government Controls -- Permits, Zoning
- Informational Devices -- Notices, Advisories, Warnings
- Proprietary Controls -- Easements, Restrictive Covenants
- Enforcement Mechanisms -- Administrative Orders, Cleanup Agreements

EPA, the states, and local governments have increased their knowledge about the long-term requirements needed to reuse and revitalize contaminated sites. The cleanup remedies for contaminated sites and properties often require the management and oversight of on-site waste materials and contaminated environmental media for long periods of time. EPA and its regulatory partners implement (or ensure that responsible parties implement) long-term stewardship after construction of the remedy for site cleanup and for as long as wastes are controlled on site. Long-term stewardship can last many years, decades, or in some cases, even longer. Long-term stewardship involves ongoing coordination and communication among numerous stakeholders, each with different responsibilities, capabilities, and information needs.

Even though the various cleanup programs have different authorities, there are common elements to address the long-term stewardship efforts. For example, under Superfund, long-term stewardship activities are performed as part of the O&M of a remedy. Responsibility for O&M is contingent upon whether the cleanup was conducted by a potentially responsible party (PRP), including federal facilities, or whether EPA funded the cleanup. Under the RCRA

program, cleanups are conducted in connection with the closure of regulated units and in facility-wide corrective action under either a permit, imminent hazard, or other order or agreement.

EPA, under the Brownfields program, provides cleanup grants to state and local governments and non-profit organizations to carry out cleanup activities, including monitoring and enforcement of institutional controls.

Pursuant to the Underground Storage Tanks (UST) program, when a release has been detected or discovered at an UST, the UST owner/operator must perform corrective action to clean up any contamination caused by the release. Under cooperative agreements between EPA and the states, states are largely responsible for overseeing corrective actions in connection with underground storage tanks, including long-term stewardship. EPA is generally responsible for overseeing the corrective actions, including long-term stewardship activities on tribal lands.

More information on long-term stewardship is available on EPA's Land Revitalization Web site at http://www.epa.gov/LANDREVITALIZATION/lstf_report/what_is_longterm_stewardship.htm.

B. State Response Programs

1. Voluntary Cleanup Programs

State response programs play a significant role in assessing and cleaning up brownfield sites. As Congress recognized in the legislative history of the Brownfield Amendments,

“[t]he vast majority of contaminated sites across the Nation will not be cleaned up by the Superfund program. Instead, most sites will be cleaned up under State authority.”

Voluntary cleanup programs (VCPs) are typically the state authority used to address brownfield and other lower-risk sites. Links to state VCPs can be found on EPA's Web site at http://www.epa.gov/brownfields/state_tribal.htm#links.

EPA has historically supported the use of VCPs and continues to provide grant funding to establish and enhance VCPs. EPA also continues to provide general enforcement assurances to individual states to encourage the assessment and cleanup of sites addressed under VCP oversight. This approach to VCPs was codified in the Brownfields Amendments as Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) § 128:

- CERCLA § 128(a) addresses grant funding and Memoranda of Agreements (MOAs) for state response programs (*i.e.*, VCPs);
- CERCLA § 128(b) addresses the “enforcement bar” which limits EPA enforcement actions, under CERCLA §§ 106(a) and 107(a), at sites addressed in compliance with such programs; and
- CERCLA § 128(b)(1)(C) addresses the establishment and maintenance of a public record by a state to document the cleanup and potential use restrictions of sites addressed by a VCP.

2 Memoranda of Agreement

Since 1995, EPA has encouraged the use of VCPs at lower-risk sites by entering into non-binding Memoranda of Agreement (MOAs) with interested states based on a review of the state VCP's capabilities. MOAs can be a valuable mechanism to support and strengthen efforts to achieve protective cleanups under VCP oversight. The purpose of the MOAs is to foster more effective and efficient

working relationships between EPA and individual states regarding the use of their VCPs. Specifically, MOAs define EPA and state roles and responsibilities and provide EPA recognition of the state's capabilities. MOAs typically include a general statement of EPA enforcement intentions regarding certain sites cleaned up under the oversight of a VCP. A number of states are also using their VCPs to address facilities subject to corrective action under the Resource Conservation and Recovery Act (RCRA). As a result, EPA and several states have expanded upon the CERCLA VCP MOA concept to address some facilities subject RCRA corrective action. Those agreements are commonly known as RCRA Memoranda of Understanding (MOUs). EPA has also entered into a few MOAs that address multiple cleanup programs and are consistent with EPA's One Cleanup Program. More information on EPA's One Cleanup Program is available on EPA's Web site at <http://www.epa.gov/oswer/onecleanupprogram/>.

Copies of a specific MOA or MOU, and additional information about state and tribal response programs are available from EPA's Web site at <http://www.epa.gov/swerosps/bf/html-doc/statemoa.htm>.

3. Eligible Response Sites

The Brownfields Amendments included the concept of an eligible response site (CERCLA § 101(41)), which is a site at which EPA may not take an enforcement action under §§ 106 or 107 in certain circumstances, and that may be eligible for deferral from listing on the National Priorities List (NPL) in certain circumstances. CERCLA §§ 128(b), 105(h). If an EPA Region determines that a site is not an "eligible response site," that site will not be subject to the deferral provisions in § 105(h) and the limitations on EPA's enforcement and cost recovery authorities under § 128(b). For more information on eligible response sites, please see EPA's March 2003 guidance, *Regional Determinations Regarding Which Sites Are Not "Eligible Response Sites."*

C. Supplemental Environmental Projects (SEPs)

Supplemental Environmental Projects (SEPs) may play a key role in revitalizing contaminated sites. SEPs are environmentally beneficial projects undertaken by a party, in a settlement of an environmental enforcement action, but which the violator is not otherwise legally required to perform. SEPs are critical to site revitalization because they are one of only a few tools EPA can use to enhance the environment of those communities that were directly put at risk by the violator. The successful use of SEPs is even more important because many sites are in environmental justice communities.

As stated in the November 2006 *Brownfield Sites and Supplemental Environmental Projects (SEPs)* fact sheet, EPA does not approve SEPs that require assessment and/or cleanup of brownfield sites because appropriations law prohibits SEP activities that are funded by Congress. Congress provides funds for assessment and cleanup activities to EPA's brownfields program. However, EPA does approve SEP activities that complement brownfield site activities, such as: green building projects; projects that call for the violator to provide energy-efficient building materials to a redeveloper; urban forest projects; and stream restoration projects. To learn more about the general requirements of a SEP, please refer to *U.S. EPA Supplemental Environmental Projects Policy* ("*U.S. EPA SEP Policy*") (May 1, 1998).

D. OECA Guiding Principles

OECA is guided in the development of policy documents not only by enforcement principles such as "polluter pays" and "enforcement first," but also by broader principles that have been established to carry out the Agency's mission. Key among these guiding principles are:

- the recognition and addressing of environmental justice issues;
- the requirement of public participation in the Agency's work; and
- financial assurance to ensure the costs of cleanup are addressed.

1. Environmental Justice

EPA recognizes that minority and/or low-income communities frequently may be exposed disproportionately to environmental harms and risks. As a result, the Agency works to protect these and other communities burdened by adverse human health and environmental effects of its programs and has incorporated environmental justice as a priority throughout the Agency. Accordingly, EPA maintains its ongoing commitment to the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies, including the brownfields program. More information about EPA's environmental justice program as it relates to Superfund can be found at <http://www.epa.gov/oswer/ej/index.html>.

EPA's Office of Enforcement and Compliance Assurance (OECA) is committed to improving environmental performance through compliance with environmental requirements, preventing pollution, promoting environmental stewardship, and by incorporating environmental justice across the spectrum of our programs, policies, and activities. When working with local environmental justice communities, private parties should address the following environmental justice issues:

- Meaningfully involve the community in the planning, cleanup and revitalization process;
- Review the cumulative effects of multiple sources of contamination in close proximity;

- Ensure an equitable distribution of brownfields assistance to environmental justice communities;
- Adhere to community commitments made in brownfields grant proposals;
- Assist environmental justice communities in obtaining independent technical advisors to help communities navigate the brownfields cleanup and redevelopment process;
- Provide equal opportunity for local minority owned businesses specializing in environmental assessment and cleanup work to compete for contracts needed to plan, cleanup and revitalize brownfields; and
- Take steps to limit the displacement, equity loss and cultural loss of the local community.

2 Public Participation

Citizens are an essential component of the Superfund cleanup and RCRA permitting processes and for the revitalization of these sites and brownfield sites. The formal public participation activities, required by law or regulation, are designed to provide citizens with both access to information and opportunities to participate in the cleanup process. EPA uses the term “public participation” to denote the activities that:

- Encourage public input and feedback;
- Encourage a dialogue with the public;
- Provide access to decision-makers;
- Assimilate public viewpoints and preferences; and
- Demonstrate that those viewpoints and preferences have been considered by the decision-makers.

“The public” in this case refers to not only private citizens, but also representatives of consumer, environmental, and minority associations; trade, industrial, agricultural, and labor organizations; public health, scientific, and professional societies; civic associations; public officials; and governmental and educational associations. Considered in this broad sense, public participation can mean any stakeholder activity carried out to increase the public’s ability to understand and influence the Superfund cleanup and RCRA permitting processes and the revitalization of contaminated sites.

In the revitalization context, working with a variety of community members, local planners, and elected officials is an effective way to identify and integrate long-term community needs into the reuse plans for the site. Redevelopment planning enables citizens to realize their vision for the future reuse of the site. This process should encourage participation of all community members in goal development, action planning, and implementation. By considering a community’s vision of future land uses for contaminated sites, EPA often can tailor cleanup options to accommodate community goals.

While successful redevelopment planning can occur at any stage of a cleanup, redevelopment planning should begin as early as possible in the remedial process. The planning process can last several days or months depending on the issues facing the community. It is vital to help communities think of long-term strategies for sustainable future land use and EPA should begin the public participation process in the earliest stages of redevelopment.

3. Financial Assurance

Financial assurance requirements are implemented under Superfund and RCRA to ensure that adequate funds are available to address closure and cleanup of facilities or sites that handle hazardous materials.

Financial assurance requirements can play an important role in promoting the revitalization of contaminated sites. Where the financial resources are available for cleanup and closure activities, entities interested in reusing or redeveloping the property are not confronted with the question of where to obtain the resources for cleaning up the property. When there are inadequate financial assurance funds, EPA or the states may have to spend taxpayer money to fund cleanups. This not only shifts the responsibility away from the liable party, it may also result in a significant delay in closure or cleanup activities. While the property awaits the performance of closure or cleanup activities, it is often difficult to attract outside parties to the property for further reuse and redevelopment.

Given the importance of financial assurance requirements and concerns that entities were not providing adequate financial assurance in accordance with their obligations, financial responsibility was selected as a national enforcement and compliance priority for the fiscal year (FY) 2007-2008 period. The goal of the financial responsibility priority is to ensure that EPA optimizes its financial safeguards under the existing financial assurance requirements through compliance assistance, compliance monitoring, and enforcement. OECA has developed tools, guidance, and training to assist the Regions and states in these areas, which are available on EPA's Web site at <http://cfpub.epa.gov/compliance/data/planning/priorities/financialresp/resources/>.

E. Initiatives and Programs

OSRE has worked closely with other EPA offices including the Office of Brownfields and Land Revitalization (OBLR), the Office of Site Remediation and Technology Innovation (OSRTI), and the Office of Solid Waste (OSW), all within the Office of Solid Waste and Emergency Response (OSWER), to develop and launch new initia-

tives or programs to address certain revitalization challenges. Four of those initiatives -- the Environmentally Responsible Redevelopment and Reuse (ER3) Initiative, brownfields grants and state/tribal funding, the Superfund Redevelopment Initiative (SRI), and the RCRA Brownfields Prevention Initiative -- are described below.

1. ER3 - The Environmentally Responsible Redevelopment and Reuse Initiative

OSRE formally launched its Environmentally Responsible Redevelopment and Reuse (ER3) Initiative in the fall of 2004 at the National Brownfields Conference in St. Louis, MO. The genesis for ER3 was the recognition by former Administrator Christine Todd Whitman that the “built” environment has a tremendous impact on the natural environment and that every office within EPA should work to reduce that impact. OSRE realized that it could reduce the impact of redevelopment by encouraging *sustainable redevelopment* of contaminated sites by offering enforcement and liability relief incentives to developers and other parties. Historically, under the liability schemes found in both Superfund and RCRA, developers faced enforcement and liability concerns if they purchased or operated contaminated land for redevelopment. To some extent, these concerns were addressed, at least for Superfund sites, by the 2002 Brownfields Amendments. ER3 was designed to provide extra relief as an enforcement incentive not only to develop, but to develop in a sustainable manner. For more information on ER3, please visit the ER3 Web site at <http://www.epa.gov/compliance/cleanup/revitalization/er3/index.html>.

ER3 is composed of three interconnected principles. First, OSRE will provide an extra layer of liability relief incentives through a variety of tools available to it (*e.g.* prospective purchaser agreements (PPAs), comfort letters, etc.). That is, OSRE will provide comfort regarding the statutory requirements of CERCLA or RCRA. In return for this “extra” comfort, developers will be required to develop

sustainably. However, OSRE recognizes that many builders do not know *how* to build with sustainable principles. So as the second component, the ER3 team created a national network of outside partners who have this expertise. Finally, the third component is joint outreach and education on sustainable development principles by the OSRE ER3 team, other EPA offices, and the ER3 partners. Information on the ER3 partners is available on EPA's Web site at <http://www.epa.gov/compliance/cleanup/revitalization/er3/partner/index.html#partners>.

In March 2006, OECA Assistant Administrator Granta Nakayama issued a memorandum to EPA Regions calling for ER3 pilot projects. To date, there have been two pilots and the ER3 team is in the process of developing others. For information on ER3 pilot projects, see EPA's Web site at <http://www.epa.gov/compliance/cleanup/revitalization/er3/pilot.html>.

2 Brownfields Grants and State/Tribal Funding

The 2002 Brownfield Amendments established a competitive grant program for the assessment and cleanup of brownfield sites, along with environmental job training under CERCLA § 104(k). Regarding site cleanup, the brownfield grant program provides direct funding for brownfields assessment, cleanup, and revolving loans (that is, establishment of a revolving loan fund for eligible entities to make

**Office of Brownfields and Land
Revitalization Grants and Funding
Web Access**

For information on the EPA brownfields
grant program, please refer to:

<http://www.epa.gov/brownfields>

loans to be used for cleanup), which helps communities revitalize blighted sites by allowing them to take what is often the first step in the process - addressing potential contamination. To be eligible for a brownfield grant, an entity must be an eligible entity and must plan to use the grant funding at an eligible “brownfield site.” *See* CERCLA §§ 104(k)(1), 104(k)(3), and 101(39). The 2002 Brownfields Amendments define a brownfield site broadly, but exclude certain sites from funding eligibility. Still other sites are excluded unless EPA makes a property-specific determination for funding.

CERCLA § 104(k)(4)(B) provides certain other restrictions on the use of brownfield grant funding, such as the prohibition on the use of funds to pay response costs at a site at which a recipient of the federal grant funds would be considered liable as a PRP.

Because state and tribal response programs play a significant role in cleaning up brownfields, the Brownfields Amendments also authorized EPA to provide assistance to states and tribes to establish or enhance their response programs. *See* CERCLA § 128(a).

3. The Superfund Redevelopment Initiative

EPA’s Superfund Redevelopment Initiative helps communities return some of the nation’s worst hazardous waste sites to safe and productive use. While cleaning up these Superfund sites and making them protective of human health and the environment, the Agency is working with communities and other partners in considering future use opportunities and integrating appropriate reuse options into the cleanup process.

EPA’s goal is to make sure that at every cleanup site, the Agency and its partners have an effective process and the necessary tools and information needed to fully explore future uses, before the cleanup remedy is implemented. This gives the Agency the best chance of

making its remedies consistent with the likely future use of a site. In turn, EPA gives communities the best opportunity to productively use sites following cleanup.

As part of the Superfund Redevelopment Initiative, EPA has developed a series of tools to aid in the redevelopment of Superfund sites. One principal tool is the Ready for Reuse (RfR) Determination document, which the Agency creates to provide potential users of Superfund sites with an environmental status report. This documents a technical determination by EPA, in consultation with states, tribes, and local governments, that all or a portion of a real estate property at a site can support specified types of uses and remain protective of human health and the environment. For more information on RfR Determinations, please refer to <http://www.epa.gov/superfund/programs/recycle/policy/reuse.html>.

Before EPA created the RfR determination, potential users often had to seek out information about a site's environmental condition from many different sources, and the information that was available was often expressed in terms difficult for the marketplace to interpret. This meant that many sites able to accommodate certain types of uses were needlessly difficult to market. With the creation of the RfR determination, potential users and the real estate marketplace will have an affirmative statement written in plain English and accompanied by supporting decision documentation, that a site identified as ready for reuse will remain protective as long as all required response conditions and use limitations identified in the site's response decision documents and land title documents continue to be met.

4. The RCRA Brownfields Prevention Initiative

A potential RCRA brownfield is a RCRA facility that is not in full use, where there is redevelopment potential, and where reuse or redevelopment of that site is slowed due to real or perceived concerns

about actual or potential contamination, liability, and RCRA requirements. The RCRA Brownfields Prevention Initiative was established by EPA to encourage the reuse of potential RCRA brownfields so that the land better serves the needs of the community, either through more productive commercial or residential development or as greenspace. More information on the RCRA Brownfields Prevention Initiative is available on EPA's Web site at <http://www.epa.gov/swerosps/rcrabf/>.

The Initiative links EPA's brownfields program with EPA's RCRA Corrective Action Program and other Agency cleanup programs, as well as with state cleanup programs to help communities address contaminated and often blighted properties that may stand in the way of economic vitality. The initiative includes:

- Showcasing cleanup and revitalization approaches through RCRA Brownfields Prevention Pilot projects;
- Addressing barriers to cleanup and revitalization with Targeted Site Efforts (TSEs);
- Supporting outreach efforts to EPA Regional offices, states, and the RCRA community through conferences, training, Internet seminars, and the RCRA Brownfields Web page; and
- Identifying policies that inadvertently may be hindering cleanup, and addressing them with guidance and technical assistance, or through other means.

APPENDICES

Appendix A

The “Common Elements Guidance”

Issued March 6, 2003

The following contains the text of a policy issued by the U.S. Environmental Protection Agency (EPA). Formatting (margins, page numbering, etc.) may be different than the original hard copy to make the document more easily readable. This text is a courtesy copy of the official policy. If any discrepancies are found, the file copy (hard copy original) which resides at the U.S. EPA provides the official policy and is available on the Agency’s Web site at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf>.

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

MEMORANDUM

Subject: Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability (“Common Elements”)

From: Susan E. Bromm, Director
Office of Site Remediation Enforcement

To: Director, Office of Site Remediation and Restoration, Reg. I
Director, Emergency and Remedial Response Division, Reg. II
Director, Hazardous Site Cleanup Division, Reg. III
Director, Waste Management Division, Reg. IV
Directors, Superfund Division, Regs. V, VI, VII and IX
Assistant Regional Administrator, Office of Ecosystems Protection and Remediation, Reg. VIII
Director, Office of Environmental Cleanup, Reg. X
Director, Office of Environmental Stewardship, Reg. I
Director, Environmental Accountability Division, Reg. IV
Regional Counsel, Regs. II, III, V, VI, VII, IX, and X
Assistant Regional Administrator, Office of Enforcement, Compliance, and Environmental Justice, Reg. VIII

I INTRODUCTION

The Small Business Liability Relief and Brownfields Revitalization Act, (“Brownfields Amendments”), Pub. L. No. 107-118, enacted in January 2002, amended the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), to provide important liability limitations for landowners that qualify as: (1) bona fide prospective purchasers, (2) contiguous property owners, or (3) innocent landowners (hereinafter, “landowner liability protections” or “landowner provisions”).

To meet the statutory criteria for a landowner liability protection, a landowner must meet certain threshold criteria and satisfy certain continuing obligations.¹ Many of the conditions are the same or similar under the three landowner provisions (“common elements”). This memorandum is intended to provide Environmental Protection Agency personnel with some general guidance on the common element of the landowner liability protections. Specifically, this memorandum first discusses the threshold criteria of performing “all appropriate inquiry” and demonstrating no “affiliation” with a liable party. The memorandum then discusses the continuing obligations:

- Compliance with land use restrictions and not impeding the effectiveness or integrity of institutional controls;
- Taking “reasonable steps” with respect to hazardous substances affecting a landowner’s property;
- Providing cooperation, assistance and access;
- Complying with information requests and administrative subpoenas; and
- Providing legally required notices.

A chart summarizing the common elements applicable to bona fide prospective purchasers, contiguous property owners, and innocent landowners is attached to this memorandum (Attachment A). In addition, two documents relating to reasonable steps are attached to this memorandum: (1) a “Questions and Answers” document (Attachment B); and (2) a sample site-specifics Comfort/Status Letter (Attachment C).

This memorandum addresses only some of the criteria a landowner must meet in order to qualify under the statute as a bona fide prospective pur-

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

chaser, contiguous property owner, or innocent landowner (i.e., the common elements described above). Other criteria (e.g. the criterion that a contiguous property owner “did not cause, contribute, or consent to the release or threatened release,” found in CERCLA § 107(q)(1)(A)(i), and the criterion that a bona fide prospective purchaser and innocent landowner purchase the property after all disposal of hazardous substances at the facility, found in CERCLA §§ 101(40)(A), 101(35)(A)), are not addressed in this memorandum. In addition, this guidance does not address obligations landowners may have under state statutory or common law.

This memorandum is an interim guidance issued in the exercise of EPA’s enforcement discretion. As EPA gains more experience implementing the Brownfields Amendments, the Agency may revise this guidance. EPA welcomes comments on this guidance and its implementation. Comments may be submitted to the contacts identified at the end of this memorandum.

II. BACKGROUND

The bona fide prospective purchaser provision, CERCLA § 107(r), provides a new landowner liability protection and limits EPA’s recourse for unrecovered response costs to a lien on property for the increase in fair market value attributable to EPA’s response action. To qualify as a bona fide prospective purchaser, a person must meet the criteria set forth in CERCLA § 101(40), many of which are discussed in this memorandum. A purchaser of property must buy the property after January 11, 2002 (the date of enactment of the Brownfields Amendments), in order to qualify as a bona fide prospective purchaser. These parties may purchase property with knowledge of contamination after performing all appropriate inquiry, and still qualify for the landowner liability protection, provided they meet the other criteria set forth in CERCLA § 101(40).²

The new contiguous property owner provision, CERCLA § 107(q), excludes from the definition of “owner” or “operator” a person who owns property that is “contiguous” or otherwise similarly situated to, a facility that is the only source of contamination found on his property. To qualify as a contiguous property owner, a landowner must meet the criteria set forth in

² For a discussion of when EPA will consider providing a prospective purchaser with a covenant not to sue in light of the Brownfields Amendments, see “Bona Fide Prospective Purchasers and the New Amendments to CERCLA,” B. Breen (May 31, 2001).

CERCLA § 107(q)(1)(A), many of which are common elements. This landowner provision “protects parties that are essentially victims of pollution incidents caused by their neighbor’s actions.” S. Rep. No. 107-2, at 10 (2001). Contiguous property owners must perform all appropriate inquiry prior to purchasing property. Persons who know, or have reason to know, prior to purchase, that the property is or could be contaminated, cannot qualify for the contiguous property owner liability protection.³

The Brownfields Amendments also clarified the CERCLA § 107(b)(3) innocent landowner affirmative defense. To qualify as an innocent landowner, a person must meet the criteria set forth in section 107(b)(3) and section 101(35). Many of the criteria in section 101(35) are common elements. CERCLA § 101(35)(A) distinguishes between three types of innocent landowners. Section 101(35)(A)(i) recognizes purchasers who acquire property without knowledge of the contamination. Section 101(35)(A)(ii) discusses governments acquiring contaminated property by escheat, other involuntary transfers or acquisitions, or the exercise of eminent domain authority by purchase or condemnation. Section 101(35)(A)(iii) covers inheritors of contaminated property. For purposes of this guidance, the term “innocent landowner” refers only to the unknowing purchasers as defined in section 101(35)(A)(i). Like contiguous property owners, persons desiring to qualify as innocent landowners must perform all appropriate inquiry prior to purchase and cannot know, or have reason to know, of contamination in order to have a viable defense as an innocent landowner.

III. DISCUSSION

A party claiming to be a bona fide prospective purchaser, contiguous property owner, or section 101(35)(A)(i) innocent landowner bears the burden of proving that it meets the conditions of the applicable landowner liability protection.⁴ Ultimately, courts will determine whether landowners in specific cases have met the conditions of the landowner liability protections and may provide interpretations of the statutory conditions. EPA offers some general guidance below regarding the common elements. This guid-

³ CERCLA § 107(q)(1)(C) provides that a person who does not qualify as a contiguous property owner because he had, or had reason to have, knowledge that the property was or could be contaminated when he bought the property, may still qualify for a landowner liability protection as a bona fide prospective purchase, as long as he meets the criteria set forth in CERCLA § 101(40).

ance is intended to be used by Agency personnel in exercising enforcement discretion. Evaluating whether a party meets these conditions will require careful, fact-specific analysis.

A Threshold Criteria

To qualify as a bona fide prospective purchaser, contiguous property owner, or innocent landowner, a person must perform “all appropriate inquiry” before acquiring the property. Bona fide prospective purchasers and contiguous property owners must, in addition, demonstrate that they are not potentially liable or “affiliated” with any other person that is potentially liable for response costs at the property.

1. All Appropriate Inquiry

To meet the statutory criteria of a bona fide prospective purchaser, contiguous property owner, or innocent landowner, a person must perform “all appropriate inquiry” into the previous ownership and uses of property before acquisition of the property. CERCLA §§ 101(40)(B), 107(q)(1)(A)(viii), 101(35)(A)(i), (B)(i). Purchasers of property wishing to avail themselves of a landowner liability protection cannot perform all appropriate inquiry after purchasing contaminated property. As discussed above, bona fide prospective purchasers may acquire property with knowledge of contamination, after performing all appropriate inquiry, and maintain their protection from liability. In contrast, knowledge, or reason to know, of contamination prior to purchase defeats the contiguous property owner liability protection and the innocent landowner liability protection.

The Brownfields Amendments specify the all appropriate inquiry standard to be applied. The Brownfields Amendments state that purchasers of property before May 31, 1997 shall take into account such things as commonly known information about the property, the value of the property if clean, the ability of the defendant to detect contamination, and other similar criteria. CERCLA § 101(35)(B)(iv)(I). For property purchased on or after May 31, 1997, the procedures of the American Society for Testing and Materials (“ASTM”), including the document known as Standard E1527 - 97, entitled “Standard Practice for Environmental Site Assessments: Phase 1 Environmental Site Assessment Process,” are to be used. CERCLA § 101(35)(B)(iv)(II).

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

The Brownfields Amendments require EPA, not later than January 2004, to promulgate a regulation containing standards and practices for all appropriate inquiry and set out criteria that must be addressed in EPA's regulation. CERCLA § 101(35)(B)(ii), (iii). The all appropriate inquiry standard will thus be the subject of future EPA regulation and guidance.

2 Affiliation

To meet the statutory criteria of a bona fide prospective purchaser or contiguous property owner, a party must not be potentially liable or affiliated with any other person who is potentially liable for response costs.⁵ Neither the bona fide prospective purchaser/contiguous property owner provisions nor the legislative history define the phrase "affiliated with," but on its face the phrase has a broad definition, covering direct and indirect familial relationships, as well as many contractual, corporate, and financial relationships. It appears that Congress intended the affiliation language to prevent a potentially responsible party from contracting away its CERCLA liability through a transaction to a family member or related corporate entity. EPA recognizes that the potential breadth of the term "affiliation" could be taken to an extreme, and in exercising its enforcement discretion, EPA intends to be guided by Congress' intent of preventing transactions structured to avoid liability.

⁵ *The bona fide prospective purchaser provision provides, in pertinent part:* The bona fide prospective purchaser provision provides, in pertinent part: NO AFFILIATION -- The person is not -- (i) potentially liable, or affiliated with any other person that is potentially liable, for response costs at a facility through -- (I) any direct or indirect familial relationship; or (II) any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by the instruments by which title to the facility is conveyed or financed or by a contract for the sale of goods or services); or (ii) the result of a reorganization of a business entity that was potentially liable. CERCLA § 101(40)(H).

The contiguous property owner provides provisions, in pertinent part: **NOT CONSIDERED TO BE AN OWNER OR OPERATOR** -- ...(ii) the person is not -- (I) potentially liable, or affiliated with any other person that is potentially liable, for response costs at a facility through any direct or indirect familial relationship or any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by a contract for the sale of goods or services); or (II) the result of a reorganization of a business entity that was potentially liable[.] CERCLA § 107(q)(1)(A)(ii).

The innocent landowner provision does not contain this “affiliation” language. In order to meet the statutory criteria of the innocent landowner liability protection, however, a person must establish by a preponderance of the evidence that the act or omission that caused the release or threat of release of hazardous substances and the resulting damages were caused by a third party with whom the person does not have an employment, agency, or contractual relationship. Contractual relationship is defined in section 101(35)(A).

B. Continuing Obligations

Several of the conditions a landowner must meet in order to achieve and maintain a landowner liability protection are continuing obligations. This section discusses those continuing obligations: (1) complying with land use restrictions and institutional controls; (2) taking reasonable steps with respect to hazardous substance releases; (3) providing full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration; (4) complying with information requests and administrative subpoenas; and (5) providing legally required notices.

1. Land Use Restrictions and Institutional Controls

The bona fide prospective purchaser, contiguous property owner, and innocent landowner provisions all require compliance with the following ongoing obligations as a condition for maintaining a landowner liability protection:

- the person is in compliance with any land use restrictions established or relied on in connection with the response action and
- the person does not impede the effectiveness or integrity of any institutional control employed in connection with a response action.

CERCLA §§ 101(40)(F), 107(q)(1)(A)(V), 101(35)(A). Initially, there are two important points worth noting about these provisions. First, because institutional controls are often used to implement land use restrictions, failing to comply with a land use restriction may also impede the effectiveness or integrity of an institutional control, and vice versa. As explained below, however, these two provisions do set forth distinct requirements. Second,

these are ongoing obligations and, therefore, EPA believes the statute requires bona fide prospective purchasers, contiguous property owners, and innocent landowners to comply with land use restrictions and to implement institutional controls even if the restrictions or institutional controls were not in place at the time the person purchased the property.

Institutional controls are administrative and legal controls that minimize the potential for human exposure to contamination and protect the integrity of remedies by limiting land or resource use, providing information to modify behavior, or both.⁶ For example, an institutional control might prohibit the drilling of a drinking water well in a contaminated aquifer or disturbing contaminated soils. EPA typically uses institutional controls whenever contamination precludes unlimited use and unrestricted exposure at the property. Institutional controls are often needed both before and after completion of the remedial action. Also, institutional controls may need to remain in place for an indefinite duration and, therefore, generally need to survive changes in property ownership (i.e., run with the land) to be legally and practically effective.

Generally, EPA places institutional controls into four categories:

- (1) governmental controls (e.g., zoning);
- (2) proprietary controls (e.g., covenants, easements);
- (3) enforcement documents (e.g., orders, consent decrees); and
- (4) informational devices (e.g., land record/deed notices).

Institutional controls often require a property owner to take steps to implement the controls, such as conveying a property interest (e.g., an easement or restrictive covenant) to another party such as a governmental entity, thus providing that party with the right to enforce a land use restriction; applying for a zoning change; or recording a notice in the land records.

Because institutional controls are tools used to limit exposure to contamination or protect a remedy by limiting land use, they are often used to implement or establish land use restrictions relied on in connection with the

⁶ For additional information on institutional controls, see “Institutional Controls: A Site Manager’s Guide to Identifying, Evaluating, and Selecting Institutional Controls at Superfund and RCRA Corrective Action Cleanups,” September 2000, (OSWER Directive 9355.0-74FS-P).

response action. However, the Brownfields Amendments require compliance with land use restrictions relied on in connection with the response action, even if those restrictions have not been properly implemented through the use of an enforceable institutional control. Generally, a land use restriction may be considered “relied on” when the restriction is identified as a component of the remedy. Land use restrictions relied on in connection with a response action may be documented in several places depending on the program under which the response action was conducted, including: a risk assessment; a remedy decision document; a remedy design document; a permit, order, or consent decree; under some state response programs, a statute (*e.g.*, no groundwater wells when relying on natural attenuation); or, in other documents developed in conjunction with a response action.

An institutional control may not serve the purpose of implementing a land use restriction for a variety of reasons, including: (1) the institutional control is never, or has yet to be, implemented; (2) the property owner or other persons using the property impede the effectiveness of the institutional controls in some way and the party responsible for enforcement of the institutional controls neglects to take sufficient measures to bring those persons into compliance; or (3) a court finds the controls to be unenforceable. For example, a chosen remedy might rely on an ordinance that prevents groundwater from being used as drinking water. If the local government failed to enact the ordinance, later changed the ordinance to allow for drinking water use, or failed to enforce the ordinance, a landowner is still required to comply with the groundwater use restriction identified as part of the remedy to maintain its landowner liability protection. Unless authorized by the regulatory agency responsible for overseeing the remedy, if the landowner fails to comply with a land use restriction relied on in connection with a response action, the owner will forfeit the liability protection and EPA may use its CERCLA authorities to order the owner to remedy the violation, or EPA may remedy the violation itself and seek cost recovery from the noncompliant landowner.

In order to meet the statutory criteria of a bona fide prospective purchaser, contiguous property owner, or innocent landowner, a party may not impede the effectiveness or integrity of any institutional control employed in connection with a response action. See CERCLA §§ 101(40)(F)(ii), 107(q)(1)(A)(v)(II), 101(35)(A)(iii). Impeding the effectiveness or integrity of an institutional control does not require a physical disturbance or disrupt-

tion of the land. A landowner could jeopardize the reliability of an institutional control through actions short of violating restrictions on land use. In fact, not all institutional controls actually restrict the use of land. For example, EPA and State programs often use notices to convey information regarding contamination on site rather than actually restricting the use. To do this, EPA or a State may require a notice to be placed in the land records. If a landowner removed the notice, the removal would impede the effectiveness of the institutional control. A similar requirement is for a landowner to give notice of any institutional controls on the property to a purchaser of the property. Failure to give this notice may impede the effectiveness of the control. Another example of impeding the effectiveness of an institutional control would be if a landowner applies for a zoning change or variance when the current designated use of the property was intended to act as an institutional control. Finally, EPA might also consider a landowner's refusal to assist in the implementation of an institutional control employed in connection with the response action, such as not recording a deed notice or not agreeing to an easement or covenant, to constitute a violation of the requirement not to impede the effectiveness or integrity of an institutional control.⁷

An owner may seek changes to land use restrictions and institutional controls relied on in connection with a response action by following procedures required by the regulatory agency responsible for overseeing the original response action. Certain restrictions and institutional controls may not need to remain in place in perpetuity. For example, changed site conditions, such as natural attenuation or additional cleanup, may alleviate the need for restrictions or institutional controls. If an owner believes changed site conditions warrant a change in land or resource use or is interested in performing additional response actions that would eliminate the need for particular restrictions and controls, the owner should review and follow the appropriate regulatory agency procedures prior to undertaking any action that may violate the requirements of this provision.

2 *Reasonable Steps*

a. **Overview**

Congress, in enacting the landowner liability protections, included the condition that bona fide prospective purchasers, contiguous property owners,

and innocent landowners take “reasonable steps” with respect to hazardous substance releases to do all of the following:

- Stop continuing releases,
- Prevent threatened future releases, and
- Prevent or limit human, environmental, or natural resource exposure to earlier hazardous substance releases.

CERCLA §§ 101(40)(D), 107(q)(1)(A)(iii), 101(35)(B)(i)(II).⁸ Congress included this condition as an incentive for certain owners of contaminated properties to avoid CERCLA liability by, among other things, acting responsibly where hazardous substances are present on their property.

In adding this new requirement, Congress adopted an approach that is consonant with traditional common law principles and the existing CERCLA “due care” requirement.⁹

By making the landowner liability protections subject to the obligation to take “reasonable steps,” EPA believes Congress intended to balance the desire to protect certain landowners from CERCLA liability with the need to ensure the protection of human health and the environment. In requiring reasonable steps from parties qualifying for landowner liability protections, EPA believes Congress did not intend to create, as a general matter, the same types of response obligations that exist for a CERCLA liable party (e.g., removal of contaminated soil, extraction and treatment of contaminated groundwater).¹⁰ Indeed, the contiguous property owner provision’s legislative history states that absent “exceptional circumstances . . . , these persons are not expected to conduct ground water investigations or install remediation systems, or undertake other response actions that would be more properly paid for by the responsible parties who caused the contamination.” S. Rep. No. 107-2, at 11 (2001). In addition, the Brownfields Amendments provide that contiguous property owners are generally not required to conduct groundwater investigations or to install ground water remediation systems. CERCLA § 107(q)(1)(D).¹¹ Nevertheless, it seems clear that Congress also did not intend to allow a landowner to ignore the potential dangers associated with hazardous substances on its property.

⁷ This may also constitute a violation of the ongoing obligation to provide full cooperation, assistance, and access. CERCLA §§ 101(40)(E), 107(q)(1)(A)(iv), 101(35)(A).

Although the reasonable steps legal standard is the same for the three landowner provisions, the obligations may differ to some extent because of other differences among the three statutory provisions. For example, as noted earlier, one of the conditions is that a person claiming the status of a bona fide prospective purchaser, contiguous property owner, or innocent landowner must have “carried out all appropriate inquiries” into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices. CERCLA §§ 101(40)(B), 107(q)(1)(A)(viii), 101(35)(B). However, for a contiguous property owner or innocent landowner, knowledge of contamination defeats eligibility for the liability protection. A bona fide prospective purchaser may purchase with knowledge of the contamination and still be eligible for the liability protection. Thus, only the bona fide prospective purchaser could purchase a contaminated property that is, for example, on CERCLA’s National Priorities List¹² or is undergoing active cleanup under an EPA or State cleanup program, and still maintain his liability protection.

The pre-purchase “appropriate inquiry” by the bona fide prospective purchaser will most likely inform the bona fide prospective purchaser as to the nature and extent of contamination on the property and what might be

⁸ CERCLA § 101(40)(D), the bona fide prospective purchaser reasonable steps provision, provides: “[t]he person exercises appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to -- (i) stop any continuing release; (ii) prevent any threatened future release; and (iii) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance.”

CERCLA § 107(q)(1)(A), the contiguous property owner reasonable steps provision, provides: “the person takes reasonable steps to -- (I) stop any continuing release; (II) prevent any threatened future release; and (III) prevent or limit human, environmental, or natural resource exposure to any hazardous substance released on or from property owned by that person.”

CERCLA § 101(35)(B)(II), the innocent landowner reasonable steps provision, provides: “the defendant took reasonable steps to -- (aa) stop any continuing release; (bb) prevent any threatened future release; and (cc) prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substance.”

⁹ See innocent landowner provision, CERCLA § 107(b)(3)(a).

considered reasonable steps regarding the contamination -- how to stop continuing releases, prevent threatened future releases, and prevent or limit human, environmental, and natural resource exposures. Knowledge of contamination and the opportunity to plan prior to purchase should be factors in evaluating what are reasonable steps, and could result in greater reasonable steps obligations for a bona fide prospective purchaser.¹³ Because the pre-purchase “appropriate inquiry” performed by a contiguous property owner or innocent landowner must result in no knowledge of the contamination for the landowner liability protection to apply, the context for evaluating reasonable steps for such parties is different. That is, reasonable steps in the context of a purchase by a bona fide prospective purchaser may differ from reasonable steps for the other protected landowner categories (who did not have knowledge or an opportunity to plan prior to purchase). Once a contiguous property owner or innocent landowner learns that contamination exists on his property, then he must take reasonable steps considering the available information about the property contamination.

The required reasonable steps relate only to responding to contamination for which the bona fide prospective purchaser, contiguous property owner, or innocent landowner is not responsible. Activities on the property subsequent to purchase that result in new contamination can give rise to full CERCLA liability. That is, more than reasonable steps will likely be required from the landowner if there is new hazardous substance contamination on

¹⁰ There could be unusual circumstances where the reasonable steps required of a bona fide prospective purchaser, contiguous property owner, or innocent landowner would be akin to the obligations of a potentially responsible party (e.g., the only remaining response action is institutional controls or monitoring, the benefit of a the response action will inure primarily to the landowner, or the landowner is the only person in a position to prevent or limit an immediate hazard.) This may be more likely to arise in the context of a bona fide prospective purchaser as the purchaser may buy the property with knowledge of the contamination.

¹¹ CERCLA § 107(q)(1)(D) provides: GROUND WATER -- With respect to a hazardous substance from one or more sources that are not on the property of a person that is a contiguous property owner that enters ground water beneath the property of the person solely as a result of subsurface migration in an aquifer, subparagraph (A)(iii) shall not require the person to conduct ground water investigations or to install ground water remediation systems, except in accordance with the policy of the Environmental Protection Agency concerning owners of property containing contaminated aquifers, dated May 24, 1995.

the landowner's property for which the landowner is liable. See, e.g., CERCLA § 101(40)(A) (requiring a bona fide prospective purchaser to show “[a]ll disposal of hazardous substances at the facility occurred before the person acquired the facility”).

As part of the third party defense that pre-dates the Brownfields Amendments and continues to be a distinct requirement for innocent landowners, CERCLA requires the exercise of “due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all the relevant facts and circumstances.” CERCLA § 107(b)(3)(a). The due care language differs from the Brownfields Amendments’ new reasonable steps language. However, the existing case law on due care provides a reference point for evaluating the reasonable steps requirement. When courts have examined the due care requirement in the context of the pre-existing innocent landowner defense, they have generally concluded that a landowner should take some positive or affirmative step(s) when confronted with hazardous substances on its property. Because the due care cases cited in Attachment B (see Section III.B.2.b “Questions and Answers,” below) interpret the due care statutory language and not the reasonable steps statutory language, they are provided as a reference point for the reasonable steps analysis, but are not intended to define reasonable steps.

The reasonable steps determination will be a site-specific, fact-based inquiry. That inquiry should take into account the different elements of the landowner liability protections and should reflect the balance that Congress sought between protecting certain landowners from CERCLA liability and assuring continued protection of human health and the environment. Although each site will have its own unique aspects involving individual site analysis, Attachment B provides some questions and answers intended as general guidance on the question of what actions may constitute reasonable steps.

¹²The National Priorities List is “the list compiled by EPA pursuant to CERCLA § 105, of uncontrolled hazardous substance releases in the United States that are priorities for long-term remedial evaluation and response.” 40 C.F.R. § 300.5 (2001).

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

b. Site-Specific Comfort/Status Letters Addressing Reasonable Steps

Consistent with its “Policy on the Issuance of Comfort/Status Letters,” (“1997 Comfort/Status Letter Policy”), 62 Fed. Reg. 4,624 (1997), EPA may, in its discretion, provide a comfort/status letter addressing reasonable steps at a specific site, upon request. EPA anticipates that such letters will be limited to sites with significant federal involvement such that the Agency has sufficient information to form a basis for suggesting reasonable steps (e.g., the site is on the National Priorities List or EPA has conducted or is conducting a removal action on the site). In addition, as the 1997 Comfort/Status Letter Policy provides, “[i]t is not EPA’s intent to become involved in typical real estate transactions. Rather, EPA intends to limit the use of . . . comfort to where it may facilitate the cleanup and redevelopment of brownfields, where there is the realistic perception or probability of incurring Superfund liability, and where there is no other mechanism available to adequately address the party’s concerns.” *Id.* In its discretion, a Region may conclude in a given case that it is not necessary to opine about reasonable steps because it is clear that the landowner does not or will not meet other elements of the relevant landowner liability protection. A sample reasonable steps comfort/status letter is attached to this memorandum (see Attachment C).

The 1997 Comfort/Status Letter Policy recognizes that, at some sites, the state has the lead for day-to-day activities and oversight of a response action, and the Policy includes a “Sample State Action Letter.” For reasonable steps inquiries at such sites, Regions should handle responses consistent with the existing 1997 Comfort/Status Letter Policy. In addition, where appropriate, if EPA has had the lead at a site with respect to response actions (e.g., EPA has conducted a removal action at the site), but the state will be taking over the lead in the near future, EPA should coordinate with the state prior to issuing a comfort/status letter suggesting reasonable steps at the site.

1. Cooperation, Assistance, and Access

The Brownfields Amendments require that bona fide prospective purchasers, contiguous property owners, and innocent landowners provide full cooperation, assistance, and access to persons who are authorized to conduct response actions or natural resource restoration at the vessel or facil-

ity from which there has been a release or threatened release, including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action or natural resource restoration at the vessel or facility. CERCLA §§ 101(40)(E), 107(q)(1)(A)(iv), 101(35)(A).

2. *Compliance with Information Requests and Administrative Subpoenas*

The Brownfields Amendments require bona fide prospective purchasers and contiguous property owners to be in compliance with, or comply with, any request for information or administrative subpoena issued by the President under CERCLA. CERCLA §§ 101(40)(G), 107(q)(1)(A)(vi). In particular, EPA expects timely, accurate, and complete responses from all recipients of section 104(e) information requests. As an exercise of its enforcement discretion, EPA may consider a person who has made an inconsequential error in responding (e.g., the person sent the response to the wrong EPA address and missed the response deadline by a day), a bona fide prospective purchaser or contiguous property owner, as long as the landowner also meets the other conditions of the applicable landowner liability protection.

3. *Providing Legally Required Notices*

The Brownfields Amendments subject bona fide prospective purchasers and contiguous property owners to the same “notice” requirements. Both provisions mandate, in pertinent part, that “[t]he person provides all legally required notices with respect to the discovery or release of any hazardous substances at the facility.” CERCLA §§ 101(40)(C), 107(q)(1)(A)(vii). EPA believes that Congress’ intent in including this as an ongoing obligation was to ensure that EPA and other appropriate entities are made aware of hazardous substance releases in a timely manner.

“Legally required notices” may include those required under federal, state, and local laws. Examples of federal notices that may be required include, but are not limited to, those under: CERCLA § 103 (notification requirements regarding released substances); EPCRA § 304 (“emergency notification”); and RCRA § 9002 (notification provisions for underground storage tanks). The bona fide prospective purchaser and contiguous property owner have the burden of ascertaining what notices are legally required in a given instance and of complying with those notice requirements. Regions may require these landowners to self-certify that they have provided (in the case

of contiguous property owners), or will provide within a certain number of days of purchasing the property (in the case of bona fide prospective purchasers), all legally required notices. Such self-certifications may be in the form of a letter signed by the landowner as long as the letter is sufficient to satisfy EPA that applicable notice requirements have been met. Like many of the other common elements discussed in this memorandum, providing legally required notices is an ongoing obligation of any landowner desiring to maintain its status as a bona fide prospective purchaser or contiguous property owner.

IV. CONCLUSION

Evaluating whether a landowner has met the criteria of a particular landowner provision will require careful, fact-specific analysis by the regions as part of their exercise of enforcement discretion. This memorandum is intended to provide EPA personnel with some general guidance on the common elements of the landowner liability protections. As EPA implements the Brownfields Amendments, it will be critical for the regions to share site-specific experiences and information pertaining to the common elements amongst each other and with the Office of Site Remediation Enforcement, in order to ensure national consistency in the exercise of the Agency's enforcement discretion. EPA anticipates that its Landowner Liability Protection Subgroup, which is comprised of members from various headquarters offices, the Offices of Regional Counsel, the Office of General Counsel, and the Department of Justice, will remain intact for the foreseeable future and will be available to serve as a clearinghouse for information for the regions on the common elements.

Questions and comments regarding this memorandum or site-specific inquiries should be directed to Cate Tierney, in OSRE's Regional Support Division (202-564-4254, Tierney.Cate@EPA.gov), or Greg Madden, in OSRE's Policy & Program Evaluation Division (202-564-4229, Madden.Gregory@EPA.gov).

V. DISCLAIMER

This memorandum is intended solely for the guidance of employees of EPA and the Department of Justice and it creates no substantive rights for any persons. It is not a regulation and does not impose legal obligations. EPA will apply the guidance only to the extent appropriate based on the facts.

Attachments

cc: Jewell Harper (OSRE)
Paul Connor (OSRE)
Sandra Connors (OSRE)
Thomas Dunne (OSWER)
Benjamin Fisherow (DOJ)
Linda Garczynski (OSWER)
Bruce Gelber (DOJ)
Steve Luftig (OSWER)
Earl Salo (OGC)
EPA Brownfields Landowner Liability Protection Subgroup

Attachment A
Chart Summarizing Applicability of “Common Elements” to
Bona Fide Prospective Purchasers, Contiguous Property
Owners, and Section 101(35)(A)(i) Innocent Landowners

Common Element among the Brownfields Amendments Landowner Provisions	Bona Fide Prospective Purchaser	Contiguous Property Owner	Section 101 (35)(A)(i) Innocent Landowner
All Appropriate Inquiry	√	√	√
No affiliation demonstration	√	√	*
Compliance with land use restrictions and institutional controls	√	√	√
Taking reasonable steps	√	√	√
Cooperation, assistance, access	√	√	√
Compliance with information requests and administrative subpoenas	√	√	**
Providing legally required notices	√	√	***

* Although the innocent landowner provision does not contain this “affiliation” language, in order to meet the statutory criteria of the innocent landowner liability protection, a person must establish by a preponderance of the evidence that the act or omission that caused the release or threat of release of hazardous substances and the resulting damages were caused by a third party with whom the person does not have an employment, agency, or contractual relationship. CERCLA § 107(b)(3). Contractual relationship is defined in section 101(35)(A).

** Compliance with information requests and administrative subpoenas is not specified as a statutory criterion for achieving and maintaining the section 101(35)(A)(i) innocent landowner liability protection. However, CERCLA requires compliance with administrative subpoenas from all persons, and timely, accurate, and complete responses from all recipients of EPA information requests.

*** Provision of legally required notices is not specified as a statutory criterion for achieving and maintaining the section 101(35)(A)(i) innocent landowner liability protection. These landowners may, however, have notice obligations under federal, state and local laws.

Attachment B Reasonable Steps Questions and Answers

The “reasonable steps” required of a bona fide prospective purchaser, contiguous property owner, or section 101(35)(A)(i) innocent landowner under CERCLA §§ 101(40)(D), 107(q)(1)(A)(iii), and 101(35)(B)(i)(II), will be a site-specific, fact-based inquiry. Although each site will have its own unique aspects involving individual site analysis, below are some questions and answers intended to provide general guidance on the question of what actions may constitute reasonable steps. The answers provide a specific response to the question posed, without identifying additional actions that might be necessary as reasonable steps or actions that may be required under the other statutory conditions for each landowner provision (e.g., providing cooperation and access). In addition, the answers do not address actions that may be required under other federal statutes (e.g., the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*; the Clean Water Act, 33 U.S.C. § 1251, *et seq.*; and the Toxic Substances Control Act, 15 U.S.C. § 2601, *et seq.*), and do not address landowner obligations under state statutory or common law.¹

Notification

Q1: If a person conducts “all appropriate inquiry” with respect to a property where EPA has conducted a removal action, discovers hazardous substance contamination on the property that is unknown to EPA, and then purchases the property, is notification to EPA or the state about the contamination a reasonable step?

A1: Yes. First, bona fide prospective purchasers may have an obligation to provide notice of the discovery or release of a hazardous substance under the legally required notice provision, CERCLA § 101(40)(C). Second, even if not squarely required by the notice conditions, providing notice of the contamination to appropriate governmental authorities would be a reasonable step in order to prevent a “threatened future release” and “prevent or limit . . . exposure.” Congress specifically identified “notifying appropriate

¹ The Brownfields Amendments did not alter CERCLA § 114(a), which provides: “[n]othing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State.”

Federal, state, and local officials” as a typical reasonable step. S. Rep. No.107-2, at 11 (2001); see also, Bob’s Beverage Inc. v. Acme, Inc., 169 F. Supp. 2d 695, 716 (N.D. Ohio 1999) (failure to timely notify EPA and Ohio EPA of groundwater contamination was factor in conclusion that party failed to exercise due care), *aff’d*, 264 F. 3d 692 (6th Cir. 2001). It should be noted that the bona fide prospective purchaser provision is the only one of the three landowner provisions where a person can purchase property with knowledge that it is contaminated and still qualify for the landowner liability protection.

Site Restrictions

Q2: Where a property owner discovers unauthorized dumping of hazardous substances on a portion of her property, are site access restrictions reasonable steps?

A2: Site restrictions are likely appropriate as a first step, once the dumping is known to the owner. Reasonable steps include preventing or limiting “human, environmental, or natural resource exposure” to hazardous substances. CERCLA §§ 101(40)(D)(iii), 107(q)(1)(A)(iii)(III), 101(35)(B)(i)(II)(cc). The legislative history for the contiguous property owner provision specifically notes that “erecting and maintaining signs or fences to prevent public exposure” may be typical reasonable steps. S. Rep. No. 107-2, at 11 (2001); see also, Idylwoods Assoc. v. Mader Capital, Inc., 915 F. Supp. 1290, 1301 (W.D.N.Y. 1996) (failure to restrict access by erecting signs or hiring security personnel was factor in evaluating due care), *aff’d on reh’g*, 956 F. Supp. 410, 419-20 (W.D.N.Y. 1997); New York v. Delmonte, No. 98-CV-0649E, 2000 WL 432838, *4 (W.D.N.Y. Mar. 31, 2000) (failure to limit access despite knowledge of trespassers was not due care).

Containing Releases or Threatened Releases

Q3: If a new property owner discovers some deteriorating 55 gallon drums containing unknown material among empty drums in an old warehouse on her property, would segregation of the drums and identification of the material in the drums constitute reasonable steps?

A3: Yes, segregation and identification of potential hazards would likely be appropriate first steps. Reasonable steps must be taken to “prevent any threatened future release.” CERCLA §§ 101(40)(D)(ii), 107(q)(1)(A)(iii)(II), 101(35)(B)(i)(II)(bb). To the extent the drums have the potential to leak,

segregation and containment (e.g., drum overpack) would prevent mishandling and releases to the environment. For storage and handling purposes, an identification of the potential hazards from the material will likely be necessary. Additional identification steps would likely be necessary for subsequent disposal or resale if the material had commercial value.

Q4: If a property owner discovers that the containment system for an on-site waste pile has been breached, do reasonable steps include repairing the breach?

A4: One of the reasonable steps obligations is to “stop any continuing release.” CERCLA §§ 101(40)(D)(i), 107(q)(1)(A)(iii)(I), 101(35)(B)(i)(II)(aa). In general, the property owner should take actions to prevent contaminant migration where there is a breach from an existing containment system. Both Congress and the courts have identified maintenance of hazardous substance migration controls as relevant property owner obligations. For example, in discussing contiguous property owners’ obligations for migrating groundwater plumes, Congress identified “maintaining any existing barrier or other elements of a response action on their property that address the contaminated plume” as a typical reasonable step. S. Rep. No. 107-2, at 11 (2001); see also, Franklin County Convention Facilities Auth. v. American Premier Underwriters, Inc., 240 F.3d 534, 548 (6th Cir. 2001) (failure to promptly erect barrier that allowed migration was not due care); United States v. DiBiase Salem Realty Trust, No. Civ. A. 91-11028-MA, 1993 WL 729662, *7 (D. Mass. Nov. 19, 1993) (failure to reinforce waste pit berms was factor in concluding no due care), *aff’d*, 45 F.3d 541, 545 (1st Cir. 1995). In many instances, the current property owner will have responsibility for maintenance of the containment system. If the property owner has responsibility for maintenance of the system as part of her property purchase, then she should repair the breach. In other instances, someone other than the current landowner may have assumed that responsibility (e.g., a prior owner or other liable parties that signed a consent decree with EPA and/or a State). If someone other than the property owner has responsibility for maintenance of the containment system pursuant to a contract or other agreement, then the question is more complicated. At a minimum, the current owner should give notice to the person responsible for the containment system and to the government. Moreover, additional actions to prevent contaminant migration would likely be appropriate.

Q5: If a bona fide prospective purchaser buys property at a Superfund site where part of the approved remedy is an asphalt parking lot cap, but the entity or entities responsible for implementing the remedy (e.g., PRPs who signed a consent decree) are unable to repair the deteriorating cap (e.g., the PRPs are now defunct), should the bona fide prospective purchaser repair the deteriorating asphalt parking lot cap as reasonable steps?

A5: Taking “reasonable steps” includes steps to: “prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substances.” CERCLA §§ 101(40)(D)(iii), 107(q)(1)(A)(iii)(III), 101(35)(B)(i)(II)(cc). In this instance, the current landowner may be in the best position to identify and quickly take steps to repair the asphalt cap and prevent additional exposures.

Remediation

Q6: If a property is underlain by contaminated groundwater emanating from a source on a contiguous or adjacent property, do reasonable steps include remediating the groundwater?

A6: Generally not. Absent exceptional circumstances, EPA will not look to a landowner whose property is not a source of a release to conduct groundwater investigations or install groundwater remediation systems. Since 1995, EPA’s policy has been that, in the absence of exceptional circumstances, such a property owner did not have “to take any affirmative steps to investigate or prevent the activities that gave rise to the original release” in order to satisfy the innocent landowner due care requirement. *See* May 24, 1995 “Policy Toward Owners of Property Containing Contaminated Aquifers.” (“1995 Contaminated Aquifers Policy”). In the Brownfields Amendments, Congress explicitly identified this policy in noting that reasonable steps for a contiguous property owner “shall not require the person to conduct groundwater investigations or to install groundwater remediation systems,” except in accordance with that policy. *See* CERCLA § 107(q)(1)(D). The policy does not apply “where the property contains a groundwater well, the existence or operation of which may affect the migration of contamination in the affected area.” 1995 Contaminated Aquifers Policy, at 5. In such instances, a site-specific analysis should be used in order to determine reasonable steps. In some instances, reasonable steps may simply mean operation of the groundwater well consistent with the selected remedy. In other instances, more could be required.

Q7: If a protected landowner discovers a previously unknown release of a hazardous substance from a source on her property, must she remediate the release?

A7: Provided the landowner is not otherwise liable for the release from the source, she should take some affirmative steps to “stop the continuing release,” but EPA would not, absent unusual circumstances, look to her for performance of complete remedial measures. However, notice to appropriate governmental officials and containment or other measures to mitigate the release would probably be considered appropriate. Compare Lincoln Properties, Ltd. v. Higgins, 823 F. Supp. 1528, 1543-44 (E.D. Calif. 1992) (sealing sewer lines and wells and subsequently destroying wells to protect against releases helped establish party exercised due care); Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1508 (11th Cir. 1996) (timely development of maintenance plan to remove tar seeps was factor in showing due care was exercised); New York v. Lashins Arcade Co., 91 F.3d 353 (2nd Cir. 1996) (instructing tenants not to discharge hazardous substances into waste and septic systems, making instructions part of tenancy requirements, and inspecting to assure compliance with this obligation, helped party establish due care); with Idylwoods Assoc. v. Mader Capital, Inc., 956 F. Supp. 410, 419-20 (W.D.N.Y. 1997) (property owner’s decision to do nothing resulting in spread of contamination to neighboring creek was not due care); Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co., 14 F.3d 321, 325 (7th Cir. 1994) (party that “made no attempt to remove those substances or to take any other positive steps to reduce the threat posed” did not exercise due care). As noted earlier, if the release is the result of a disposal after the property owner’s purchase, then she may be required to undertake full remedial measures as a CERCLA liable party. Also, if the source of the contamination is on the property, then the property owner will not qualify as a contiguous property owner but may still qualify as an innocent landowner or a bona fide prospective purchaser.

Site Investigation

Q8: If a landowner discovers contamination on her property, does the obligation to take reasonable steps require her to investigate the extent of the contamination?

A8: Generally, where the property owner is the first to discover the contamination, she should take certain basic actions to assess the extent of contamination. Absent such an assessment, it will be very difficult to determine what reasonable steps will stop a continuing release, prevent a threatened future release, or prevent or limit exposure. While a full environmental investigation may not be required, doing nothing in the face of a known or suspected environmental hazard would likely be insufficient. See, e.g., United States v. DiBiase Salem Realty Trust, 1993 WL 729662, *7 (failure to investigate after becoming aware of dangerous sludge pits was factor in concluding party did not exercise due care), *aff'd*, 45 F.3d 541, 545 (1st Cir. 1995); United States v. A&N Cleaners and Launderers, Inc., 854 F. Supp. 229 (S.D.N.Y. 1994) (dictum) (failing to assess environmental threats after discovery of disposal would be part of due care analysis). Where the government is actively investigating the property, the need for investigation by the landowner may be lessened, but the landowner should be careful not to rely on the fact that the government has been notified of a hazard on her property as a shield to potential liability where she fails to conduct any investigation of a known hazard on her property. Compare New York v. Lashins Arcade Co., 91 F.3d 353, 361 (2nd Cir. 1996) (no obligation to investigate where RI/FS already commissioned) with DiBiase Salem Realty Trust, 1993 WL 729662, *7 (State Department of Environmental Quality knowledge of hazard did not remove owner's obligation to make some assessment of site conditions), *aff'd*, 45 F.3d 541, 545 (1st Cir. 1995).

Performance of EPA Approved Remedy

Q9: If a new purchaser agrees to assume the obligations of a prior owner PRP, as such obligations are defined in an order or consent decree issued or entered into by the prior owner and EPA, will compliance with those obligations satisfy the reasonable steps requirement?

A9: Yes, in most cases compliance with the obligations of an EPA order or consent decree will satisfy the reasonable steps requirement so long as the order or consent decree comprehensively addresses the obligations of the prior owner through completion of the remedy. It should be noted that not all orders or consent decrees identify obligations through completion of the remedy and some have open-ended cleanup obligations.

Attachment C
Sample Federal Superfund Interest
Responsible Steps Letter

The sample comfort/status letter below may be used in the exercise of enforcement discretion where EPA has sufficient information regarding the site to have assessed the hazardous substance contamination and has enough information about the property to make suggestions as to steps necessary to satisfy the “reasonable steps” requirement. In addition, like any comfort/status letter, the letters should be provided in accordance with EPA’s “Comfort/Status Letter Policy.” That is, they are not necessary or appropriate for purely private real estate transactions. Such letters may be issued when: (1) there is a realistic perception or probability of incurring Superfund liability, (2) such comfort will facilitate the cleanup and redevelopment of a brownfield property, (3) there is no other mechanism to adequately address the party’s concerns, and (4) EPA has sufficient information about the property to provide a basis for suggesting reasonable steps.

[Insert Addressee]

Re: **[Insert Name or Description of Property]**

Dear **[Insert name of requestor]**:

I am writing in response to your letter dated **[insert date]** concerning the property referenced above. As you know, the **[insert name]** property is located within or near the **[insert name of CERCLIS site.]** EPA is currently **[insert description of action EPA is taking or plans to take and any contamination problem.]**

The **[bona fide prospective purchaser, contiguous property owner, or innocent landowner]** provision states that a person meeting the criteria of **[insert section]** is protected from CERCLA liability. **[For bona fide prospective purchaser only, it may be appropriate to insert following language: To the extent EPA’s response action increases the fair market value of the property, EPA may have a windfall lien on the property. The windfall lien is limited to the increase in fair market value attributable to EPA’s response action, capped by EPA’s unrecovered response costs.]** (I am enclosing a copy of the relevant statutory provisions for your reference.) To qualify as a **[bona fide prospective purchaser, contiguous property owner, or section 101(35)(A)(i) innocent landowner]**, a person must (among other requirements) take “reasonable steps” with respect to stopping continuing releases, preventing threatened future releases, and preventing or limiting

human, environmental, or natural resources exposure to earlier releases. You have asked what actions you must take, as the **[owner or prospective owner]** of the property, to satisfy the “reasonable steps” criterion.

As noted above, EPA has conducted a **[insert most recent/relevant action to “reasonable steps” inquiry taken by EPA]** at **[insert property name]** and has identified a number of environmental concerns. Based on the information EPA has evaluated to date, EPA believes that, for an owner of the property, the following would be appropriate reasonable steps with respect to the hazardous substance contamination found at the property:

[insert paragraphs outlining reasonable steps with respect to each environmental concern]

This letter does not provide a release from CERCLA liability, but only provides information with respect to reasonable steps based on the information EPA has available to it. This letter is based on the nature and extent of contamination known to EPA at this time. If additional information regarding the nature and extent of hazardous substance contamination at **[insert property name]** becomes available, additional actions may be necessary to satisfy the reasonable steps criterion. In particular, if new areas of contamination are identified, you should ensure that reasonable steps are undertaken. As the property owner, you should ensure that you are aware of the condition of your property so that you are able to take reasonable steps with respect to any hazardous substance contamination at or on the property.

Please note that the **[bona fide prospective purchaser, contiguous property owner, or innocent landowner]** provision has a number of conditions in addition to those requiring the property owner to take reasonable steps. Taking reasonable steps and many of the other conditions are continuing obligations of the **[bona fide prospective purchaser, contiguous property owner, or section 101(35)(A)(i) innocent landowner]**. You will need to assess whether you satisfy each of the statutory conditions for the **[bona fide prospective purchaser, contiguous property owner, or innocent landowner]** provision and continue to meet the applicable conditions.

EPA hopes this information is useful to you. If you have any questions, or wish to discuss this letter, please feel free to contact **[insert EPA contact and address]**.

Sincerely,

[insert name of EPA contact]

Appendix B

Brownfields Enforcement and Land Revitalization Policy and Guidance Documents

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

Bona Fide Prospective Purchases and the New Amendments to CERCLA **May 31, 2002**

Describes when EPA will consider providing a bona fide prospective purchaser (BFPP) with a liability limitation despite having knowledge of contamination pursuant to changes made to the Superfund statute by the 2002 Brownfield Amendments. The Amendments list certain requirements that must be met to achieve BFPP status, dispense with the prior need for Prospective Purchaser Agreements (PPA) (except in limited circumstances), and provide for EPA's recovery of any windfall that a purchaser may receive.

To access online: <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/bonf-pp-cercla-mem.pdf>

Brownfields Sites and Supplemental Environmental Projects (SEPs) **November 30, 2006**

Provides background information on the use of supplemental environmental projects (SEPs), in addition to questions and answers on the complementary role of SEPs at brownfield sites. This document supersedes the 1998 guidance document "Using Supplemental Environmental Projects to Facilitate Brownfields Redevelopment."

To access online: <http://www.epa.gov/compliance/resources/publications/cleanup/brownfields/brownfield-seps.pdf>

Comfort/Status Letters for RCRA Brownfields Properties February 5, 2001

Addresses the use of comfort/status letters at Resource Conservation and Recovery Act (RCRA) properties, where the letters may facilitate the cleanup and reuse of brownfield sites, where there exists a real probability or perception that EPA may initiate a cleanup, or where there is no other adequate mechanism to assuage a party's concerns. This document also includes four sample letters.

To access online: <http://www.epa.gov/compliance/resources/policies/cleanup/rcra/comfort-rcra-brwn-mem.pdf>

“Common Elements” Guidance Reference Sheet March 6, 2003

Highlights the main points made in EPA's March 2003 “Common Elements” guidance document concerning the conditional liability provided to bona fide prospective purchasers, contiguous property owners, and innocent landowners by the 2002 Brownfield Amendments. The document focuses on the shared factors required to qualify for the above Superfund liability protections.

To access online: <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-lem-ref.pdf>

Contiguous Property Owner Guidance Reference Sheet February 5, 2004

The reference sheet summarizes the important points and requirements of the January 13, 2004 guidance document “Interim Enforcement Discretion Guidance Regarding Contiguous Property Owners,” which addresses liability limitations.

To access online: <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/contig-prop-faq.pdf>

Environmentally Responsible, Redevelopment & Reuse (“ER3”) Frequently Asked Questions and Answers December 31, 2005

Provides a list of frequently asked questions and answers regarding EPA’s Environmentally Responsible, Redevelopment and Reuse (ER3) Initiative. This program seeks to encourage redevelopment in a sustainable way that prevents future environmental hazards through incentives, assistance, and education.

To access online: <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/er3-faqs-05.pdf>

Final Policy Toward Owners of Property Containing Contaminated Aquifers May 24, 1995

Details EPA’s position concerning owners of property that contains an aquifer that has become contaminated as a result of subsurface migration. In certain circumstances, EPA will not take enforcement action against a landowner whose property has become contaminated through subsurface migration through no fault of their own, their agent, or their employee. In addition, EPA may consider de minimis settlements which would protect the landowner from contribution suits.

To access online: <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/contamin-aqui-rpt.pdf>

Guidance for Preparing Superfund Ready for Reuse Determinations February 12, 2004

Provides guidance to EPA employees in preparing Ready for Reuse Determinations (RfR) in order to encourage the reuse of Superfund sites by informing the real estate market of the status of the site subject to the determination. RfR is an environmental status report that documents a technical determination by EPA, in consultation with the States, Tribes, and local governments, that all or a portion of a Superfund site can support specified types of uses and remain protective of human health and the environment.

To access online: <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/rfr-deter-cmpt.pdf>

Guidance on Agreements with Prospective Purchasers of Contaminated Property
May 24, 1995

Provides guidance to prospective purchasers of contaminated Superfund property, specifically concerning the expanded circumstances by which purchasers can enter into covenants not to sue with EPA. This document also provides a model agreement.

To access online: <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/prosper-cont-mem.pdf>

Interim Enforcement Discretion Policy Concerning “Windfall Liens” Under Section 107(r) of CERCLA
July 16, 2003

Discusses EPA and the Department of Justice’s (DOJ) interim policy implementation of the new CERCLA 107(r) windfall lien provision contained in the 2002 Brownfields Amendments. This document lists the factors that EPA will use to determine whether to file a lien, in addition to discussing how EPA will settle the liens and the possibility of EPA issuing comfort letters to or making agreements with bona fide prospective purchaser (BFPPs).

To access online: <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-windfall-lien.pdf>

Interim Enforcement Discretion Guidance Regarding Contiguous Property Owners
January 13, 2004

Addresses the addition of liability protection to contiguous property owners to Superfund by the 2002 Brownfields Amendments. The document discusses the criteria property owners need to meet, how the Amendments apply to current and former owners, the relationship between the Amendments and EPA’s Residential Homeowner Policy and Contaminated Aquifers Policy, and mechanisms that EPA may use to resolve landowner liability concerns.

To access online: <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/contig-prop.pdf>

Interim Guidance on the Municipal Solid Waste Exemption Under CERCLA Section 107(p)
August 20, 2003

Discusses the qualified liability exemption added to Superfund by the 2002 Brownfields Amendments and provided to certain residential, small business and non-profit generators of municipal solid waste (MSW) at sites on the National Priorities List (NPL). This document discusses the criteria to qualify for this exemption, the provisions in the Amendments meant to deter litigation against exempt parties, and the interaction between this exemption and existing policies.

To access online: **<http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-msw-exempt.pdf>**

Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability (“Common Elements”)
March 6, 2003

Provides general information regarding the common elements of the landowner liability protections contained in the 2002 Brownfields Amendments to Superfund. These common elements include the requirements of “all appropriate inquiry” (AAI), demonstrating no affiliation with a liable party, and continuing obligations.

To access online: **<http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf>**

Issuance of CERCLA Model Agreement and Order on Consent for Removal Action by a Bona Fide Prospective Purchaser
November 27, 2006

Provides a model agreement and order on consent for those bona fide prospective purchasers (BFPP) who are required to perform a removal action. This model addresses those situations where there is a federal interest or where the work is complex or significant in extent, such as where EPA will oversee the removal action or where the removal work will exceed the “reasonable steps to prevent releases” obligation upon which BFPP status depends.

To access online: **<http://www.epa.gov/compliance/resources/policies/cleanup/superfund/bfpp-ra-mem.pdf>**

Municipal Immunity from CERCLA Liability for Property Acquired through Involuntary State Action
October 20, 1995

Sets forth EPA and DOJ policy regarding the government's enforcement of Superfund against lenders and against governmental entities that acquire property involuntarily.

To access online: <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/immunity-cercla-mem.pdf>

Policy on CERCLA Enforcement Against Lenders and Government Entities that Acquire Property Involuntarily, updated version of September 22, 1995 memorandum
October 23, 1995

Provides EPA and DOJ's policy to adhere to the 1992 "Lender Liability Rule" as official enforcement policy in order to appropriately contend with those lenders and governmental entities who have acquired contaminated property involuntarily.

To access online: <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/cercla-enfinvol-mem.pdf>

Policy on Interpreting CERCLA Provisions Addressing Lenders and Involuntary Acquisitions by Government Entities
June 30, 1997

Sets forth EPA's policy on lender and governmental entity involuntary acquisition of contaminated property in light of the amendments to Superfund as a result of the passage of the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996. In addition, this document discusses how these amendments affect EPA's application of the Lender Liability Rule.

To access online: <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/lendr-aquis-mem.pdf>

Policy on the Issuance of Comfort/Status Letters November 8, 1996

Discusses EPA's policy on the use of comfort/status letters to provide the recipient party with any releasable information that EPA has pertaining to a property, as well as interpret what the information means and the likelihood or current plans for EPA to undertake any Superfund action. A letter is used in order to facilitate the cleanup and redevelopment of a brownfield site if there is a realistic perception or probability of incurring liability or if there is no other mechanism available to address the recipient's concerns. This document also contains four sample comfort/status letters.

To access online: <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/comfort-let-mem.pdf>

Policy Towards Owners of Residential Property at Superfund Sites July 3, 1991

Sets forth EPA's policy to not require an owner of residential property to undertake response actions or pay cleanup costs, unless the owner has caused the contamination. This policy does not apply when the owner fails to cooperate with EPA or a state's response actions, meet CERCLA obligations, or uses the property inconsistently with a residential use depiction.

To access online: <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/policy-owner-rpt.pdf>

Prospective Purchaser Agreements and Other Tools to Facilitate Cleanup and Reuse of RCRA Sites April 8, 2003

Discusses three useful tools for EPA to overcome obstacles in cleanup and reuse of Resource Conservation and Recovery Act (RCRA) sites:

- Prospective Purchaser Agreements (PPA),
- the February 2003 "Final Guidance on Corrective Action Activities at RCRA Facilities," and
- comfort/status letters.

This document also includes the factors used by EPA to evaluate a request for a PPA.

To access online: <http://www.epa.gov/swerosps/rcrabf/pdf/memoppa.pdf>

Regional Determinations Regarding Which Sites are Not “Eligible Response Sites” under CERCLA Section 101(41)(C)(i), as Added by the Small Business Liability Relief and Brownfields Revitalization Act
March 6, 2003

Provides background information on the definition of an eligible response site, how the regions make a determination of whether a site fits this definition, and what the implications of this determination are. This document also provides the regions with guidance for making these determinations in conjunction with future site assessment decisions and for sites with past site assessment determinations.

To access online: <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/reg-determ-small-bus-mem.pdf>

Revised Settlement Policy and Contribution Waiver Language Regarding Exempt De Micromis and Non-Exempt De Micromis Parties
November 6, 2002

Provides a revision to EPA and DOJ’s policy regarding settlements with de micromis parties at Superfund sites in light of the codification of this policy in the 2002 Brownfields Amendments. This document also revises the model contribution waiver language that has been used in CERCLA agreements to waive private contribution claims against parties that contributed only very small amounts of waste. In addition, this document contains five attachments of model language.

To access online: <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/wv-exmpt-dmicro-mem.pdf>

Transmittal of “Supplemental Environmental Projects: Green Building on Contaminated Properties”
July 24, 2004

Contains a fact sheet on supplemental environmental projects to promote redevelopment on contaminated properties. EPA issued this fact sheet to improve the environmental performance of redevelopment that follows clean up at any contaminated property.

To access online: <http://www.epa.gov/compliance/resources/policies/cleanup/brownfields/sep-redev-fs.pdf>

Standards and Practices for All Appropriate Inquiries; Final Rule November 1, 2005

Final rule detailing the standards and practices for all appropriate inquiries (AAI). The rule establishes specific regulatory requirements and standards for conducting AAI into the previous ownership and uses of a property for the purposes of meeting the AAI provisions necessary to qualify for certain landowner liability protections under Superfund. The standards and practices also will be applicable to persons conducting site characterization and assessments with the use of grants awarded by EPA.

To access online: **http://www.epa.gov/swerosps/bf/aai/aai_final_rule.pdf**

The Effect of Superfund on Involuntary Acquisitions of Contaminated Property by Government Entities December 31, 1995

Sets forth EPA's policy on Superfund enforcement against government entities that involuntarily acquire contaminated property. Also describes some types of government actions that EPA believes qualify for a liability exemption or a defense to Superfund liability.

To access online: **<http://www.epa.gov/compliance/resources/policies/cleanup/superfund/fs-involacqprty-rpt.pdf>**

“Windfall Liens” Guidance Frequently Asked Questions July 16, 2003

Provides questions and answers regarding Superfund's windfall lien section, including what properties it applies to, the factors that EPA uses to determine whether EPA will file a windfall lien, and how the windfall lien interacts with a § 107(l) lien.

To access online: **<http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-windfall-lien-faq.pdf>**

Appendix C

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

I. Superfund Redevelopment Program

Superfund Redevelopment Web site

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

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

Superfund Redevelopment Tools

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

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

“Reusing Superfund Sites” (PDF) - October 2006

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

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

Superfund Reuse Policy and Guidance Web site

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

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

Community Reinvestment Act Fact Sheet

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

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

II. Brownfields and Land Revitalization

Brownfields and Land Revitalization Web site

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

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

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

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

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

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

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

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

Anatomy of Brownfields Redevelopment - October 2006

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

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

All Appropriate Inquiries Web site

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

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

Brownfields Federal Programs Guide (2005 Edition) - August 2005

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

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

III. RCRA Brownfields Prevention Initiative

RCRA Brownfields Prevention Initiative Web site

Web site provides descriptions, official documents and links concerning the RCRA Brownfields Prevention Initiative, a program established by EPA to encourage the reuse of potential RCRA brownfields so that the land better serves the needs of the community either through more productive commercial or residential development or as greenspace.

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

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

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

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

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

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

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

IV. Underground Storage Tanks

Underground Storage Tanks Web site

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

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

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

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

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

V. Office of Solid Waste

Office of Solid Waste Web site

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

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

RCRA Public Participation Manual (1996 Edition) - 1996

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

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

V. Other Non-EPA Sources

National Association of Local Government Environmental Professionals (NALGEP)

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

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

International City/County Management Association (ICMA)

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

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

U.S. Green Building Council

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

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

Appendix D Brownfields Contacts

Headquarters

US Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460-0001

Office of Site Remediation Enforcement

Erin Smith
Phone: 202-564-2038
smith.erin@epa.gov

Matt Sander
Phone: 202-564-7233
sander.matthew@epa.gov

Office of Brownfields and Land Revitalization

Danita Bowling
Phone: 202-566-2025
bowling.danita@epa.gov

Office of Emergency and Remedial Response

Melissa Friedland
Phone: 703-603-8864
friedland.melissa@epa.gov

Office of Solid Waste (RCRA)

Sara Rasmussen
Phone: 703-308-8399
rasmussen.sara@epa.gov

Regional Contacts

Region 1 – CT, ME, MA, NH, RI, VT
U.S. Environmental Protection Agency
Region 1
One Congress Street
Suite 1100
Boston, MA 02114-2023

Diane Kelley – Brownfields
Phone: 617-918-1424
kelley.diane@epa.gov

Rona Gregory – Reuse attorney
Phone: 617-918-1096
gregory.rona@epa.gov

Edgar Davis – RCRA reuse
Phone: 617-918-1379
davis.edgar@epa.gov

Region 2 – NJ, NY, PR, VI
U.S. Environmental Protection Agency
Region 2
290 Broadway
18th Floor
New York, NY 10007

Ramon Torres - Brownfields
Phone: 212-637-4309
torres.ramon@epa.gov

Michael Mintzer – Reuse attorney
Phone: 212-637-3168
mintzer.michael@epa.gov

Deborah Schwenk – Reuse attorney
Phone: 212-637-3149
schwenk.deborah@epa.gov

Michael Poetzsch – RCRA reuse
Phone: 212-637-4147
poetzsch.michael@epa.gov

Region 3 - DE, DC, MD, PA, VA, WA
U.S. Environmental Protection Agency
Region 3
1650 Arch Street
Philadelphia, Pennsylvania 19103

Tom Stolle - Brownfields
Phone: 215-814-3129
stolle.tom@epa.gov

Chris Minshall – Reuse attorney
Phone: 215-814-2473
minshall.chris@epa.gov

Deborah Goldblum – RCRA Reuse
Phone: 215-814-3432
goldblum.deborah@epa.gov

Russ Fish – RCRA Reuse
Phone: 215-8143226
fish.russell@epa.gov

Region 4 – AL, FL, GA, KY, MS, NC, SC, TN

U.S. Environmental Protection Agency

Region 4

Sam Nunn Atlanta Federal Center

61 Forsyth Street

Atlanta, GA 30303

Michael Norman - Brownfields

Phone: 404-562-8792

michael.norman@epa.gov

Karen Singer – Reuse attorney

Phone: 404-562-9540

singer.karen@epa.gov

Amy McLaughlin – RCRA reuse

Phone: 404-562-8776

mclaughlin.amy@epa.gov

Region 5 – IL, IN, MI, MN, OH, WI

U.S. Environmental Protection Agency

Region 5

77 West Jackson Boulevard

Chicago, Illinois 60604-3507

Deborah Orr - Brownfields

Phone: 312-886-7576

orr.deborah@epa.gov

Terry Stanuch – Reuse attorney

Phone: 312-886-8044

stanuch.terry@epa.gov

Ann Wentz – RCRA reuse
Phone: 312-886-8097
wentz.ann@epa.gov

Gary Victorine – RCRA reuse
Phone: 312-886-1479
victorine.gary@epa.gov

Region 6 – AR, LA, MN, OK, TX
U.S. Environmental Protection Agency
First Interstate Bank Tower at Fountain Place
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733

Monica Smith - Brownfields
Phone: 214-665-6780
smith.monica@epa.gov

Barbara Nann – Reuse attorney
Phone: 214-665-2157
nann.barbara@epa.gov

Jeanne Schulz – RCRA reuse
Phone: 214-665-7254
schulz.jeanne@epa.gov

Region 7 – IA, KS, MOK NE
U.S. Environmental Protection Agency
Region 7
901 N. 5th Street
Kansas City, Kansas 66101

Susan Klein - Brownfields
Phone: 913-551-7786
klein.susan@epa.gov

Robert Richards – Reuse attorney
Phone: 913-551-7502
richards.robert@epa.gov

Stephanie Doolan – RCRA reuse
Phone: 913-551-7719
doolan.stephanie@epa.gov

Deborah Kennedy – RCRA reuse
Phone: 913-551-7628
kennedy.deborah@epa.gov

Region 8 – CO, MT, ND, SD, UT, WY
U.S. Environmental Protection Agency
Region 8
1595 Wynkoop Street
Denver, Colorado 80202-1129

Dan Heffernan - Brownfields
Phone: 303-312-7074
heffernan.dan@epa.gov

Michael Gleason – Reuse attorney
Phone: 303-312-6898
gleason.michael@epa.gov

Matt Cohn – Reuse attorney
Phone: 303-312-6853
cohn.matthew@epa.gov

Bill Rothenmeyer – RCRA reuse
Phone: 303-312-6045
rothenmeyer.william@epa.gov

Region 9 – AZ, CA, HO, NV, AS, GU
US EPA Region 9
75 Hawthorne Street, SFD 1-1
San Francisco, California 94105

Carolyn Douglas - Brownfields
Phone: 415-972-3092
douglas.carolyn@epamail.epa.gov

Marie Rongone – Reuse attorney
Phone: 415-972-3891
rongone.marie@epa.gov

Steve Armann – RCRA reuse
Phone: 415-972-3352
armann.steve@epa.gov

Region 10 – AK, ID, OR, WA
U.S. Environmental Protection Agency
Region 10
1200 Sixth Avenue
Seattle, Washington 98101

Susan Morales - Brownfields
Phone: 206-553-7299
morales.susan@epa.gov

Kelly Cole – Reuse attorney
Phone: 206-553-1506
cole.kelly@epa.gov

Mike Slater – RCRA reuse
Phone: 503-326-5872
slater.mike@epa.gov