EPA
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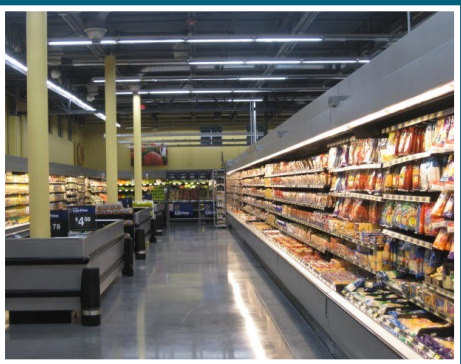
Agency

THE REVITALIZATION HANDBOOK

Addressing Liability Concerns at Contaminated Properties



Office of Site Remediation Enforcement
Office of Enforcement and Compliance Assurance

December 2019

Cover photographs capture the reuse of the Chemical Commodities, Inc. Superfund site in Olathe, Kansas; the Celotex Corporation site, in Chicago, Illinois; the Kansas City Structural Steel site in Kansas City, Kansas; and the Buckbee-Mears site in Cortland, New York. For more information about these sites, please visit the Agency's Superfund Redevelopment website. The EPA's Addressing Liability Concerns to Support Cleanup and Land Reuse website provides information about the liability protections that facilitated these projects.

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List of Text Boxes, Highlights and Tables

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Commonly Used Acronyms and Abbreviations

AAI	All Appropriate Inquiries
BFPP	Bona Fide Prospective Purchaser
Brownfields Amendments	Small Business Liability Relief and Brownfields Revitalization Act of 2002
BUILD Act	Brownfields Utilization, Investment, and Local Development Act of 2018
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
CPO	Contiguous Property Owner
DOJ	United States Department of Justice
EPA	United States Environmental Protection Agency
IC	Institutional Control
IL	Innocent Landowner
LUST	Leaking Underground Storage Tank
MOA	Memorandum of Agreement
MOU	Memorandum of Understanding
NCP	National Oil and Hazardous Substances Contingency Plan
NPL	National Priorities List
OSRE	Office of Site Remediation Enforcement
O&M	Operations and Maintenance
PLA	Prospective Lessee Agreement
PPA	Prospective Purchaser Agreement
PRP	Potentially Responsible Party
RCRA	Resource Conservation and Recovery Act
RfR	Ready for Reuse
SR	Superfund Redevelopment
TSDF	Treatment, Storage, and Disposal Facility
UST	Underground Storage Tank
VCP	Voluntary Cleanup Program

Purpose and Use of the Revitalization Handbook

The U.S. Environmental Protection Agency's (EPA's) Office of Site Remediation Enforcement (OSRE) manages the enforcement of the nation's contaminated sites cleanup laws, including the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, commonly known as Superfund), 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 potentially responsible parties (PRPs) and others in performing and paying for cleanups in a manner that ensures protection of human health and the environment.

Both CERCLA and RCRA are designed to protect human health and the environment from the dangers of hazardous substances that were improperly disposed. A key focus of the RCRA program is proper waste management to avoid potential threats to human health and the environment. CERCLA is focused on responding to releases of hazardous substances to the environment. Both programs have cleanup authorities that address contaminated sites.

The Small Business Liability Relief and Brownfields Revitalization Act of 2002 ("Brownfields Amendments") amended CERCLA and promoted the cleanup, reuse, and redevelopment of sites by addressing potential liability concerns associated with contaminated, potentially contaminated, and formerly contaminated properties. The Brownfields Amendments provided important self-implementing liability limitations for certain categories of landowners (hereinafter, "landowner liability protections" or "landowner provisions"), enabling private parties to save time and costs, in part, by reducing EPA involvement in most private party transactions. The EPA provides guidance on CERCLA's landowner liability provisions and develops site-specific tools for use by EPA regional staff to assist property owners and other parties seeking to clean up, reuse, or redevelop contaminated properties.

The EPA is committed to encouraging site cleanup and reuse to achieve environmental protection goals, including long-term site stewardship and sustainable land use planning**.** Often, reuse supports these environmental protection goals and helps remove obstacles to cleanups and revitalization. Beginning in 1998, OSRE has highlighted these efforts through the Revitalization Handbook. This 2019 edition provides an updated overview of guidance, policy documents, and site-specific enforcement tools that are available to help parties interested in managing potential liability associated with the assessment, cleanup, and revitalization of contaminated sites.

Prospective purchasers, developers, lenders, and other third parties may hesitate to get involved with contaminated properties because of concerns that they might be held liable under CERCLA or RCRA. However, many contaminated properties may never be subject to the EPA's attention under these federal laws. This handbook promotes a better understanding of these laws and their implementation in order to support the redevelopment and reuse of contaminated properties.

For any party contemplating the revitalization of contaminated or formerly contaminated property, there are a number of important initial considerations and determinations. For example:

- A party should determine the end use of the property and should collect and consider information on past uses and potential contamination.
- If a party intends to purchase the property, it should consider whether it needs to conduct all appropriate inquiries (AAI) to take advantage of CERCLA liability protections, such as the bona fide prospective purchaser (BFPP) provision.
- If a party needs information or has concerns about cleanup or liability provisions, it should identify the most appropriate level of government to consult.
- For Superfund sites, interested parties should review the EPA's *Top 10 Questions to Ask When Buying a Superfund Site*.
- A party may want to employ private mechanisms such as indemnification or insurance (see Private Party Tools text box), or take advantage of existing state tools, programs, or incentives such as participating in a state response program.
- If contamination on the property warrants the EPA's attention under CERCLA or RCRA, a party should first determine if the EPA or the state is taking or planning to take action at the property. After making such a determination, a party may use this handbook to help decide which tools, if any, may be most appropriate.

Key Legal and Policy Updates Since the 2014 Edition

Brownfields Utilization, Investment, and Local Development Act Amendments to CERCLA

Congress enacted the Brownfields Utilization, Investment, and Local Development Act of 2018 (BUILD Act) amending the brownfields provisions of CERCLA. The BUILD Act included the following major changes:

- Removal of the "involuntary" requirement for the liability exemption for certain state or local governmental acquisitions of contaminated property;
- Expansion of the BFPP liability protection for parties with tenancy or leasehold interests;
- Creation of a new liability protection for Alaska Native Villages and Alaska Native Corporations that received a facility under the Alaska Native Claims Act; and
- Expansion of brownfield grant eligibility, funding, ranking criteria, and technical assistance.

For more information on the BUILD Act, please see Sections III.C.1 and III.D.1.

Superfund Task Force

In 2017, the EPA established the Superfund Task Force to identify opportunities for improving and expediting site cleanups and promoting reuse. The Task Force developed 42 recommendations in five goal areas:

- Expediting Cleanup and Remediation
- Reinvigorating Responsible Party Cleanup and Reuse
- Encouraging Private Investment
- Promoting Redevelopment and Community Revitalization
- Engaging Partners and Stakeholders

The EPA issued and will continue to issue new and updated guidance and other tools to address the landowner liability concerns of prospective purchasers, developers, lenders, and other third parties interested in the cleanup and reuse of contaminated properties. This handbook refers to several updated guidances, particularly those related to the goal of encouraging private investment and which address CERCLA's landowner liability protections and the use of site-specific tools to facilitate cleanup and reuse. More information is available on the EPA Superfund Task Force website.

DISCLAIMER

This handbook provides general information to assist with the cleanup and reuse of properties. It is not legally binding. "Should" and other similar terms used within it are general recommendations or suggestions that might be generally applicable or appropriate rather than legal, technical, financial, or other advice regarding a specific set of circumstances. This handbook is not a rule and does not create new liabilities or limit or expand obligations under any law. It does not create any substantive or procedural rights for any person at law or in equity. This handbook does not alter the EPA's policy against providing "no action" assurances outside the context of a legal settlement or formal enforcement proceeding. It discusses EPA guidance documents which may address the exercise of its enforcement discretion on a site-specific basis where appropriate. This handbook does not address all the circumstances in which the EPA may choose to exercise enforcement discretion with respect to a party under CERCLA, nor does it cover all of the statutory or other protections that may be available to a party at contaminated or formerly contaminated property. Finally, it does not modify or supersede any existing EPA guidance document or affect the EPA's enforcement discretion.

I. Overview of CERCLA and RCRA

A. CERCLA

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, commonly known as Superfund), which authorizes the federal government to assess and/or clean up contaminated sites and provides authority for response to releases of hazardous substances.

CERCLA establishes a comprehensive liability scheme to require certain categories of parties to conduct or pay for cleanup of releases of hazardous substances. The EPA may exercise its response authority through removal or remedial actions. Remedial responses financed by the Hazardous Substance Superfund Trust Fund ("Fund") are undertaken only at sites on the EPA's National Priorities List (NPL). The National Oil and Hazardous Substances Contingency Plan (NCP), 40 C.F.R. Part 300, provides the "blueprint" for conducting removal and remedial actions under CERCLA.

There are many different types of contaminated or potentially contaminated properties 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 these sites are listed on the NPL. Other properties may be "brownfields" — properties where expansion, redevelopment, or reuse may be complicated by the presence (or potential presence) of contamination. The level of contamination may vary and generally, brownfields sites are lower risk than Superfund sites. 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 for actual or potential contamination. The EPA and state programs play a significant role in cleaning up and helping to revitalize these properties.

The EPA launched the Brownfields Initiative in the 1990s and developed guidance and tools to help further the Initiative's goals to empower states, communities, and other stakeholders to assess, safely clean up, sustainably reuse, and prevent future brownfield sites. The EPA's Brownfields Initiative established a number of practices, policies, and guidances to support cleanup and reuse at contaminated property.

In 2002, many elements of the EPA's Brownfields Initiative were codified into CERCLA by the Small Business Liability Relief and Brownfields Revitalization Act of 2002 ("Brownfields Amendments"). Section 101(39) of CERCLA defines 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."

In 2018, Congress enacted the Brownfields Utilization, Investment, and Local Development Act of 2018 (BUILD Act), which amends the brownfields provisions of CERCLA. The BUILD Act provided greater liability protection and certainty for parties who did not cause or contribute to a release of hazardous substances at a contaminated property.

Specifically, Congress provided greater liability relief for state and local governments that acquired contaminated properties; parties with leasehold interests in contaminated properties; and the Alaska Native Villages and Alaska Native Corporations that received contaminated property from the federal government under the Alaska Native Claims Act. The BUILD Act also made significant changes to the Brownfields grant program including expanding grant eligibility for public entities that acquired contaminated properties before the enactment of the Brownfields Amendments. These BUILD Act amendments to CERCLA are discussed more fully in Sections III.C.1 and III.D.1.

CERCLA's key revitalization provisions:

- Address the liability concerns of certain landowners and other interested parties;
- Provide statutory authority for the EPA's Brownfields grant program;
- Enable the EPA to obtain a windfall lien on certain properties owned by bona fide prospective purchasers; and
- Prohibit certain EPA enforcement actions at certain brownfields sites addressed in compliance with a state response program.

Under CERCLA's liability scheme, the current owner of a contaminated property is responsible for the property's cleanup based solely on its ownership status, even if the owner 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 liability protections (and clarified the existing innocent landowner provision) for landowners who acquire property and meet certain criteria both before and after acquisition.

CERCLA's landowner liability protections address:

- Bona fide prospective purchasers (BFPPs),
- Contiguous property owners (CPOs), and
- Innocent landowners (ILOs).

JOHN F. QUEENY – MONSANTO CHEMICAL WORKS FACILITY
St. Louis, Missouri

The 38-acre John F. Queeny – Monsanto Chemical Works facility is located in St. Louis, Missouri. The facility began operation in 1901 and used more than 800 raw materials to manufacture more than 200 products, before ceasing operations in 2006. On April 12, 2019, Soulard Second Street, LLC entered into a BFPP agreement with the EPA and U.S. Department of Justice (DOJ) to carry out several cleanup actions addressing polychlorinated biphenyl contamination at an 8.3-acre facility parcel. The BFPP agreement required installation of a vapor mitigation system and a remote, telemetry-based system to monitor functionality of the vapor mitigation system on a real-time basis. The vapor monitoring system is an example of a timely and innovative method of leveraging advanced monitoring to help achieve cleanup and beneficial reuse of an impacted property.

These landowner liability provisions, the CERCLA liability scheme, and related cleanup enforcement policy and guidance are discussed in Section III.

The EPA's Superfund enforcement program, Superfund cleanup program, Superfund Redevelopment, and Brownfields and Land Revitalization websites provide further information.

B. RCRA

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

- Protecting human health and the environment from hazards posed by waste disposal;
- Conserving energy and natural resources through waste recycling and recovery;
- Reducing the amount of waste generated; and
- Ensuring that wastes are managed in an environmentally safe manner.

RCRA Subtitle C provides the EPA with the authority to manage hazardous waste from "cradle to grave." There are Subtitle C regulations for the generation; transportation; and treatment, storage, or disposal of hazardous waste. These regulations first identify the criteria to determine which solid wastes are hazardous, and then establish various requirements for the three categories of hazardous waste handlers: generators; transporters; and treatment, storage, or disposal facilities (TSDFs). In addition, the Subtitle C regulations set technical standards for the design and safe operation of TSDFs. These regulations for TSDFs serve as the basis for developing and issuing permits, which TSDFs are required to obtain. Unlike CERCLA, RCRA does not contain a bona fide prospective purchaser or similar landowner liability provision. Also, unlike CERCLA, RCRA provides for states to become authorized to operate in lieu of the EPA's program.

RCRA Subtitle I authorizes the EPA to establish a regulatory program that includes technical requirements to prevent, detect, and clean up releases from underground storage tanks (UST). Tanks that are subject to Subtitle I regulations may be found at a variety of locations, including convenience stores, service stations, small and large manufacturing facilities, and airports. Since the UST program is not part of RCRA Subtitle C, there are separate technical and administrative requirements, including notification, design and installation standards, and closure.

The EPA's RCRA state authorization program, the RCRA corrective action cleanup enforcement program, and Office of Underground Storage Tank websites provide further information.

II. Liability

A. CERCLA Liability

CERCLA's liability scheme ensures that wherever possible, potentially responsible parties (PRPs), rather than the general public, pay for cleanups. As described in CERCLA § 107(a), the following categories of persons may be held liable for the costs or performance of cleanup work under CERCLA:

(1) The current 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 or arranger); and

(4) A person who accepted a hazardous substance for transport to a disposal or treatment facility or to a site and such person selected the facility or site.

CERCLA provides certain landowners statutory protections from liability, as discussed in Section III.

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) regardless of whether its conduct was negligent, intentional, or in compliance with industry standards.
- 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 its 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.

Throughout the Superfund cleanup process, the EPA expects to compel those responsible for contaminated sites to take the lead in cleanup, thus conserving taxpayer money for cleanups at sites where there are no financially viable PRPs. Using the enforcement authorities provided under CERCLA, the EPA may enter into settlements with or compel PRPs to clean up a site where a release of hazardous substances has occurred. When the EPA spends Fund monies to finance a removal or remedial action, the EPA may then seek reimbursement from PRPs. Private entities may also conduct cleanups and seek reimbursement of eligible response costs from PRPs.

B. RCRA Corrective Action Liability

The RCRA program is designed to prevent future environmental problems from being caused by hazardous waste. Under RCRA Subtitle C, the EPA has developed a comprehensive program to manage hazardous waste. In addition, it oversees the cleanup of current environmental problems resulting from disposal of hazardous waste. This cleanup process is known as "corrective action." The EPA can use several corrective action authorities to compel cleanup.

Owners and operators of facilities where releases have occurred are required to clean up contamination caused by hazardous wastes. Additional information on the corrective action process is available in the "Components of the RCRA Corrective Action Process" text box below. The steps necessary to achieve cleanup at a facility depend on site-specific conditions. The components may occur in any order, and not every component is necessary to determine that no further action is required.

States are an integral part of the RCRA program. The EPA may authorize a state or territory's RCRA program to operate in lieu of the EPA's program. The EPA generally authorizes a state-administered RCRA corrective action program if the state requirements are no less stringent than the federal requirements and the state has the ability to take adequate enforcement actions. In authorized states, facilities must comply with the authorized state requirements rather than the corresponding federal requirements. After authorization, both the state and the EPA have the authority to enforce those requirements.

Currently, 48 states and territories have been granted authority to implement the RCRA base, or initial, program, and 44 states and the territory of Guam are authorized to operate the RCRA corrective action program in lieu of the EPA's program. Owners and operators of corrective action facilities in authorized states should contact their state regulatory agency because the state program may have different or more stringent requirements than the federal RCRA corrective action program.

More information is available on the EPA's RCRA state authorization program website and the RCRA corrective action cleanup enforcement program website.

COMPONENTS OF THE RCRA CORRECTIVE ACTION PROCESS

- Initial Site Assessment (RCRA Facility Assessment)
- Release Assessment and Site Characterization (RCRA Facility Investigation)
- Interim Actions to control or abate ongoing risks to human health and the environment (Interim Measures)
- Evaluation of different alternatives to remediate the site (Corrective Measures Study)
- Remedy selection for a thorough cleanup of the hazardous release (Statement of Basis)
- Design, construction, operation, maintenance, and monitoring of the chosen remedy (Corrective Measures Implementation)

III. CERCLA Liability Protections and EPA Policies

Partly in response to the EPA's Brownfields Initiative and efforts to address liability concerns through site-specific tools, Congress enacted the Brownfields Amendments, which amended CERCLA. The Brownfields Amendments added new landowner liability protections (and clarified the existing innocent landowner provision) and provided funding for grants for the assessment and cleanup of brownfields. Since enactment of the Brownfields Amendments, the EPA has developed guidance documents, model enforcement documents, responses to frequently asked questions, fact sheets, and other documents to support revitalization of contaminated land. The EPA's cleanup enforcement website contains policy and guidance documents addressing liability concerns to support cleanup and reuse.

A. Statutory Defenses and Liability Protections

1. Bona Fide Prospective Purchasers

In 2002, the Brownfields Amendments created a new liability protection for a BFPP who can purchase with knowledge of contamination. A key advantage of the BFPP provision is that it is self-implementing and, therefore, the EPA is not involved in site-specific determinations as to whether a party qualifies for BFPP status. A party can achieve and maintain status as a BFPP, which provides statutory protection from CERCLA liability, without entering into an agreement with the EPA, so long as that party meets the threshold criteria and continuing obligations identified in the statute. Although the EPA may be able to utilize site-specific tools (discussed below) such as letters and agreements to assist a party achieve and maintain its BFPP status, a court, rather than the EPA, ultimately makes the final determination in a legal challenge regarding whether a party meets the criteria for BFPP status.

Section 107(r) of CERCLA protects a party as a BFPP from owner/operator liability if the party acquires property after January 11, 2002 and meets the criteria in CERCLA §§ 101(40) and 107(r). These criteria (threshold criteria and continuing obligations) are outlined below in Section III.A.2. Under CERCLA § 107(r), BFPPs must not impede the performance of a response action or natural resource restoration.

A BFPP is protected from liability as an owner/operator under CERCLA, except that the EPA may pursue a windfall lien on the BFPP's property where the Agency's response action has increased the fair market value of the property. The United States, after spending taxpayer money for cleanup at a property,

BFPP PROTECTIONS APPLY TO TENANTS

The definition of a BFPP under Section 101(40) also includes a party who acquires a leasehold interest in the facility after January 11, 2002 if it falls within one of the following three categories and is not designed to avoid liability:

(1) the owner of the facility is a BFPP;

(2) the owner of the facility was a BFPP at the time the leasehold interest was acquired but lost BFPP status through no action of the lessee and the lessee independently establishes the criteria in Section 101(40) (with the exception of all appropriate inquiries); or

(3) the lessee independently establishes the criteria in Section 101(40).

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, which is found in CERCLA § 107(r), is different than the lien provision found in CERCLA § 107(l). For more discussion of resolution of windfall liens, please refer to Section IV.B.3.

2. Third Party and Innocent Landowner Defenses

Entities that acquire property and have no knowledge of the contamination at the time of purchase may be eligible for CERCLA's third-party defense or innocent landowner (ILO) defense, in addition to the BFPP liability protection.

i. Third Party Defense

CERCLA § 107(b) includes the following defenses to liability if a person can show, by a preponderance of the evidence, that the contamination was solely caused by:

- An act of God (CERCLA § 107(b)(1));
- An act of war (CERCLA § 107(b)(2)); or
- The act or omission of a third party (CERCLA § 107(b)(3)).

To invoke CERCLA's § 107(b)(3) third-party defense, the third party's act or omission must not occur "in connection with a contractual relationship." Moreover, an entity asserting a CERCLA § 107(b)(3) third-party defense must show that: (a) it exercised due care with respect to the contamination and (b) it took precautions against the third party's foreseeable acts or omissions and the consequences that could foreseeably result from such acts or omissions.

ii. Innocent Landowner Defense

The Superfund Amendments and Reauthorization Act of 1986 amending CERCLA expanded the third-party defense by creating innocent landowner exclusions to the definition of a "contractual relationship." Previously, the deed transferring title between a PRP and the new landowner was a "contractual relationship" that prevented the new landowner from raising the traditional CERCLA § 107(b)(3) third-party defense. The "innocent landowner defense" applies to entities that meet the criteria set forth in CERCLA §§ 101(35) and 107(b)(3). CERCLA § 101(35)(A) distinguishes among three types of innocent landowners:

- Purchasers who acquire property without knowledge of contamination and who have no reason to know about the contamination, CERCLA § 101(35)(A)(i);
- Governments "which acquired the facility by escheat, or through any other involuntary transfers or acquisition, or through the exercise of eminent domain authority by purchase or condemnation," CERCLA § 101(35)(A)(ii); and
- Inheritors of contaminated property, CERCLA § 101(35)(A)(iii).

For all three types of landowners, the facility must be acquired after the disposal or placement of the hazardous substances on, in, or at the facility. Further, a set of continuing obligations similar to what is required of BFPPs also applies under CERCLA § 101(35)(A).

For purchasers who acquire property without knowledge of contamination after 2002, an owner must have conducted AAI before purchase in accordance with CERCLA Sections 101(35)(A)(i) and 101(35)(B)(i).

3. Owners of Property Impacted by Contamination from an Off-Site Source

The EPA issued enforcement discretion documents before and after the Brownfields Amendments to address liability protections for contiguous landowners. One document discusses the statutory protection provided to contiguous landowners through the Brownfields Amendments and the other discusses how the EPA will treat certain owners situated above a contaminated aquifer.

i. Contiguous Property Owners

The Brownfields Amendments added a statutory protection for a contiguous property owner (CPO). 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. This provision protects parties that are victims of contamination 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 perform AAI before acquiring the property and show that it is not affiliated with a liable party (see the "Affiliation" text box). Like BFPPs, CPOs must also satisfy ongoing obligations. Persons who know, or have reason to know, before purchase that the property is or could be

FORMER SPELLMAN ENGINEERING SITE
Orlando, Florida

An aerial view of the recreational facilities on site.

Working relationships and innovative settlement agreements led to the cleanup of the Former Spellman Engineering site and reuse of the adjacent Lake Highland property in Orlando, Florida. In 2008, the EPA and the city of Orlando (the City) signed the nation's first CPO agreement, in which the City agreed to voluntarily implement the site's estimated $12.9-million remedy. Lake Highland Preparatory School (LHPS) also worked with the City to finalize the project's Sale and Purchase agreement and with the City, the EPA and Florida Department of Environmental Protection to finalize Prospective Purchaser Agreement and Brownfield Site Rehabilitation agreements that addressed potential liability concerns and facilitated the property's reuse. LHPS has reused part of the Lake Highland property for sports fields and parking and has plans for a gymnasium and maintenance facilities. The Dinky Line segment of the Orlando Urban Trail, a paved recreation trail, now extends through the area. Commercial and industrial businesses are located on part of the site. The City and the Orlando Utilities Commission are also exploring opportunities for mixed-use redevelopment on the property.

contaminated cannot qualify for the contiguous property owner liability protection. These parties, however, may still be entitled to rely on the BFPP statutory protection or the EPA may exercise its enforcement discretion not to pursue such persons pursuant to other relevant policies (see, for example, the EPA's 1995 *Final Policy Toward Owners of Property Containing Contaminated Aquifers* ("Contaminated Aquifers Policy"), as discussed below).

In 2004, the 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) application of CERCLA § 107(q) to current and former owners of property;

(3) the relationship between CERCLA § 107(q) and the EPA's *Policy Towards Owners of Residential Property at Superfund Sites* and Contaminated Aquifers Policy; and

(4) discretionary mechanisms the EPA may use to address remaining liability concerns of contiguous property owners.

In 2009, the EPA issued the *Model CERCLA Section 107(q)(3) Contiguous Property Owner Assurance Letter* in accordance with the 2004 enforcement discretion guidance mentioned above to be used under specified circumstances. Because CERCLA § 107(q) is self-implementing, the EPA's use of such letters has been limited.

ii. Contaminated Aquifers

Like 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.

In 1995, the EPA developed the Contaminated Aquifers Policy in response to this concern. The EPA stated 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, the EPA would consider entering into a settlement with the landowner covered under the policy to prevent third party damages from being awarded.

In the Brownfields Amendments, the contiguous property owner liability provisions in CERCLA § 107(q) said that "reasonable steps" required of a contiguous property owner do not include conducting groundwater investigations or installing groundwater remediation systems, except in accordance with the EPA's Contaminated Aquifers Policy. Subsequently, the EPA clarified the relationship of the Contaminated Aquifers Policy to the contiguous property owner liability protection in the Contiguous Property Owner Guidance, as discussed above.

4. Common Elements Guidance

In 2003, the EPA issued the "Common Elements" Guidance to provide EPA personnel with general guidance on the common elements of the landowner liability protections for bona fide prospective purchasers (BFPPs), contiguous

property owners (CPOs), and innocent landowners (ILOs). In 2019, the Common Elements Guidance was comprehensively revised based on experience the EPA has gained through a thorough analysis of relevant and emerging case law, continuous site-specific work on landowner liability issues, development and issuance of related guidance documents, and regular discussions with brownfields stakeholders. To achieve and maintain the BFPP, CPO, and ILO liability protections, a landowner must meet certain threshold criteria and satisfy certain continuing obligations. Many of the conditions are the same or similar under the three landowner liability provisions ("common elements").

The Common Elements Guidance first discusses the threshold criteria BFPPs, CPOs, and ILOs must meet to assert these liability protections. The first threshold requirement is that the landowner must perform "all appropriate inquiries" (AAI) into the previous ownership and uses of property before acquiring the property, per CERCLA Sections 101(40)(B)(ii) (for BFPPs), 107(q)(1)(A)(viii) (for CPOs), and 101(35)(A)(i), and (B)(i) (for ILOs).

The second threshold requirement for BFPPs and CPOs requires that these parties not be potentially liable or "affiliated" with any other person who is potentially liable for response costs per CERCLA §§ 101(40)(B)(viii), 107(q)(1)(A)(ii). The innocent landowner provision does not contain similar "no 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, per CERCLA Sections 107(b)(3) and 101(35)(A).

In addition to providing guidance on the threshold criteria of the landowner liability protections, the Common Elements Guidance discusses the common continuing obligations for each type of landowner liability protection, identified as follows:

- Demonstrating that no disposal of hazardous substances occurred at the facility after acquisition by the landowner (for BFPPs and ILOs);
- Complying with land use restrictions and not impeding the effectiveness or integrity of institutional controls (ICs);
- Taking "reasonable steps" with respect to hazardous substance releases affecting a landowner's property;
- Providing cooperation, assistance and access to persons authorized to conduct response actions or natural resource restoration;
- Complying with information requests and administrative subpoenas (for BFPPs and CPOs); and
- Providing legally required notices (for BFPPs and CPOs).

Finally, the guidance includes two attachments:

- A chart summarizing the common elements and other statutory criteria applicable to BFPPs, CPOs, and ILOs (See Chart on page 16); and
- A "Reasonable Steps Categories and Examples" document, which identifies acts and omissions that courts have found to be indicative of "due care" or the lack thereof in evaluating the ILO affirmative defense, as well as "reasonable steps" identified by courts in evaluating BFPP status. This document also lists some site-specific examples of reasonable steps from previously-issued EPA comfort/status letters.

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

Common Elements and other Requirements	Bona Fide Prospective Purchaser	Contiguous Property Owner	Innocent Landowner Section 101 (35)(A)(i)
	Can acquire with knowledge of contamination	Cannot acquire with knowledge of contamination	Cannot acquire with knowledge of contamination
Threshold Criteria			
Perform All Appropriate Inquiries	✓ 101(40)(B)(ii)	✓ 107(q)(1)(A)(viii)	✓ 101(35)(A)(i),(B)(i)
"No Affiliation" demonstration	✓ 101(40)(B)(viii)	✓ 107(q)(1)(A)(ii)	See footnote one
Acquisition after January 11, 2002	✓ 101(40)(A)(i)(I)		
Continuing Obligations			
No disposal after acquisition	✓ 101(40)(B)(i)		✓ 101(35)(A)
Compliance with land use restrictions and not impeding institutional controls	✓ 101(40)(B)(vi)	✓ 107(q)(1)(A)(v)	✓ 101(35)(A)
Taking "reasonable steps" to manage releases	✓ Exercise appropriate care 101(40)(B)(iv)	✓ 107(q)(1)(A)(iii)	✓ 101(35)(B)(i)(II)
Providing full cooperation/ assistance/access	✓ 101(40)(B)(v)	✓ 107(q)(1)(A)(iv)	101(35)(A)
Compliance with information requests and administrative subpoenas	✓ 101(40)(B)(vii)	✓ 107(q)(1)(A)(vi)	See footnote two
Providing legally required notices	✓ 101(40)(B)(iii)	✓ 107(q)(1)(A)(vii)	See footnote three
No impeding performance of response action or natural resource restoration	✓ 107(r)(1)		
Did not cause/contribute to contamination		✓ 107(q)(1)(A)(i)	
Third-Party Defense requirements (due care and precautions)			✓ 107(b)(3)

All section citations in this table are to the Comprehensive Environmental Response, Compensation, and Liability Act, 42. U.S.C. Chap. 103, §§ 9601-9675. Visit the GPO website for current version of the United States Code.

[1] The innocent landowner provision does not contain similar "no 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. The term "contractual relationship" for the purpose of the innocent landowner liability protection is defined in CERCLA § 101(35)(A).

[2] Compliance with information requests and administrative subpoenas is not specified as a statutory criterion for achieving and maintaining the § 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.

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

AFFILIATION

The BFPP and contiguous property owner liability protections require that the purchaser or owner of the property at issue not be "affiliated" with a person who is potentially liable at that property. For both liability protections, "affiliation" includes a familial, contractual, financial, or corporate relationship. The affiliation language is found in CERCLA § 101(40) for those seeking liability protection as a BFPP, while the affiliation language for a contiguous property owner is found in CERCLA § 107(q)(1)(A). The contiguous property owner affiliation language differs from the BFPP affiliation language in that there is no exception for relationships created by the instruments by which title to the facility is conveyed or financed. Except for this difference, the affiliation language in the BFPP and contiguous property owner provisions is identical.

In 2011, the EPA issued *Enforcement Discretion Guidance Regarding the Affiliation Language of CERCLA's Bona Fide Prospective and Contiguous Property Owner Liability Protections* on how it intends to apply the affiliation language in the BFPP and CPO liability protections to individual property owners. This memorandum is meant to provide assistance to EPA regional attorneys in evaluating whether specific circumstances run afoul of the "no affiliation" clauses in CERCLA. To that end, the memorandum is divided into two sections: the first addresses general guidance regarding the statutory language, while the second addresses the three situations in which the EPA will exercise its enforcement discretion for non-site related relationships, post-acquisition relationships, and tenants. The guidance uses questions and answers and more specific examples to explain the statutory language and the EPA's intention for the use of enforcement discretion.

ALL APPROPRIATE INQUIRIES

BFPPs, CPOs, and ILOs must all undertake "all appropriate inquiries" (AAI) under CERCLA § 101(35)(B) before acquiring property to obtain liability protection. CERCLA § 101(35)(B) required the EPA to publish a regulation to "establish standards and practices for the purpose of satisfying the requirement to carry out [AAI] . . . ." The EPA's All Appropriate Inquiries Rule (AAI Rule), 40 C.F.R. Part 312 (2006), establishes those requirements. Parties affected by the AAI Rule are those purchasing commercial or industrial real estate who wish to take advantage of CERCLA's landowner liability protections and those persons conducting a site characterization or assessment with funds provided by certain federal brownfields grants. For additional information on AAI, see the EPA's website on All Appropriate Inquiries.

B. State Response Programs

1. State Voluntary Cleanup Programs

State response programs -- often referred to as voluntary cleanup programs (VCPs) or brownfield programs -- play a significant role in assessing and cleaning up brownfield sites. VCPs typically are programs authorized by state statutes to address brownfields and other lower-risk sites that generally are not of federal interest. These programs typically provide certainty regarding state liability through a "no further action" letter or covenant not to sue to a party who successfully completes a cleanup under the state's authority.

The EPA has historically supported the use of VCPs and continues to provide grant funding to establish and enhance VCPs. The EPA also may provide general enforcement assurances to individual states to encourage the assessment and cleanup of brownfields addressed under state oversight. This approach to VCPs was codified in 2002 as CERCLA § 128 and contains the following:

- CERCLA § 128(a) addresses grant funding and memoranda of agreement (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 "eligible response sites" addressed in compliance with state response programs that specifically govern cleanups to protect human health and the environment; 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 state response program.

2. Memoranda of Agreement

Beginning in the 1990s, the EPA increased its partnership with states to address the cleanup of brownfields and to strengthen and build state program capacity. As part of that effort, the EPA entered into MOAs with individual states to encourage the assessment and cleanup of brownfields under state oversight. MOAs can be valuable mechanisms to support and strengthen efforts to achieve protective cleanups under state oversight. The purpose of the MOAs is to foster more effective and efficient working relationships between an EPA Region and an individual state regarding the use of its state response program. MOAs are non-binding documents that promote coordination and clarify the general roles and responsibilities and provide the EPA's recognition of the state's capabilities. MOAs typically include a general statement of the EPA's enforcement intentions regarding certain sites cleaned up under the oversight of a state response program. An MOA, or the absence of an MOA, does not alter EPA's or a state's legal authority.

MOAs are entered into after an evaluation of the state response program's capabilities and are tailored to those capabilities. A number of states have the capabilities and authorities to take voluntary cleanup approaches in support of cleanups of facilities subject to corrective action under RCRA. As a result, the EPA and several states have expanded the VCP MOA concept to recognize these voluntary approaches under RCRA. Most of these expanded agreements are known as Memoranda of Understanding (MOUs). To learn more about which states have VCP MOAs or MOUs, please go to the Brownfields and Land Revitalization Activities Near You website.

3. Eligible Response Sites and the Enforcement Bar

An "eligible response site" as defined by CERCLA § 101(41) is a site at which the EPA may not take an enforcement action under CERCLA §§ 106 or 107, subject to certain exceptions, because it is already being cleaned up under a state response program. This limitation on federal enforcement is provided for by CERCLA § 128(b) and is commonly known as the enforcement bar. Eligible response sites also may be deferred from listing on the NPL in certain circumstances. If an EPA regional office determines that a site is not an "eligible response site," that site will not be subject to the deferral provisions in CERCLA § 105(h) or the limitations in CERCLA § 128(b) on the EPA's enforcement and cost recovery authorities. For more information, see the EPA's guidance on regional determinations regarding eligible response sites.

C. Protections for State and Local Governments from Liability

1. Section 101(20)(D) State and Local Government Liability Exemption

CERCLA § 101(20)(D) is a powerful liability exemption available to units of state and local government, as it may exempt them from being an "owner" or "operator" and thus may protect them from potential CERCLA liability stemming from certain types acquisitions.

The BUILD Act amended CERCLA § 101(20)(D) to expand the liability exemption for state and local governments. The BUILD Act added a new category of exempt acquisitions, "through seizure or otherwise in connection with law enforcement activity" and removed the requirement that state and local governments must acquire title to property "involuntarily."
CERCLA § 101(20)(D) now exempts from potential owner or operator liability, a "unit of state or local government which acquired ownership or control through seizure or

MIDDLEFIELD-ELLIS-WHISMAN
Mountain View, California

A sculpture and waiting area at a new company campus on site.

In Mountain View, the Middlefield-Ellis-Whisman Superfund Study Area (or MEW Site) is comprised of three Superfund sites: Fairchild Semiconductor Corp., Raytheon Company, Intel Corp., several other facilities and portions of the former Naval Air Station Moffett Field. In 2017, the EPA and DOJ entered into a BFPP agreement with Warmington Fairchild Associates LLC to accelerate cleanup and significantly reduce subsurface contamination in a short timeframe at three parcels in the MEW Site. The BFPP agreement also ensured residential redevelopment in a manner protective of human health for future occupancy. Upon completion, the redevelopment at the MEW Site will include 22 townhomes and 4 detached homes. The Fairchild Semiconductor Corp. site is now in reuse as an office complex for a major multi-national technology company. The Raytheon Company site currently hosts various business and commercial offices, light manufacturing facilities and the headquarters for an information security, storage and systems management solutions company. The Intel Corp. site is currently home to commercial businesses and headquarters for a software company.

otherwise in connection with law enforcement activity, or through bankruptcy, tax delinquency, abandonment or other circumstances in which the government acquires title by virtue of its function as sovereign."

The EPA intends to treat state or local government acquisitions "by virtue of its function as sovereign" as exempt from owner or operator liability under Section 101(20)(D) only when the governmental unit acquires title to property via a function that is unique to its status as a governmental body. Accordingly, such exempt acquisitions may include property transfers between governmental units, escheat, and in certain circumstances, eminent domain. However, acquisitions through purchase, gift, and donation would not be treated as exempt.

A unit of state or local government wishing to take advantage of the Section 101(20)(D) liability exemption should note that it does not apply if that unit of government has "caused or contributed to the release or threatened release of a hazardous substance from the facility." For example, some actions or omissions during ownership such as dispersing contaminated soil during excavation and grading and failing to prevent the release of hazardous substances may cause or contribute to a release of hazardous substances from a property and make the unit of government ineligible for the liability exemption. Thus, in cases where it is unclear whether the Section 101(20)(D) liability exemption or other liability protections apply, the EPA encourages units of state and local government to conduct AAI prior to acquiring a property and to fulfill other necessary requirements to achieve and maintain BFPP status.

As of December 2019, the EPA is developing guidance addressing CERCLA liability and local government property acquisitions as a result of the BUILD Act. The EPA intends to reissue this Handbook in 2020 to incorporate the guidance. In the interim, see the EPA's 2011 fact sheet on state and local government acquisitions and activities.

2. Land Banks and Redevelopment Agencies

In an effort to promote the acquisition, redevelopment, and reuse of abandoned properties, an increasing number of states and municipalities are passing legislation authorizing land banks and redevelopment agencies. Enabled by state legislation and enacted by local ordinances, these governmental entities acquire, hold, lease, and/or manage vacant, abandoned, and tax delinquent properties. The EPA recognizes their importance and increased use as tools to address abandoned or vacant properties, improve existing land use practices, and support local community development. They can also facilitate land reuse while advancing public policy goals such as providing affordable housing, stabilizing neighborhoods, developing open space, revitalizing brownfields, planning for smart growth, and reducing crime and potential fire hazards.

It is important that land banks and redevelopment agencies are aware of the potential for contamination on properties they acquire. They are encouraged to assess whether there is an applicable CERCLA liability protection before acquiring property. For example, the CERCLA § 101(20)(D) exemption for a "unit of State of local government" may be applicable, however, this term is undefined in CERCLA. To address any potential uncertainty regarding this term, the EPA generally intends to treat a land bank, redevelopment agency, or other quasi-governmental entity as a "unit of State or local government" and exempt from CERCLA owner or operator liability if it acquired property through one of the methods in CERCLA § 101(20)(D) (discussed above); has not caused or contributed to a release or threatened release of hazardous substances at the property; and meets the definition of "municipality" in RCRA § 1004(13) or the definition of "local

government" in the Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments, 2 C.F.R. § 200.64.

3. Emergency Response

Local units of government, especially fire, health, and public safety departments, are often the first responders to emergencies and other dangerous situations at contaminated properties in their communities. So as not to interfere with these activities, CERCLA § 107(d)(2) provides that state or local governments will not be liable for "costs or damages as a result of actions taken in response to an emergency created by a release or threatened release of a hazardous substance by or from property owned by another party." This protection does not apply in cases where the local government is grossly negligent or intentionally engages in misconduct. Further, the EPA may reimburse local governments up to $25,000 for the costs of temporary measures under CERCLA § 123.

D. Lender Liability Protections

1. CERCLA Secured Creditor Exemption

Under the secured creditor liability exemption in CERCLA §§ 101(20)(F)-(H), 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. Please note that the BUILD Act changed the citations for exemption from Section 101(20)(E)-(G) to Section 101(20)(F)-(G). CERCLA § 101(20)(G) defines key terms and lists activities that a lender may undertake without forfeiting the exemption. Additional information is available in the "Participation in Management" text box. The EPA also has issued enforcement guidance to address these statutory provisions. *See Policy on Interpreting CERCLA Provisions Addressing Lenders and Involuntary Acquisitions by Government Entities*.

2. Underground Storage Tank Lender Liability Protection

Local communities often struggle with what to do about polluted, abandoned gas stations and other petroleum-contaminated properties, generally referred to as petroleum brownfields. Often, citizens and businesses shy away from the reuse potential of these properties, fearing the potential liability of environmental contamination under the underground storage tank (UST) provisions of RCRA. RCRA § 9003(h)(9) and the EPA's UST Lender Liability Rule (40 C.F.R. § 280.200 et seq.) address the fear of potential lender liability to encourage the reuse of abandoned gas station sites.

Holders of security interests as described in the UST Lender Liability Rule are not owners or operators of petroleum USTs or UST systems, or property on which petroleum USTs or UST systems are located for purposes of compliance with certain UST requirements for corrective action, technical requirements, and financial responsibility, provided that specified criteria are met. By allowing security interest holders to market their foreclosed properties without being subject to UST requirements, gas stations are reused when they otherwise may have been abandoned.

PARTICIPATION IN MANAGEMENT

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;
- 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 with respect to environmental compliance; or
- All, or substantially all, of the operational (as opposed to financial or administrative) functions of the facility other than environmental compliance.

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 the EPA;
- 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 before 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 an emergency response or action under the direction of the EPA; 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. The 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.

E. Residential Property Owners

In 1991, the EPA issued the *Policy Towards Owners of Residential Properties at Superfund Sites*. The goal of this enforcement discretion policy is 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, residential property is defined as "single family residences of one-to-four dwelling units. . . ." Further, this policy deems irrelevant a residential owner's knowledge of contamination. The residential owner policy applies to residents as well as their lessees, so long as the activities the resident takes on the property 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 the resident undertakes on the property after acquisition are consistent with the policy.

Residential property owners who purchase contaminated property after January 11, 2002, may also take advantage of the statutory BFPP provision. The Brownfields Amendments addressed residential property owners by clarifying the type of pre-purchase investigation (i.e., AAI) that a residential property owner must conduct to obtain BFPP status. Specifically, CERCLA § 101(40)(B)(ii)(III) provides that an inspection and title search that reveal no basis for further investigation will qualify as AAI for a residential purchaser.

CRITERIA FOR RESIDENTIAL PROPERTY OWNERS

An owner of residential property located on a CERCLA site may be protected from liability if the owner:

- Has not engaged and does not engage in activities that lead to a release or threat of release of hazardous substances, resulting in the EPA taking a response action at the site;
- Has cooperated fully with the EPA by providing access and information when requested;
- Does not interfere with the activities that either the EPA or a state takes to implement a CERCLA response action;
- Does not use or 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 EPA's response action.

IV. Site-Specific Tools to Address Cleanup Status, Liability Concerns, and/or Perceived Stigma

A. Comfort/Status Letters

Comfort/status letters provide a prospective purchaser with the information the EPA may have about an impacted property and the potential applicability of statutory provisions, regulations, and the EPA guidance to that purchaser. The "comfort" comes from hearing directly from the Agency, near to the time of the potential property transaction, about the EPA's knowledge of the property based on information known or provided to the EPA at the time of the letter. Comfort/status letters are not "no action" assurances; that is, they are not assurances by the EPA that it will not take an enforcement action at a particular site in the future. They are intended for use in limited circumstances and subject to the availability of Agency resources.

1. Superfund Comfort/Status Letters

Since 1996, the Agency has issued comfort/status letters to parties concerned about the status of impacted properties that may present CERCLA cleanup and liability concerns. Reflecting the Agency's continued interest in facilitating investment in the cleanup and reuse of impacted properties, the EPA issued the *2019 Policy on the Issuance of Superfund Comfort/Status Letters* ("2019 Comfort/Status Letter Policy"), which included models for use by the EPA Regions when developing site-specific letters. The letters provide a party with relevant publicly available information the EPA has about 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 also suggest the property-specific "reasonable steps" that EPA staff believe a party should take at the property to help ensure protectiveness of human health and the environment. Suggested language on reasonable steps is included in the *Model*

ARMOUR ROAD
North Kansas City, Missouri

A view of the Armour Road site.

The 1.8-acre Armour Road Superfund site is located in North Kansas City, Missouri. From 1929 to 1986, an herbicide-blending facility operated on the site and resulted in arsenic contamination in the soil and groundwater. The site was referred to the EPA in 1996 and the Agency conducted a non-time critical removal to excavate and dispose of contaminated soil. The remedial action at the site has been expedited by coordination between the EPA and the PRP. For example, the EPA issued comfort letters to North Kansas City and prospective businesses. These comfort letters informed interested parties on the status of the site, including how the site can and cannot be reused. Today, the former industrial area is growing into a mixed-use urban center filled with hotels, apartments, restaurants, and a medical center. Coordination on the redevelopment of this property has been most recently recognized in a ceremony whereby the Regional Administrator presented Leading Environmentalism and Forwarding Sustainability (L.E.A.F.S.) Awards to the Mayor of North Kansas City and others committed to sustainable development.

Federal Superfund Interest Comfort/Status Letter, which was issued as part of the 2019 Comfort/Status Letter Policy. The model language provides a template for the EPA Regions to outline specific reasonable steps with respect to identified environmental concerns at a property, based on the information evaluated by the Region prior to issuance of the comfort/status letter. Comfort/status letters that include suggested "reasonable steps" do not provide a release from CERCLA liability and are based on the available information and the nature and extent of contamination known to the EPA at the time the letter is issued. If additional information regarding the nature and extent of hazardous substance contamination at the site becomes available, additional actions may be necessary to satisfy the reasonable steps requirement.

The EPA may consider several questions to assess whether, and what type of, a Superfund comfort/status letter is the correct tool, such as what is known about:

- past and present contamination,
- cleanup status,
- the potential for or actual Agency involvement at the property,
- the involvement of the State at the property, and
- potentially applicable statutory protections.

2. RCRA Comfort/Status Letters

RCRA treatment, storage, and disposal (TSD) facilities present unique challenges in terms of cleanup and reuse but may also provide opportunities for revitalization. Recognizing that situations often exist at RCRA facilities analogous to those at Superfund sites, the EPA developed guidance for issuing comfort/status letters for RCRA TSD facilities. In 2003, the EPA further explained the proper use of RCRA comfort/status letters in its guidance *Prospective Purchaser Agreements and Other Tools to Facilitate Cleanup and Reuse of RCRA Sites*. In addition, in the 2001 guidance, *Comfort/Status Letters for RCRA Brownfield Properties*, the EPA indicated that it would use such letters to facilitate the cleanup and reuse of brownfields, where there was a realistic perception or probability of the EPA initiating a RCRA cleanup action, and where there was no other mechanism to adequately address the party's concern.

3. Comfort/Status Letters for Federally Owned Properties

The EPA may issue a comfort/status letter to address various issues concerning perceived NPL stigma and CERCLA liability involved with a military property. In 1996, the EPA updated its *Model Comfort Letter Clarifying NPL Listing, Uncontaminated Parcel Identifications, and CERCLA Liability Issues Involving Transfers of Federally Owned Property*. This type of comfort/ status letter may include a determination that a remedy is operating properly and successfully.

The model letter also describes certain CERCLA provisions applicable to a federal agency before transferring any property on which hazardous substances have been stored for a year or more, or are known to have been released or disposed of. The EPA's Federal Facilities Restoration and Reuse Office website further explains efforts to clean up, transfer, and reuse federal facilities.

B. Site-Specific Agreements

Federal involvement in private real estate transactions is unnecessary at the vast majority of contaminated properties. However, the EPA and the DOJ recognize that a site-specific agreement with the federal government addressing the liability concerns of a BFPP, prospective purchaser, or other third party may facilitate the cleanup and reuse at some sites of federal interest, e.g., sites on the NPL. Accordingly, as reflected in the Superfund Task Force Recommendations and the EPA and DOJ policy on *Agreements with Third Parties to Support Cleanup and Reuse at Sites on the Superfund National Priorities List*, the EPA Regions are encouraged to consider more frequent use of these agreements with third parties.

1. Bona Fide Prospective Purchaser Work Agreements

After the addition of the BFPP liability provision to CERCLA, the EPA issued a policy, *Bona Fide Prospective Purchasers and the New Amendments to CERCLA*, stating that, in most cases, agreements with the federal government are unnecessary because the activities of most BFPPs will not require liability protection beyond what is provided by the self-implementing BFPP provision in CERCLA.

However, if a BFPP wants to perform cleanup work at a contaminated site of federal interest that exceeds the BFPP's statutory requirements to maintain their liability protection (e.g., reasonable steps), an agreement may be used to address potential liability concerns. The EPA's 2006 model agreement provides a covenant not to sue for "existing contamination" and contribution protection in exchange for the BFPP's performance of cleanup work. A release and waiver of any windfall lien also may be provided.

HIGHLAND PLATING
Los Angeles, California

From 1964 to 2014, the Highland Plating Company conducted metal plating operations at the Highland Plating property in North Hollywood. A July 2014 fire destroyed the facility. Fire suppression fluids distributed plating solutions throughout the facility and into nearby soils. In 2016, 7007 W. Romaine (LA), LLC, entered into a BFPP agreement with the EPA and DOJ. In consideration for the agreement, the BFPP agreed to demolish the remaining contaminated building, excavate contaminated soils and install a ventilation system for any potential soil vapor concerns. The work conducted by the BFPP exceeded the removal goals the EPA anticipated for the site.

CIM Group, the parent company of the BFPP, completed construction of a 6-floor mixed-use development in 2019. The BFPP agreement facilitated reuse of the property, which includes the Hollywood Romaine Medical offices of Kaiser Permanente.

SYCAMORE SUPERFUND REMOVAL SITE
Los Angeles, California

The Sycamore site in Los Angeles, California, had various owners between 1933 and 1976, including a motion picture producer, a construction company and a dry-cleaning operation. Soil and groundwater investigations found USTs and contaminated soil. Site soils were contaminated with chlorinated volatile organic compounds (VOCs). In 2017, Sycamore LLC, the purchaser, entered into a BFPP agreement with DOJ and the EPA to conduct a removal action for soils and soil vapor. Sycamore LLC further agreed to pay the removal oversight costs incurred by the EPA.

The BFPP agreement facilitated the redevelopment of the contaminated site. CIM Group, Sycamore's parent company, completed construction of a three-level, 67,000-square-foot office building with ground-floor retail in May 2019. The development is also the new headquarters for Sirius XM satellite radio's West Coast programming.

2. Prospective Purchaser Agreements and Prospective Lessee Agreements

At some sites of federal interest, e.g., sites on the NPL, a prospective purchaser agreement (PPA) may be appropriate, e.g., the purchaser may not qualify as a BFPP. PPAs, similar to BFPP agreements, provide liability protections in exchange for cleanup work and/or payment at the site. For more information, see the EPA's guidance titled, *Agreements with Third Parties to Support Cleanup and Reuse at Sites on the Superfund National Priorities List*. PPAs and prospective lessee agreements (PLAs) may be available for CERCLA and RCRA sites.

3. Windfall Lien Resolution Agreements

In the EPA's *Interim Enforcement Discretion Policy Concerning "Windfall Liens" Under Section 107(r) of CERCLA*, the Agency anticipates that there may be situations where a site has a windfall lien and a BFPP wants to satisfy any existing or potential windfall lien before or close to the time of acquisition. Congress specifically provided the EPA with the authority to resolve windfall liens in CERCLA § 107(r)(2). The EPA and DOJ have developed a model agreement to facilitate resolution of windfall liens as an attachment to the windfall liens guidance.

4. Contiguous Property Owner Assurance Letters and Settlements

The Brownfields Amendments provide CERCLA liability protection for CPOs. Some landowners, however, continue to have liability concerns especially where the EPA has conducted a response action on the neighboring contaminated property or the contiguous property owner's property. While the CPO provisions are self-implementing, Congress authorized the EPA, in its discretion, to offer assurance that no enforcement action will be brought against a CPO for contamination resulting from a neighbor's actions. Alternatively, the EPA may enter into a settlement agreement with the CPO, providing them with cost recovery or contribution protection from PRPs at the site. The EPA's *Interim Enforcement Discretion Guidance Regarding Contiguous Property Owners* and *Model CERCLA Section 107(q)(3) Contiguous Property Owner Assurance Letter* provide guidance on when such an assurance letter or agreement is appropriate.

WINDFALL LIEN GUIDANCE AND SETTLEMENTS

In 2003, the EPA and DOJ jointly issued the *Interim Enforcement Discretion Policy Concerning "Windfall Liens" Under Section 107(r) of CERCLA*. The EPA separately published the accompanying *"Windfall Lien" Guidance Frequently Asked Questions*. In addition to explaining how the EPA intends to perfect a windfall lien and when the EPA may seek to foreclose on this lien, the guidance includes two attachments: (1) a sample "comfort letter" that explains to the recipient whether the EPA believes there is a possible windfall lien applicable to the property and (2) a model settlement document, which the EPA may use to settle any applicable windfall lien provision in exchange for monetary or other adequate consideration.

In 2008, the 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 and the EPA administrative procedures that should accompany filing a windfall lien notice.

C. Other Tools

1. National Priorities List Deletions

Under certain conditions, the EPA may delete or recategorize a property or portion of a property from the NPL. States play a key role in NPL deletions. Before developing a notice of intent to delete, the EPA must consult with the state. In consultation with the state, the EPA must consider:

- Whether responsible parties or other parties have taken all appropriate response actions that are required;
- Whether no further response actions are required; and
- Whether the remedial investigation has shown that the release poses no significant threat to public health or the environment and taking of remedial measures is, therefore, not appropriate.

Sites may not be deleted from the NPL without state concurrence and publication of a proposed deletion in the Federal Register. It is important to note that deletion or partial deletion of a site from the NPL does not itself create, alter, or remove any legal rights or obligations.

2. Look First Approach in Settlement Agreements

To encourage cleanup and reuse, a "look first" provision may be used in CERCLA settlement agreements involving PRPs and third parties that agree to fund or perform environmental cleanup obligations, where appropriate and in the interest of the Superfund program. Under a "look first" approach, the EPA agrees to initially seek performance and corrective measures from the third party assuming the cleanup obligations before pursuing the settling PRP(s). At certain sites, this approach may provide the Agency with a viable, responsible, and willing corporate entity that can perform response work and the long-term oversight and management required at the site. As of December 2019, the EPA is developing a memo to the Regions on the "look first" approach.

ST. MARIES CREOSOTE SUPERFUND SITE
St. Maries, Idaho

In 2009, the United States, along with the Coeur d'Alene Tribe, entered into a settlement agreement with the city of St. Maries, numerous PRPs, and a third-party environmental contractor. Under this consent decree, the settling PRPs and the environmental contractor were jointly and severally responsible for performing the work at the site, but the EPA acknowledged that the environmental contractor is the party primarily responsible for performing the work. This was memorialized in a "look-first" provision, whereby, the EPA agreed to initially seek corrective measures, including performance and stipulated penalties, only from the environmental contractor for noncompliance, before seeking corrective measures from the settling PRPs. The approach allowed cleanup to commence at a significantly contaminated site.

PRIVATE PARTY TOOLS

Private parties can use other tools to manage environmental liability risks associated with contaminated properties. These tools may include:

- Indemnification Provisions – These are private contractual mechanisms in which one party promises to cover the costs of liability of another party. Indemnification provisions provide prospective buyers, lenders, insurers, and developers with a means of assigning responsibility among themselves for cleanup costs, and encourage negotiations among 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, but many factors affect their utility including the types of coverage available, the dollar limits on claims, the policy time limits, site assessment requirements, and the cost of available products. Parties involved in brownfields redevelopment considering environmental insurance should retain the assistance of skilled brokers and lawyers to help select appropriate coverage.

While CERCLA recognizes that parties can contractually enter indemnification, risk transfer, or other conveyances with third parties for response activities at Superfund sites, Section 107(e) of the statute also explicitly states that a private party cannot transfer or divest its underlying CERCLA liability pursuant to a private agreement.

V. EPA Initiatives to Clean Up Contaminated Properties

A. Brownfields Grants and State/Tribal Funding

With certain legal exclusions and additions, a brownfield is defined in CERCLA § 101(39) as a property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant. The EPA's Brownfields Program is designed to empower states, communities, and other stakeholders in economic redevelopment to work together in a timely manner to prevent, assess, safely clean up, and sustainably reuse brownfields. Cleaning up and reinvesting in these properties increases local tax bases, facilitates job growth, utilizes existing infrastructure, takes development pressures off of undeveloped, open land, and both improves and protects the environment.

The EPA implements a grant program for a variety of state, local, and tribal efforts to address and redevelop brownfield sites. Included in the competitive grant program under CERCLA § 104(k) are grants for the assessment and cleanup of brownfield sites, multipurpose grants, revolving loan funds, environmental workforce development and training grants, and technical assistance and research grants. These monies help communities revitalize blighted sites by allowing them to take what is often the first step in the process -- addressing potential contamination.

Under CERCLA Sections 104(k)(1), 104(k)(3), and 101(39), to be eligible for a Brownfields competitive grant, the applicant must meet the statutory definition of an "eligible entity" and must plan to use the grant funding at a property that meets the definition of a "brownfield site." CERCLA § 104(k)(4)(B) imposes certain other restrictions on the use of Brownfields 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.

CELOTEX CORPORATION
Chicago, Illinois

La Villita Park includes athletic fields, a skate park, basketball courts, gardens, trails, a playground and a picnic pavilion.

The Celotex Corporation site is located in Chicago's Little Village neighborhood. For decades, manufacturing facilities made asphalt roofing materials on site. These operations contaminated the property and nearby residential yards. The EPA entered an agreement with the PRPs to investigate site conditions and pay for and perform the cleanup. As cleanup progressed, neighborhood residents and the city of Chicago (the City) began to consider reuse possibilities for the site, including new recreation facilities. Working with the EPA to make sure reuse would remain protective of the site's remedy, the City and the Chicago Park District entered into a PPA with the EPA and DOJ. The Chicago Park District acquired the site property in 2012; La Villita Park opened to the community in December 2014. The recreational complex includes athletic fields, a skate park, basketball courts, community gardens, a playground, a picnic pavilion, concession areas, a multi-use trail with fitness stations and environmentally-friendly utilities. For more information see the Celotex Greener Cleanup Enforcement Success Story.

The EPA also implements a non-competitive grant program pursuant to CERCLA § 128(a) to provide funding to states and tribes to establish and enhance their response programs. State and tribal response programs play a significant role in the cleanup of brownfields. The EPA encourages all recipients of Brownfields grant funding to enroll their site in the appropriate state or tribal response program to ensure proper oversight of the cleanup activities.

More information on grant funding is available in the grants section of the Brownfields website.

B. Petroleum Brownfields Revitalization

Petroleum brownfields are a specific type of brownfield where petroleum is the contaminant. Many of them are old abandoned gas stations where petroleum leaked from underground storage tanks (USTs). Petroleum can contaminate groundwater, the source of drinking water for many people. EPA's Office of Underground Storage Tanks and Office of Brownfields and Land Revitalization jointly focus on the cleanup and reuse of petroleum-contaminated sites.

Abandoned gas stations are often located on major thoroughfares, making them excellent candidates for redevelopment. EPA's Brownfields Program competitively awards grants for assessing and cleaning up petroleum brownfields that meet eligibility requirements and are relatively low risk. The EPA's UST program provides money to states and territories to oversee UST cleanups and directly clean up eligible, high-priority leaking underground storage tank (LUST) sites.

SPARROWS POINT
Baltimore Harbor, Maryland

An aerial view of the Sparrows Point Site in 2018.

The Sparrows Point Site, a 3,100-acre peninsula reaching into the Baltimore Harbor in Baltimore County, Maryland, was home to one of the world's largest steel manufacturing operations for more than 100 years. Steel manufacturing created thousands of jobs, but also resulted in significant contamination at the facility and in offshore areas. Beginning in the mid-1990s, the EPA and the Maryland Department of the Environment (MDE) were actively involved in addressing the contamination under RCRA. A variety of owners and operators were also involved through judicial and bankruptcy proceedings.

In 2014, the EPA entered into a PPA, providing liability protection to Sparrows Point Terminal LLC, who was willing to conduct cleanup work to support their new commercial vision for the site. Amazon, FedEx and Under Armour are the first major tenants at the site, which is being redeveloped by Tradepoint Atlantic, a private joint venture. Tradepoint Atlantic plans to further redevelop the waterfront land into an e-commerce and manufacturing hub as well as a deep-water port for bulk materials. In 2019, the complex primarily features warehouse and distribution centers, providing 3,500 jobs. Investors believe the redeveloped former steel mill site will eventually bring 17,000 direct and related jobs to the Baltimore Harbor site.

The EPA's petroleum brownfields initiative includes:

- Creating documents and guides that help regulators conduct responsible party searches and ability to pay analyses, and
- Sharing successful approaches and best management practices such as:
    - Developing an inventory of LUST sites for redevelopment;
    - Using a corridor approach to clean up multiple sites in an area;
    - Integrating cleanup and redevelopment with community needs for housing, health centers, charging stations, parks, and other uses;
    - Encouraging regulators and local communities to capture benefits data, for example, jobs created and tax revenue increases, and produce success stories associated with putting abandoned gas stations back into productive use; and
    - Promoting better coordination between state UST and voluntary cleanup programs to route LUST sites to state voluntary cleanup programs.

C. Superfund Redevelopment

The year 2019 marks the 20th anniversary of Superfund Redevelopment (SR), the EPA's initiative to safely reclaim, reuse and redevelop formerly contaminated land for the benefit of communities across the country. The SR program works with communities, site stakeholders and other partners in considering future use opportunities at Superfund sites and integrating appropriate reuse options into all stages of the cleanup process. Recent projects have integrated cleanup and reuse to save taxpayer dollars, accelerated cleanups, restored access to vital services and enabled infrastructure projects that address community priorities. There is reuse and redevelopment happening at Superfund sites in every state across the country.

At each site, the SR program's goal is to make sure the site team and its partners have an effective process and the necessary tools and information to fully explore site uses as early in the cleanup process as possible. SR provides tools and resources to address evolving community priorities and tackle new reuse challenges.

SR efforts include:

- Reuse planning and facilitation services to bring people together to discuss community priorities, address concerns and develop plans for the future.
- Partnerships with communities, states, tribal and local governments, nonprofits, and private-sector organization to remove unnecessary reuse barriers.

- Innovative tools such as Ready for Reuse (RfR) Determinations to provide site owners, businesses, local governments and lenders with the information they need to make reuse happen.

- Information resources – case studies, videos, success stories, awards, trainings – to inspire, build capacities and highlight new reuse directions.

For more information on these efforts, visit the Superfund Redevelopment website.

D. Ready for Reuse Determinations

When all or a portion of a Superfund site is protective for specified uses, the EPA has the discretion to issue an RfR Determination. RfR Determinations are intended to facilitate reuse and provide helpful information to lenders, communities, and the real estate marketplace about the environmental status of the Superfund site.

RfR Determinations are technical rather than legal and explain the nature and extent of contamination. Before the 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 technical terms difficult for the marketplace to interpret. This meant that many sites that were able to accommodate certain types of uses were needlessly difficult to market. An RfR Determination provides potential users and the real estate marketplace with an affirmative, plain-language statement and supporting decision documentation to show that the site will remain protective of the remedy as long as all required response conditions and identified use limitations continue to be met. For examples and more information, please see the EPA's Superfund Ready for Reuse Determinations website.

TEX TIN CORP.
Texas City, Texas

An on-site storage and laydown facility.

The 140-acre Tex Tin Corp. Superfund site is located near the banks of Galveston Bay in Texas City, Texas. Historical smelting operations contaminated soil, sediment and groundwater with hazardous chemicals. Cleanup at the site addressed contaminated groundwater, soil and sediment, waste piles, wastewater treatment ponds, acid ponds and slag piles. After cleanup, the EPA awarded the site a Superfund Redevelopment grant in 2001.

The EPA issued the nation's first RfR Determination for the site in 2003. The RfR Determination stated that the remedy was protective for industrial uses as long as certain site conditions were met. After several initial reuse efforts, Texas City Terminal Railway Company bought the site property in 2010 under a PPA with the EPA. The Agency's RfR Determination and the PPA both helped promote the site for beneficial reuse. In November 2015, Genesis Energy, L.P. (Genesis), an integrated midstream energy company, signed a long-term lease with Texas City Terminal Railway Company for a portion of the site property to reuse as an oil terminal and transfer facility which went into service on May 1, 2017. In November 2017, EPA Region 6 presented Excellence in Site Reuse awards to Genesis, the Tex Tin Steering Committee and its remedial contractors, the Texas City Terminal Railway Company, and local officials in recognition of their extensive collaboration, cooperation and leadership throughout the cleanup and redevelopment of the site.

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

A. Financial Assurance Requirements

Financial assurance requirements are implemented under CERCLA and RCRA to ensure the availability of adequate financial resources to: (i) address corrective action at operating facilities that handle hazardous waste; (ii) address closure and post-closure of facilities that handle hazardous waste; (iii) provide the appropriate emergency response in the case of an accidental release at a facility; and (iv) provide an invaluable safeguard against the effect of financial distress that parties may experience during the course of cleanup. Financial assurance requirements play an important role in promoting the revitalization of contaminated sites by ensuring that financial resources are available for cleanup or closure activities. Further, when there are inadequate financial assurance funds to perform the cleanup, the EPA or the states may have to spend taxpayer money to fund cleanups. This not only shifts the responsibility away from the responsible party, it may also result in a significant delay in closure or cleanup activities, preventing or limiting reuse and redevelopment.

B. Long-Term Stewardship

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 "engineered" controls and effectiveness of "institutional" controls at sites. Long-term stewardship activities take on greater importance with the increased demand for the reuse of properties, especially properties where some contamination remains.

Physical or "engineered" controls are the engineered physical barriers or structures designed to monitor and prevent or limit exposure to the contamination at a site. Certain engineered cleanups will involve ongoing operations and maintenance (O&M), monitoring, evaluation, periodic repairs, and sometimes replacement of remedy components.

"Institutional" controls (ICs) are non-engineered instruments, such as administrative and/or legal mechanisms, intended to minimize the potential for human exposure to contamination by limiting land or resource use at a site. 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.

EXAMPLES OF ENGINEERED CONTROLS

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

EXAMPLES OF INSTITUTIONAL CONTROLS

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

The EPA has published a number of useful guidance documents on ICs. In 2005, to further explain the requirements of institutional controls, the 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*.

In 2012, the EPA also published two cross-program guidance documents addressing the entire lifecycle of ICs, titled *Institutional Controls: A Guide to Planning, Implementing, Maintaining, and Enforcing Institutional Controls at Contaminated Sites (PIME)* and *Institutional Controls: A Guide to Preparing Institutional Control Implementation and Assurance Plans at Contaminated Sites (ICIAP)*.

The PIME guidance identifies and addresses many of the common issues that may be encountered when using ICs pursuant to several cleanup programs. It also provides an overview of the EPA's policy regarding the roles and responsibilities of stakeholders involved in various aspects of the IC life cycle.

The ICIAP guidance provides the EPA Regions with a template for developing IC plans at contaminated sites where the response action includes ICs. An ICIAP is a document designed to systematically establish and document the activities associated with implementing and ensuring the long-term stewardship of ICs and specify the persons and/or entities that will be responsible for conducting these activities.

To fulfill the continuing obligations outlined in CERCLA (see Section III.A.4), monitoring the property and associated ICs or land use restrictions is one way to ensure that a party continuously complies with the land use restrictions and does not impede the effectiveness or integrity of the ICs, under CERCLA Sections 101(40)(B)(vi) (for BFPPs), 107(q)(1)(A)(v) (for CPOs), and 101(35)(A) (for ILOs). The EPA generally recommends annual reviews of ICs, but a shorter review period

may be appropriate if site conditions are expected to change frequently (for example, if the site is in an area being redeveloped). The PIME guidance provides further information about periodic monitoring. Furthermore, certain technologies and approaches can facilitate more efficient and timely monitoring of ICs. Some of these technologies and approaches include land activity monitoring, one-call excavation monitoring, and land use and building permit monitoring. For more information, see the EPA's 2018 memorandum, *Advanced Monitoring Technologies and Approaches to Support Long-Term Stewardship*.

The EPA, 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. The EPA and its regulatory partners implement (or ensure that responsible parties implement) long-term stewardship activities after remedy construction for as long as those activities are needed to help ensure protectiveness. Long-term stewardship can last years, decades, or in some cases, even longer. Long-term stewardship may involve 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 similarities 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 depends upon whether the cleanup was conducted by a PRP, including at federal facilities, or whether the EPA funded the cleanup. Under the RCRA program, the facility owner or operator is responsible for the O&M. Under the Brownfields Program, the EPA provides cleanup grants to state, tribal and local governments and nonprofits to carry out cleanup activities, including IC activities. Pursuant to the UST program requirements, 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 the EPA and the states, states are largely responsible for overseeing corrective actions in connection with USTs, including long-term stewardship on tribal lands; however, the EPA is generally responsible for overseeing the corrective actions, including long-term stewardship activities. For more information on long-term stewardship considerations at UST sites, see *Long Term Stewardship at Leaking Underground Storage Tank Sites with Residual Contamination*.

C. Environmental Justice

An integral part of EPA's mission is to focus on the environmental and public health challenges that face our nation's minority, low-income, tribal, and indigenous populations. The EPA works to address the needs of vulnerable populations by decreasing environmental burdens, increasing environmental benefits, and working collaboratively to build healthy, sustainable communities.

The EPA defines "environmental justice" as 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. The EPA's 2015 *Guidance on Considering Environmental Justice During the Development of Regulatory Actions* provides a definition of fair treatment and meaningful involvement.

Fair Treatment means that no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental and commercial operations or programs and policies.

Meaningful Involvement means that:

(1) potentially affected populations have an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment and/or health;

(2) the public's contribution can influence the regulatory agency's decision;

(3) the concerns of all participants involved will be considered in the decision-making process; and

(4) the rule-writers and decision-makers seek out and facilitate the involvement of those potentially affected.

This goal will be achieved when everyone enjoys:

- the same degree of protection from environmental and health hazards, and
- equal access to the decision-making process to have a healthy environment in which to live, learn, and work.

More information is available on the EPA's Environmental Justice website.

D. Public Participation

Community members are an essential component of the Superfund cleanup and the RCRA cleanup and permitting processes and the revitalization of these sites and brownfields sites. 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. The EPA uses the term "public participation" to denote activities that:

EAGLE-PICHER HENRYETTA
Henryetta, Oklahoma

In October 2018, EPA Region 6 presented their Excellence in Site Reuse Award to ECOFHC and the City.

The Eagle-Picher Smelting facility operated as a zinc smelter from 1916 to 1968. In 1974, Eagle-Picher Industries donated the former smelter facility to the city of Henryetta, Oklahoma (the City). Although Eagle-Picher demolished most of the production buildings, the slag and cinder piles remained. Between 1996 and 1997, the EPA conducted removal and remedial actions at the site, which ultimately resulted in an Administrative Order on Consent (AOC) between the EPA, Oklahoma Department of Environmental Quality, and the City.

The EPA's Superfund Redevelopment program used this AOC as a basis to issue a Ready for Reuse (RfR) Determination for the site. The environmental status report communicated that building a health clinic on site would be compatible with the site's remedy and remain protective. The RfR determination helped in procuring a $1 million grant from the U.S. Department of Health and Human Services for the clinic's construction. The East Central Oklahoma Family Health Center opened in October 2018. The 7,600-square-foot facility includes 12 exam rooms, a procedure room, and three dental units with digital X-ray services.

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

In the revitalization context, working with a variety of community members, local planners, elected officials, and other stakeholders is an effective way to identify and integrate long-term community needs into reuse plans for the site. Redevelopment planning enables affected stakeholders 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, the EPA works with PRPs to accommodate community goals.

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

E. RE-Powering America's Land Initiative

The EPA's RE-Powering America's Land Initiative encourages renewable energy development on current and formerly contaminated lands, landfills, and mine sites when such development is aligned with the community's vision for the site. The initiative identifies the renewable energy potential of these sites and provides other useful resources for communities, developers, industry, state and local governments or anyone interested in reusing these sites for renewable energy development.

Potentially contaminated land includes sites where contamination is suspected but has not been confirmed and sites where contamination has been identified. Targeted sites include brownfields, Superfund sites, sites subject to corrective action under RCRA, mining sites, and landfills. More information can be found at the EPA's RE-Powering America's Land Initiative website.

F. Sustainability, Greener Cleanups, and Resiliency

In 1969, Congress passed the first major federal environmental law, the National Environmental Policy Act (NEPA). In declaring a national policy "to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans" (42 U.S.C. § 4331(a)), Congress provided a statutory foundation for sustainability within the EPA. By its very nature, NEPA emphasizes the importance of sustainability and specifically states, at 42 U.S.C. § 4331(b)(1) that it is "the

continuing responsibility of the Federal Government" to, among other things, "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations."

Today, the EPA's efforts to achieve sustainability include reducing the environmental footprint of our cleanups and recognizing the value of ecosystem services in our cleanup process. Moreover, the Agency is focused on resiliency, adaptation, and mitigation measures in the face of changing environmental conditions which help to address and minimize the impacts of extreme weather or geological-related disasters to our cleanup efforts at sites and the surrounding communities and environment. For example, each regional office has its own "clean and green" policy. Additionally, using the Greener Cleanup Principles as a foundation, the EPA has integrated sustainable and greener cleanup principles into its core enforcement work such as the consideration of the five elements of a green cleanup assessment:

- Total Energy Use and Renewable Energy Use
- Air Pollutants and Greenhouse Gas Emissions
- Water Use and Impacts to Water Resources
- Materials Management and Waste Reduction
- Land Management and Ecosystems Protection

The EPA supports the inclusion of greener cleanup and other sustainable provisions in its orders, agreements, and statements of work (SOWs); assists in renewable energy development on current and formerly contaminated land and mine sites; and helps facilitate the appropriate reuse of contaminated property.

More information on the Agency's sustainability efforts are available from the following documents and websites:

- *Greener Cleanup Memo*
- *EPA Cleanup and Reuse Success Stories*
- *Clean Water Act Enforcement Framework*
- *Climate Change Adaptation Resource Center*
- *Green Remediation Initiative*

PHARMACIA & UPJOHN COMPANY
North Haven, Connecticut

Left: Reuse plans designated a 60-acre ecological preserve on the eastern side of the property (green areas above) and 17 acres along its western side for commercial and industrial use (blue and grey areas).
Right: One of the walking trails on the Pfizer property.

The 78-acre Pharmacia & Upjohn Company chemical manufacturing facility became contaminated through historical releases of hazardous manufacturing process wastes and wastewater treatment residuals. Through a series of RCRA enforcement orders, the EPA, Pfizer (the company that purchased Pharmacia Corporation, the parent company of the Pharmacia & Upjohn Company) and the Connecticut Department of Energy & Environmental Protection facilitated cleanup of the facility.

The most recent 2011 enforcement order allows Pfizer to develop and modify, with the EPA's approval, ambitious deadlines that keep the cleanup ahead of schedule. Incorporating ASTM International's Standard Guide for Greener Cleanups into the remedy helped Pfizer reduce the cleanup's environmental footprint. The selected corrective action objectives maximize a range of benefits – greater chemical mass removal, less impact on the community, greater beneficial reuse, a lower carbon footprint, reduced long-term groundwater pumping – and are backed by strong public support. A recent review of the corrective action activities found that Pfizer successfully incorporated 87 greener cleanup best management practices from the Standard Guide for Greener Cleanups. Pfizer also focused on incorporating community priorities into the final cleanup plan. The cleanup plan includes 17 acres of new light industrial and commercial business space, as well as about 60 acres of restored wetlands and meadows that will include nature trails available for public use. For more information, see the Pfizer Greener Cleanup Enforcement Success Story.