



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

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OFFICE OF  
ENFORCEMENT AND  
COMPLIANCE ASSURANCE

MEMORANDUM

**SUBJECT:** Model CERCLA Section 107(q)(3) Contiguous Property Owner Assurance Letter

**FROM:** Elliott J. Gilberg, Acting Director  
Office of Site Remediation Enforcement

**TO:** Director, Office of Environmental Stewardship, Region I  
Director, Environmental Accountability Division, Region IV  
Regional Counsel, Regions II, III, V, VI, VII, IX, and X  
Assistant Regional Administrator, Office of Enforcement, Compliance, and  
Environmental Justice, Region VIII

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This memorandum transmits EPA's Model CERCLA Section 107(q)(3) Contiguous Property Owner (CPO) Assurance Letter. Regions should issue CPO assurance letters in accordance with EPA's "Interim Enforcement Discretion Guidance Regarding Contiguous Property Owners," (OECA, Jan. 13, 2004) ("Interim CPO Guidance").<sup>1</sup>

The Small Business Liability Relief and Brownfields Revitalization Act of 2002 ("Brownfields Amendments") amended the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to provide liability protection to CPOs. CPOs are owners of contaminated land who are "victims of pollution incidents caused by their neighbor's actions."<sup>2</sup> Specifically, CERCLA Section 107(q) excludes from the definition of "owner or operator" under CERCLA Sections 107(a)(1) and (2) a person who owns property that is "contiguous to or otherwise similarly situated with respect to, and that is or may be contaminated by a release or threatened release of hazardous substances from" real property owned by someone else. For example, a groundwater plume migrating from its original source may affect a CPO's property. To benefit from the legal protection, a CPO must not have caused, contributed, or consented to the contamination and must meet other criteria set forth in CERCLA Section 107(q).<sup>3</sup>

While CERCLA Section 107(q), like other provisions in the Brownfields Amendments, is designed to grant landowner liability protection without any action from or involvement of EPA, Congress expressly conferred upon EPA the ability to "issue an assurance that no enforcement

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<sup>1</sup> EPA's Interim CPO Guidance is available on EPA's Web site at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/contig-prop.pdf>.

<sup>2</sup> S. Rep. No. 107-2, 107th Cong., 1st Sess. 10-13, at 10 (Mar. 12, 2001) (accompanying S. 350).

<sup>3</sup> CERCLA § 107(q)(1), 42 U.S.C. § 9607(q)(1).

action under [CERCLA] will be initiated against a [CPO].”<sup>4</sup> We believe congressional intent in passing this provision was to provide additional protection to CPOs. It is our view that the assurance can also remove the stigma associated with being neighbors of contaminated properties, as well as facilitate development. An assurance of no enforcement action is just one of the statutory mechanisms under CERCLA Section 107(q)(3) which EPA may use, in its discretion, to give liability comfort to CPOs.<sup>5</sup> Furthermore, EPA may also, in its discretion, provide a comfort/status letter addressing reasonable steps at the property, separately or in conjunction with the CPO assurance letter.<sup>6</sup>

EPA’s Interim CPO Guidance addresses the issuance of CPO assurance letters and recommends “these mechanisms should be used sparingly, because they are not necessary in order to confer liability protection [to qualifying CPOs].”<sup>7</sup> To date, EPA has issued very few CPO assurance letters. EPA expects the issuance of CPO assurance letters will continue to be rare since CERCLA Section 107(q) is self-implementing. However, a Model CPO Assurance Letter will provide national consistency to the application of the Interim CPO Guidance and assist the Regions in drafting such letters.

In its discretion, EPA may issue a CPO assurance letter to a qualifying CPO when:

- 1) the CPO sends a written request demonstrating it meets the eight statutory criteria of a CPO and attesting to the truthfulness of such statements (*e.g.*, through an affidavit),<sup>8</sup> and
- 2) EPA has been involved at the landowner’s property and/or the property where there is a release or threat of release (*i.e.*, EPA is conducting or has conducted a response action).<sup>9</sup>

A CPO assurance letter assures the property owner, based on his claim that he meets the CPO requirements, that EPA will not pursue him for costs or response actions in connection with releases or threatened releases at or from the Site, and provides him with the current status of the Site. The letter should include any relevant facts about the Site and the status of the Site,

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<sup>4</sup> CERCLA § 107(q)(3)(A) , 42 U.S.C. § 9607(q)(3)(A).

<sup>5</sup> This memorandum only discusses the issuance of CPO assurance letters. However, under CERCLA Section 107(q)(3)(B), EPA may also provide protection against a cost recovery or contribution action under CERCLA Section 113(f), by entering into a CPO settlement agreement. As discussed in the Interim CPO Guidance, a settlement is appropriate when the landowner is sued under CERCLA by third parties or demonstrates a real and substantial threat of such litigation.

<sup>6</sup> *See*, “Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for a Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability,” (OECA, March 6, 2003) (“Common Elements”) and model “reasonable steps” letter at Appendix C available on EPA’s Web site at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf>. *See also*, “Policy on the Issuance of Comfort/Status Letters,” (OECA, Nov. 8, 1996), available on EPA’s Web site at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/comfort-let-mem.pdf>. In its discretion, EPA may issue comfort/status letters, upon request, discussing site-specific reasonable steps at sites where EPA has sufficient involvement to have a basis for suggesting such steps.

<sup>7</sup> Interim CPO Guidance, at 10 (OECA, Jan. 13, 2004).

<sup>8</sup> A CPO may attest to the veracity of its statements demonstrating it meets the eight statutory criteria of a CPO by submitting an affidavit or by some other affirmative means deemed appropriate by the Region (*e.g.*, through a declaration).

<sup>9</sup> Interim CPO Guidance, at 10 (OECA, Jan. 13, 2004).

sufficient to justify issuance of the CPO assurance letter and meet the CPO's needs for such a letter.

After receiving a written request for assurance from a landowner, Regions should first analyze whether the landowner meets the eight statutory criteria of a CPO, and then determine if such a letter is necessary and appropriate given the relevant, fact-specific circumstances.<sup>10</sup> Guidance on the application of CERCLA's CPO criteria is discussed in the "Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for a Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability," (OECA, March 6, 2003) ("Common Elements")<sup>11</sup> and the Interim CPO Guidance. Regions are encouraged to coordinate with Headquarters to determine if a CPO assurance letter is necessary and appropriate.

After determining a CPO assurance letter is necessary and appropriate, Regions are required to obtain advance written concurrence from Headquarters prior to the issuance of such a letter.<sup>12</sup> The Director of the Office of Site Remediation Enforcement (OSRE) has been delegated the authority to approve the Regional Administrator's issuance of CPO assurance letters.<sup>13</sup> The concurrence memo, justifying the need for the CPO assurance letter, should include:

- (1) a description of the site background, including the location of the CPO's property in relation to the property which is the subject of the release or threatened release,
- (2) an analysis of the information provided by the CPO, affirmatively demonstrating the CPO meets the eight statutory criteria,
- (3) a discussion of why the assurance letter is necessary and appropriate given the relevant, fact-specific circumstances,
- (4) a discussion of the scope of the CPO assurance (*e.g.*, explain the reason an assurance letter is appropriate even though the CPO requested a settlement agreement),
- (5) whether the letter will deviate significantly from the Model CPO Assurance Letter and, if so, how it will deviate, and
- (6) a discussion of whether Department of Justice consultation is recommended or necessary.<sup>14</sup>

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<sup>10</sup> See, CERCLA § 107(q)(1)(A)(i)-(viii), 42 U.S.C. § 9607(q)(1)(A)(i)-(viii). The CPO bears the burden of establishing by a preponderance of evidence that the CPO has met the eight statutory criteria to be a CPO. CERCLA § 107(q)(1)(B), 42 U.S.C. § 9607(q)(1)(B).

<sup>11</sup> EPA's Common Elements Guidance is available on EPA's Web site at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf>.

<sup>12</sup> See, "OSRE Roles Chart," Category B.4 on "Contiguous Property Owners (CPOs)," available on EPA's internal Web site at <http://intranet.epa.gov/oeca/osre/documents/roles.html>.

<sup>13</sup> The authority to issue CPO assurance letters under CERCLA Section 107(q)(3) has been delegated to the Regional Administrator pursuant to Delegation 14-14-I. Small Business and Brownfields Liability Clarifications. Regional Administrators may redelegate this authority to the Division Director level, or equivalent, and no further. See, Delegation 14-14-I. Small Business and Brownfields Liability Clarifications, available on EPA's internal Web site at <http://intranet.epa.gov/ohr/rmpolicy/ads/dm/14-14-i.htm>.

<sup>14</sup> See, Interim CPO Guidance, at 11 (OECA, Jan. 13, 2004). Consultation with the Department of Justice (DOJ) is discretionary for sites at which the United States is not involved in litigation. For sites where the United States is involved in litigation, EPA will consult with DOJ before issuing section 107(q)(3) assurance letters or settlements.

Upon receiving Headquarters' approval, Regions may use the Model CPO Assurance Letter to draft a letter specific to the property. The Region only needs approval of the final letter if it will deviate significantly from the Model CPO Assurance Letter. A copy of the final letter should be sent to Headquarters. We encourage Regions to send a draft Headquarters' concurrence memo and draft CPO assurance letter to OSRE for review and discussion before finalizing either of these documents.<sup>15</sup>

Questions about the Model CPO Assurance Letter and policy related to CPOs can be directed to Hollis Luzecky (202-564-4217) in OSRE.

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

cc: Helena Healy, OSRE  
Matthew Sander, OSRE  
Hollis Luzecky, OSRE  
David Lloyd, OBLR  
James Woolford, OSRTI  
Jen Lewis, OGC  
John Michaud, OGC

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<sup>15</sup> The draft concurrence memo and CPO assurance letter may be submitted to the OSRE CPO Subject Matter Contact listed on the "OSRE's Subject Matter Contact Roster," available on EPA's internal Web site at <http://cfint.rtpnc.epa.gov/ioic/sme/>.

**MODEL CERCLA SECTION 107(q)(3) CONTIGUOUS PROPERTY OWNER  
ASSURANCE LETTER**

**CERTIFIED MAIL: RETURN RECEIPT REQUESTED**

[Date]

[Name of CPO]

[Address]

[City, State, Zip Code]

Re: CERCLA Section 107(q)(3) Contiguous Property Owner Assurance Letter related to the  
[Site Name] Site

Dear [Name of Requesting Contiguous Property Owner]:

This letter is in response to your request on [Date], seeking an Environmental Protection Agency (EPA) contiguous property owner (CPO) assurance letter under Section 107(q) of the federal Superfund law (the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601, *et seq.*) to address your concerns regarding potential liability for a release or threatened release of [a] hazardous substance[s] at or from the [Site Name] Site (“Site”), which [may/has] contaminate[d] your property. As the owner of the property located at [insert location of property], you have affirmatively attested [insert “through affidavit” or other appropriate, affirmative instrument approved by the Region] to your qualifications as a CPO under CERCLA with respect to the property. Based on this information and pursuant to CERCLA, EPA intends to treat you as a CPO, and as requested, is providing you assurance that no enforcement action under CERCLA will be initiated against you for costs or response actions in connection with releases or threatened releases at or from the Site.

To date, EPA [has conducted/is conducting] [a] response action[s] at the Site [and/or your property] to address contamination [or potential contamination] resulting from a release or threatened release of [a] hazardous substance[s] at the Site. This include[s/ed] [Describe EPA involvement and/or action at the Site and the CPO’s property that warrants issuance of a CPO assurance letter. For example, address EPA testing conducted on the CPO’s property and its relation to contamination at the Site or the contiguous property - Does it show that the contamination is contained to the Site (e.g., Do monitoring wells on the CPO property demonstrate that the groundwater plume is being contained by the remedy and has not migrated to the CPO’s property?), provide information to EPA about the contamination, or demonstrate there are no exposures to human health and the environment at the CPO’s property?].

EPA understands that you purchased the property adjacent to [, or similarly situated to,] the Site [in/on Date]. [Insert relevant, site-specific material providing background and justification for issuing this CPO assurance letter. For example, briefly describe the CPO’s activity on the property and relation to contamination at the Site. If applicable,

**acknowledge the CPO's cooperation with EPA in conducting response actions related to the Site.]**

Based on the information available to EPA as of the date of this letter, and the accuracy of the information you furnished to EPA, including **[the affidavit asserting/the affirmative assertion]** that you meet the criteria set forth in CERCLA Section 107(q)(1)(A)(i)-(viii), EPA intends to treat you as a CPO under Section 107(q) of CERCLA. As a result, EPA does not consider you liable as an owner or operator for the release or threatened release at or from the Site, and does not intend to take either a civil or administrative enforcement action against you as the owner or operator of property contiguous to **[, or similarly situated to,]** the Site to compel the cleanup or payment of the response costs incurred by EPA in connection with the Site.

In addition to EPA's reliance on the information provided in your request, the assurance provided by this letter is also contingent upon your maintaining compliance with CERCLA's CPO criteria. You should be aware that, in order to maintain your status as a CPO, you must meet certain obligations set forth in Section 107(q) of CERCLA. These include: (1) taking reasonable steps with respect to hazardous substances at the Site; (2) providing full cooperation, assistance and access to persons authorized to conduct response actions or natural resource restoration; (3) complying with any land use restrictions established, planned, or relied on in connection with the response action and not impeding the effectiveness or integrity of institutional controls **[(ICs)]**; (4) complying with information requests and subpoenas; and (5) providing legally-required notices with respect to the discovery or release of any hazardous substances. *See* 42 U.S.C. § 9607(q)(1)(A)(i)-(viii). **[If there are specific continuing obligations relating to EPA response actions, insert "Without limitation as to any other such obligations, EPA has identified the following specific obligations that currently relate to your property or are planned: (e.g., ICs, zoning restrictions for groundwater, reasonable steps, fencing, access agreements, orders or consent agreements with others to address offsite responses on the property)."]** **[When appropriate, EPA may also, in its discretion, provide a reasonable steps comfort/status letter, upon request.]**

**[OPTIONAL LANGUAGE: If circumstances change and EPA determines that further response actions are necessary, you face the threat of litigation by third parties alleging you are liable for contamination related to the Site, or you are otherwise significantly affected by the status of the Site, EPA may discuss additional steps necessary to provide you with the appropriate protection under those circumstances.]**

I trust this information has addressed any concerns you may have regarding potential CERCLA liability for response actions or costs, at or in association with a release or threatened release at or from the Site. If you have questions regarding the contamination or response actions, please contact **[Name]**, EPA's **[remedial project manager/on-scene coordinator]** for the Site, at **[phone number]**. For any legal questions, please contact **[EPA attorney name]** of EPA's Office of Regional Counsel, at **[phone number]**.

Sincerely,

**[Name]**  
**[Regional Administrator]**

cc: **[Name]**, Superfund Division  
**[Name]**, Office of Regional Counsel  
**[Name]**, Director Office of Site Remediation Enforcement  
**[Insert others, as applicable]**