# Superfund Task Force Listening Session Recommendation 29 Revising EPA's "Common Elements" Guidance to Encourage Third Party Investment

Office of Site Remediation Enforcement
Office of Enforcement and Compliance Assurance
June 11, 2018



## Housekeeping

- Entire broadcast offered live via Adobe Connect
  - Listen and watch as the presenters advance through materials live
- Audio is available online by default
  - Please check your local volume settings to adjust audio
  - Use Q&A to privately report technical difficulties
- Live public remarks will be delivered by telephone
  - All lines will be globally muted
  - Press #6 to unmute ONLY when your name is called to remark
- Use the Q&A pod to privately submit remarks, questions and report technical problems







### **Agenda**

- Introduction
- Presentation on Recommendation 29
- Live remarks by session participants
- Resources
- Closing remarks



## **Superfund Task Force Report**

- Create: May 2017, Task Force comprised of senior representatives from Superfund program and enforcement offices, EPA's General Counsel, Regions, and other offices.
- Charge: propose recommendations to streamline and strengthen the Superfund program.
- Report: July 2017, 5 goals with 42 recommendations





## **Superfund Task Force Recommendations**

#### **Five Goals:**

- 1. Expediting cleanup and remediation process
- 2. Reinvigorating responsible party cleanup and reuse
- 3. Encouraging private investment
- 4. Promoting redevelopment and community revitalization
- 5. Engaging partners and stakeholders

#### **Download the report** at

https://www.epa.gov/superfund/superfund-task-force-recommendations





## **Superfund Task Force Listening Sessions**

- Eight sessions May 21, 2018 June 18, 2018
- Session number 5
- Input from stakeholders and the public
- Increase transparency and improve communications

Register for more sessions at <a href="http://www.epa.gov/superfund/superfund-task-force">http://www.epa.gov/superfund/superfund-task-force</a>



#### Presenter

- Craig Boehr
  - Office of Site Remediation Enforcement, Policy and Program Evaluation Division



#### **Overview of Recommendation 29**

- Recommendation 29 is under Goal 3, Strategy 3, to "optimize tools and realign incentives to encourage third-party investment," and to more specifically "support the cleanup and reuse of contaminated sites."
- Propose potential revisions to the 2003 "Common Elements Guidance" based on case law developments and lessons learned by EPA and the private sector. (FY18)



#### 2003 "Common Elements" Guidance

- Core enforcement document that deals with the self-implementing landowner liability protections of the 2002 Brownfields Amendments
  - Bona Fide Prospective Purchaser (BFPP)
  - Contiguous Property Owner (CPO)
  - Innocent Landowner (ILO)
- https://www.epa.gov/enforcement/interimguidance-common-elements-landowner-criteriaqualify-bfpp-cpo-or-ilo-superfund



#### What are the "Common Elements"?

#### Threshold Criteria

- Perform "All Appropriate Inquiry" into previous ownership and uses of property before acquisition
- Have no affiliation with person potentially liable for response costs

#### Continuing Obligations

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



#### 15 Years Later - Need for Revisions

- 2003 "Common Elements" Guidance is "interim" and contemplates revisions "as EPA gains more experience implementing the Brownfields Amendments." This experience has been gained through:
  - Issuance of Numerous Guidance Documents: Numerous landowner liability-related guidance documents issued in last 15 years, including PIME guidance on ICs (2012), Tenants as BFPPs guidance (2012), Affiliation guidance (2011). Incorporating these documents will provide better certainty/clarity to landowners looking to acquire property.



#### 15 Years Later - Need for Revisions

- Understanding of Relevant Case Law: Numerous cases have been decided in last 15 years that touch on landowner liability protections (e.g. Ashley II (4<sup>th</sup> Cir.)). Incorporating these holdings will provide better guidance, particularly on the requirement to take "reasonable steps" with respect to hazardous substance releases.
- Continuous Site-Specific Work on Related Issues: EPA has gained significant experience in implementing the Brownfields Amendments through our day-to-day work (comfort/status letters, institutional control issues, etc.)



#### 15 Years Later - Need for Revisions

#### Discussions with Brownfields Stakeholders:

Stakeholders have indicated that despite self-implementing landowner liability protections, liability fears still can outweigh redevelopment potential in many circumstances (*Ashley II*). We have received feedback that a revised "Common Elements" Guidance could help ease these fears by providing greater certainty for developers, lenders, investors, and other third parties to identify/create opportunities for new investment in cleaning up contaminated sites.



#### **Issues Identified for Revision**

#### **Appropriate Care/Reasonable Steps**

 Provide better clarity on reasonable steps obligations to reflect congressional intent/EPA practices and update reasonable steps section (including overview and comfort/status letter discussions) and Reasonable Steps Attachment with relevant case law.



# Issues Identified for Revision – Appropriate Care/Reasonable Steps

Updates cover three main themes:

- 1. Updating Case Law: Relevant holdings on due care (guides appropriate care analysis) and reasonable steps will be included in both the reasonable steps overview and attachment (currently Attachment B) to provide meaningful clarity to parties when assessing the reasonable steps obligation.
- 2. Addressing Comfort/Status Letters: Section will be updated to reflect current EPA policy. Stand-alone "Sample Federal Superfund Interest Reasonable Steps Letter" to be removed.



# Issues Identified for Revision – Appropriate Care/Reasonable Steps

#### Updates cover three main themes:

3. Providing Better Certainty for Responsible Landowners:
Stakeholders have expressed concern that small missteps may hinder a landowner liability defense. Updated guidance may help to ease these and associated concerns by better reflecting the legislative intent of the Brownfields
Amendments to promote responsible redevelopment and put contaminated properties back into use.



#### **Issues Identified for Revision**

#### Land Use Restrictions/Institutional Controls

 Updated to provide better clarity to landowners on meeting the requirements of complying with land use restrictions and not impeding the effectiveness or integrity of institutional controls. Language from more recent guidance documents (i.e., 2012 PIME Guidance) will be incorporated into this section.



# Issues Identified for Revision – Land Use Restrictions/Institutional Controls

#### Main updates will focus on:

- Further defining/clarifying "land use restrictions" providing greater clarity on this term, utilizing language in the current PIME Guidance.
- Refining sources for identifying land use restrictions: So parties can more easily identify the ones they need to comply with.
- Maintaining/clarifying the obligation to implement necessary institutional controls
- New section on monitoring activities



#### **Issues Identified for Revision**

# **No Disposal After Acquisition** (potential new section)

- Requirement for BFPPs, innocent landowners
- Stakeholders have voiced concerns that landowners could lose BFPP status if activities (including performing reasonable steps to manage releases) involve any type of disposal or spreading of contaminants.
- Further opportunity to encourage third-party investment by providing certainty/clarity on this requirement.



#### **Issues Identified for Revision**

- All Appropriate Inquiry To be updated with references to final rule and more comprehensive explanation of ASTM standards; potential for separate FAQ document.
- Affiliation To be updated to incorporate language from 2011 Affiliation Guidance.
- Miscellaneous Updates To summary chart (Attachment A), other continuing obligation sections (as needed).



# What we would like to hear from you

- What changes to the 2003 "Common Elements" guidance will better serve to assist with new third-party investment in contaminated sites?
- Are there particular updates/changes you would like to see in a revised "Common Elements" guidance that would provide better clarity/certainty for third parties in cleaning up contaminated sites?

Written remarks can be emailed to <u>osre-sftf-listeningsession@epa.gov</u> until June 18, 2018.



# **Next Steps**

EPA "Common Elements" workgroup expects to:

- Review all verbal/written remarks received as part of this listening session
- Decide how best to integrate suggestions into revised guidance
- Produce internal draft in early fourth quarter



#### How to share remarks

- Live during online broadcast
  - Pre-registered
     participants may share
     remarks by phone
  - Attendees may also type remarks into the Q&A window in the lower left

- After today's online broadcast
  - Interested parties may submit remarks in writing at any time to OSRE-SFTF-listeningsession@epa.gov with the following subject: LS29. Deadline is June 18, 2018



#### **Public Remarks**

- Amy Edwards, Holland & Knight
- Lawrence Schnapf, Schnapf LLC
- Larry Davis, ArcelorMittal Burns Harbor
- 4. Constance Westfall, Clark Hill Strasburger

- 5. A. J. Birkbeck, American Brownfields Assurance Co.
- 6. Michael Sowinski, Terradex, Inc.
- 7. William Weissman, formerly Venable, LLP (retired)

Press #6 to unmute when your name is called to share remarks.



Interested parties may submit written remarks by June 18, 2018 to OSRE-SFTF-listeningsession@epa.gov with the following subject: LS 29



#### **Reference Materials**

- Superfund Task Force website
- Superfund enforcement website
- EPA's 2003 "Common Elements" Guidance and related materials at

https://www.epa.gov/enforcement/interim-guidancecommon-elements-landowner-criteria-qualify-bfpp-cpoor-ilo-superfund



#### **For More Information**

 Visit the Superfund Task Force website at <a href="https://www.epa.gov/superfund/superfund-task-force">https://www.epa.gov/superfund/superfund-task-force</a>, and the Information page for the OSRE-sponsored listening session series at

https://www.epa.gov/enforcement/listening-sessionssuperfund-task-force-recommendations

- Email
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