



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

DEC 5, 2012

MEMORANDUM

SUBJECT: Transmittal of "Revised Enforcement Guidance Regarding the Treatment of Tenants Under the CERCLA Bona Fide Prospective Purchaser Provision" and Model Comfort/Status Letters for Lessees at Renewable Energy Projects

FROM: Cynthia Giles, Assistant Administrator
Office of Enforcement and Compliance Assurance *Cynthia Giles*

Mathy Stanislaus, Assistant Administrator
Office of Solid Waste and Emergency Response *Mathy Stanislaus*

TO: Regional Administrators, Regions I-X

This memorandum transmits the "Revised Enforcement Guidance Regarding the Treatment of Tenants Under the CERCLA Bona Fide Prospective Purchaser Provision" and three new model comfort/status letters for lessees involved in renewable energy development on contaminated property. These documents may be found on the Agency's website at <http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund/>.

The revised guidance and model letters were developed, in part, in response to issues raised through the EPA's *RE-Powering America's Land Initiative: Siting Renewable Energy on Potentially Contaminated Land and Mine Sites*. The RE-Powering America's Land Initiative is an effort by the EPA to identify the renewable energy potential of contaminated properties and provide resources for communities, developers, industry, state and local governments, and others interested in reusing these properties for renewable energy development. For more information, see the Agency's website at <http://www.epa.gov/renewableenergyland/>.

The revised guidance discusses the potential applicability of the bona fide prospective purchaser (BFPP) provision to tenants who lease contaminated or formerly contaminated properties and how the Agency intends to exercise its enforcement discretion to treat certain tenants as BFPPs under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). The revised guidance addresses lessees who were not previously covered by Agency guidance because the owner of the property was not a BFPP. While the impetus for this effort is linked to renewable energy development, the updated enforcement discretion guidance applies broadly, across all industries.

The following three models may be used by the Regions when drafting site-specific comfort/status letters for lessees involved in renewable energy projects on contaminated property:

- 1) Model Federal Superfund Interest and No Current Federal Superfund Interest Comfort/Status Letter
- 2) Model No Previous Federal Interest Comfort/Status Letter
- 3) Model State Action Comfort/Status Letter

The letters are intended to provide the lessee with information the EPA currently has about the property and applicable Agency policies to help the lessee make informed decisions as they move forward with renewable energy development on their property. They are intended for use in limited circumstances and subject to the availability of regional resources. When drafting any site-specific letter based on these models, regional personnel should ensure the participation of regional counsel and, if any significant deviations are anticipated, should consult with the contacts listed below before the letter is finalized. Copies of all finalized site-specific letters should be provided to the contacts for model comfort/status letters listed below.

For more information about the revised guidance, please contact Susan Boushell at 202-564-2173 (boushell.susan@epa.gov) or James Miles at 202-564-5161 (miles.james@epa.gov) in OECA or Brigid Lowery at 202-566-0198 (lowery.brigid@epa.gov) in OSWER.

For more information about the model comfort/status letters, please contact Hollis Luzecky at 202-564-4217 (luzecky.hollis@epa.gov) or Craig Boehr at 202-564-5162 (boehr.craig@epa.gov) in OECA or Brigid Lowery in OSWER.

Attachments

cc: Regional Counsel, Regions I-X
Superfund National Policy Managers, Regions I-X
Elliott J. Gilberg, Director, Office of Site Remediation Enforcement
Brigid Lowery, Director, Center for Program Analysis
David R. Lloyd, Director, Office of Brownfields and Land Revitalization
James E. Woolford, Director, Office of Site Remediation and Technology Innovation
Reggie Cheatham, Director, Federal Facilities Restoration and Reuse Office
Mary Kay Lynch, Associate General Counsel, Office of General Counsel
Ben Fisherow, Chief, Environmental Enforcement Section, Department of Justice
EPA Renewable Energy Liability Workgroup
EPA RE-Power Team
EPA BART National Workgroup



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MEMORANDUM

SUBJECT: Revised Enforcement Guidance Regarding the Treatment of Tenants
Under the CERCLA Bona Fide Prospective Purchaser Provision

FROM: Cynthia Giles, Assistant Administrator
Office of Enforcement and Compliance Assurance

Mathy Stanislaus, Assistant Administrator
Office of Solid Waste and Emergency Response

TO: Regional Administrators, Regions I-X

I. Introduction

Section 107(r) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, commonly referred to as Superfund), 42 U.S.C. § 9601 *et seq.*, provides an important liability protection for parties who qualify as bona fide prospective purchasers (BFPPs). This guidance discusses the potential applicability of the BFPP provision to tenants who lease contaminated or formerly contaminated properties, and how the Agency intends to exercise its enforcement discretion to treat certain tenants as BFPPs under CERCLA. This guidance supersedes the EPA's January 14, 2009 guidance titled "Enforcement Discretion Guidance Regarding the Applicability of the Bona Fide Prospective Purchaser Definition in CERCLA § 101(40) to Tenants."

Leasehold interests play an important role in facilitating the cleanup and reuse of contaminated properties. It is essential that such reuse is compatible with, and does not undermine the integrity and protectiveness of, cleanups. Under current CERCLA case law, the mere execution of a lease does not necessarily make a tenant liable as an owner or operator under CERCLA § 107(a). The EPA recognizes the uncertainty regarding the potential liability of tenants under CERCLA and the potential applicability of the BFPP provision in light of the explicit reference to tenants in CERCLA § 101(40). A prospective tenant may wish to seek BFPP treatment in the event of a future federal CERCLA action at the leased property and/or to ensure appropriate environmental stewardship of the property.

This guidance is intended to assist EPA personnel in exercising the Agency's enforcement discretion.¹ The EPA intends to apply this guidance on a site-specific basis only to the extent appropriate based on the facts regarding the property. This guidance is not a rule and it does not create new liabilities or limit or expand obligations under any federal, state, tribal, or local law. It is not intended to and does not create any substantive or procedural rights for any person at law or in equity. In addition, this guidance does not alter the EPA's policy of not providing "no action" assurances outside the context of a legal settlement or formal enforcement proceeding.²

II. Discussion

a. CERCLA Liability and the BFPP Exclusion

Section 107(a)(1) of CERCLA provides that "the owner and operator of a vessel or facility . . . from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for . . . (A) all costs of removal or remedial action incurred by the United States Government" Thus, without liability protection, an owner or operator of contaminated property is a potentially liable party under CERCLA. Section 107(r)(1) of CERCLA provides statutory liability protection for certain owners or operators of property, called bona fide prospective purchasers or "BFPPs." CERCLA § 107(r)(1) states:

Notwithstanding subsection (a)(1) of this section, a bona fide prospective purchaser whose potential liability for a release or threatened release is based solely on the purchaser's being considered to be an owner or operator of a facility shall not be liable as long as the bona fide prospective purchaser does not impede the performance of a response action or natural resource restoration.

In general terms, CERCLA § 101(40)(A)-(H)³ defines a BFPP as "a person (or a tenant of a person) that acquires ownership of a facility after [January 11, 2002]" and that establishes that:

- all disposal of hazardous substances at the facility occurred prior to acquisition;
- the person conducted all appropriate inquiry (AAI) into the previous ownership and uses of the facility;⁴
- the person provides legally required notices;

¹ Exercising enforcement discretion involves, among other things, evaluating a number of factors, including the status of a particular matter, allocation of Agency resources, potential litigation risk, potential cost recovery, and equitable considerations. This guidance 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. Please note that although this guidance is being issued jointly by OSWER and OECA, the authority to exercise enforcement discretion is delegated to OECA.

² See "Applicability of Policy against 'No Action' Assurances to CERCLA" (Breen, OSRE 2000); "Processing Requests for Use of Enforcement Discretion" (Herman, OECA 1995); "Policy Against 'No Action' Assurances" (Price, OECA 1984).

³ See 42 U.S.C. §§ 9601(40)(A)-(H) and 9607(r) for a complete description of the BFPP protection criteria.

⁴ For more information about AAI, please see the AAI regulations found at 40 C.F.R. pt. 312 and the EPA's AAI webpage at <http://www.epa.gov/brownfields/aai/index.htm>.

- the person takes reasonable steps with respect to hazardous substance releases;
- the person provides cooperation, assistance, and access;
- the person complies with land use restrictions and institutional controls;
- the person complies with information requests and administrative subpoenas; and
- the person is not potentially liable for response costs at the facility or “affiliated” with any such person.

The EPA previously issued guidance to assist in the Agency’s application of the BFPP provision. *See* “Enforcement Discretion Guidance Regarding the Affiliation Language of CERCLA’s Bona Fide Prospective Purchaser and Contiguous Property Owner Liability Protections” (Gilberg, 9/21/11)(“Affiliation Guidance”); “Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA” (Bromm, 3/6/2003).⁵ These guidance documents address many of the criteria a landowner must meet to qualify under the statute as a BFPP. As discussed below, these guidance documents also provide important information on the EPA policies that may relate to tenants who may fall within the scope of this guidance.

b. Tenants Where the Owner is a BFPP

The BFPP definition in CERCLA § 101(40) applies to a “person (or a tenant of a person),” thereby providing that a tenant may *derive* BFPP status from an owner who satisfies the BFPP criteria. The tenant remains a BFPP and is protected by section 107(r) from CERCLA liability as long as the owner maintains its BFPP status and: (1) all disposal of hazardous substances at the facility occurred prior to acquisition, as provided by section 101(40)(A); and (2) the tenant does not impede the performance of a response action or natural resource restoration, as provided by CERCLA § 107(r)(1). As long as the owner maintains compliance with the BFPP criteria, the tenant who has derived BFPP status does not have any independent duty to carry out those responsibilities (such as conducting AAI). However, if the owner loses its BFPP status whether by its own action or inaction or that of the tenant, in the EPA’s view of CERCLA’s provisions, the tenant generally would no longer be a tenant with derivative BFPP status.⁶

If a tenant has derivative BFPP status through the owner and the owner loses its status through no fault of the tenant, the EPA may exercise its enforcement discretion to treat the tenant as a BFPP under CERCLA § 107(a)(1). In this situation, the EPA intends to exercise its enforcement discretion on a site-specific basis if the tenant itself meets the BFPP provisions in CERCLA §§ 101(40) and 107(r)(1) (identified above in section II(a)), with the exception of the AAI provision.⁷ In general terms, as applied

⁵ These documents are available from the Agency’s website at: <http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund/>.

⁶ Because the BFPP protection is self-implementing – by the owner asserting that status – as a practical matter it may be difficult for a tenant to know with certainty whether the owner has qualified for and continues to maintain BFPP status. Thus, tenants with derivative BFPP status may need to evaluate independently whether the BFPP criteria are being met in order to assess their own status as a BFPP.

⁷ Because AAI already has been conducted by the owner, the EPA does not expect a tenant to conduct AAI under these circumstances. It should be noted, however, that a tenant may still wish to obtain information on the prior uses of the facility

to the tenant, those BFPP provisions are as follows: (1) all disposal of hazardous substances at the facility occurred prior to execution of the lease; (2) the tenant provides legally required notices; (3) the tenant takes reasonable steps with respect to hazardous substance releases; (4) the tenant provides cooperation, assistance, and access; (5) the tenant complies with land use restrictions and institutional controls; (6) the tenant complies with information requests and administrative subpoenas; (7) the tenant is not potentially liable for response costs at the facility or “affiliated” with any such person (other than through the lease with the owner as further discussed below); and (8) the tenant does not impede any response action or natural resource restoration.

With respect to the “no affiliation” provision, CERCLA § 101(40)(H)(i)(II) provides an exception where the affiliation “is created by the instruments by which title to the facility is conveyed or financed or by a contract for the sale of goods or services.”⁸ Thus, a person can acquire title to a property from a liable party and still establish itself as a BFPP. A lease generally does not convey title to the property and thus would not fall within the scope of the exception. For purposes of this guidance, however, the EPA intends to exercise its enforcement discretion on a site-specific basis by not treating the existence of a lease between the tenant and the owner as a prohibited affiliation.

c. Tenants Where the Owner is Not a BFPP⁹

With respect to a tenant who is not addressed under section II(b) of this guidance, the EPA intends to exercise its enforcement discretion on a site-specific basis to treat the tenant as a BFPP when the tenant itself meets all of the BFPP provisions in CERCLA §§ 101(40)(A)–(H) and 107(r)(1) (as identified above in section II(a)). In general terms, as applied to the tenant, those BFPP provisions are as follows: (1) all disposal of hazardous substances at the facility occurred prior to execution of the lease; (2) the tenant conducted AAI prior to execution of the lease; (3) the tenant provides legally required notices; (4) the tenant takes reasonable steps with respect to hazardous substance releases; (5) the tenant provides cooperation, assistance, and access; (6) the tenant complies with land use restrictions and institutional controls; (7) the tenant complies with information requests and administrative subpoenas; (8) the tenant is not potentially liable for response costs at the facility or “affiliated” with any such person (other than through the lease with the owner, as further discussed above in section II(b)); and (9) the tenant does not impede any response action or natural resource restoration.

Section 101(40) of CERCLA provides that a person must have “acquire[d] ownership” of the facility after January 11, 2002 in order to qualify for BFPP liability protection. For purposes of exercising its enforcement discretion on a site-specific basis with respect to this provision under this section, the EPA

to have an informed basis on which to perform these actions (1-8 in the text above) should its owner lose BFPP status and the tenant wants to be treated as a BFPP under this paragraph.

⁸ For more information about this exception, please see the Affiliation Guidance (p. 6-7).

⁹ As stated above, this guidance supersedes the 2009 guidance titled “Enforcement Discretion Guidance Regarding the Applicability of the Bona Fide Prospective Purchaser Definition in CERCLA § 101(40) to Tenants.” One category of the 2009 guidance focused on tenants with sufficient indicia of ownership to be an owner for purposes of liability under CERCLA. In this revised guidance, this category has been expanded to include tenants of parties who are not BFPPs regardless of whether those tenants have sufficient indicia of ownership to be an owner for purposes of liability under CERCLA.

intends to treat tenants as BFPPs if their lease agreement was executed after January 11, 2002 and they meet the other BFPP provisions outlined above.

III. Limitations of this Guidance

The EPA may decline to exercise its enforcement discretion described in this guidance under various circumstances. For example, if the lease is designed to allow the landlord or tenant to avoid its CERCLA liability, or the tenant is potentially liable for reasons other than its status as a tenant (e.g., it arranged for disposal of hazardous substances at the facility), then the EPA would likely decline to exercise its enforcement discretion. The EPA also may decline to exercise its enforcement discretion when the owner is not in compliance with state or federal regulatory requirements or administrative or judicial cleanup orders or decrees relating to the leased property.

IV. Tools to Address Tenant Liability Concerns

The statutory protection found at CERCLA § 107(r)(1) is self-implementing and the EPA generally will not be involved with facility-specific transactions or determinations of BFPP status. Similarly, the EPA generally will not engage in site-specific determinations on the applicability of this enforcement discretion guidance. There may be limited instances, however, where the EPA determines that it would be necessary and appropriate to address a tenant's concerns at a particular property through an existing tool (e.g., a comfort/status letter or a prospective lessee agreement).¹⁰ In addition, the EPA may use such tools on a case-by-case basis where it is appropriate to address the concerns of tenants not covered by this guidance in order to further the public interest.

V. Agency Contacts

For more information or questions about this guidance, please contact Susan Boushell at 202-564-2173 (boushell.susan@epa.gov) or James Miles at 202-564-5161 (miles.james@epa.gov) in the Office of Enforcement and Compliance Assurance, or Brigid Lowery at 202-566-0198 (lowery.brigid@epa.gov) in the Office of Solid Waste and Emergency Response.

cc: Regional Counsel, Regions I-X
Superfund National Policy Managers, Regions I-X
Elliott J. Gilberg, Director, Office of Site Remediation Enforcement
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James E. Woolford, Director, Office of Site Remediation and Technology Innovation
Reggie Cheatham, Director, Federal Facilities Restoration and Reuse Office
Mary Kay Lynch, Associate General Counsel, Office of General Counsel
Ben Fisherow, Chief, Environmental Enforcement Section, Department of Justice
EPA Renewable Energy Liability Workgroup
EPA RE-Power Team
EPA BART National Workgroup

¹⁰ For a listing of the available tools and policies, including the EPA's policy on the issuance of comfort letters, see: <http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund/>.



Model No Previous Federal Interest Comfort/Status Letter RE-Powering America's Land Initiative

LETTER OUTLINE

- (I) Introduction
 - (II) Property Status
 - (III) Reuse of the Property
-

[Insert Addressee]

Re: **[Insert name or description of property]**

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

I am writing in response to your letter dated [“-/-”] to the U.S. Environmental Protection Agency (EPA) concerning the property referenced above (the “Property”). In your letter, you described your intentions to lease the Property for a proposed renewable energy development (the “Development”) and requested a comfort/status letter from the EPA. The purpose of this comfort/status letter is to provide you with information the EPA has about the Property and applicable Agency policies, as of the date of this letter. We hope the information in this letter enables you to make informed decisions as you move forward with the Development on the Property.

Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, commonly referred to as Superfund), the EPA’s mission is to protect human health and the environment from the risks posed by contaminated or potentially contaminated lands. In doing so, it is an Agency priority to return lands to productive reuse. The EPA views environmentally-responsible renewable energy deployment as a particularly productive reuse of such lands. The EPA is issuing this letter consistent with the RE-Powering America’s Land initiative and with the EPA’s current Agency guidance.

Property Status

Information on hazardous waste sites, including site-specific documents and fact sheets, is contained in the Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS), which may be accessed at www.epa.gov/superfund/sites/cursites/index.htm.

The Property is **[insert location, address, or parcel description]**. The EPA did not identify the Property in a search of the active and archived records in CERCLIS. Nor did we locate the Property in the Resource Conservation and Recovery Act (RCRA) database, RCRA Info **[include if Property was not a grant recipient: “; or the Brownfields’ Assessment, Cleanup and Redevelopment Exchange System (ACRES) database”]**.

Please note that its absence from CERCLIS or other databases does not represent a finding that there are no environmental conditions at the Property that require action or that are being

addressed under another federal or state program. The absence of the Property from these databases means that, at this time, the EPA is not aware of any information indicating that there has been a release or threat of release of hazardous substances at or from the facility that needs to be assessed by the federal Superfund program and that no such assessment has been performed by the EPA in the past.

Therefore, based on the information the EPA has to date regarding the Property, the EPA does not currently plan on taking federal response or enforcement action under CERCLA or RCRA at the Property.

[INSERT IF APPLICABLE FOR BROWNFIELDS GRANT RECIPIENTS]

According to the EPA's records, the Property was awarded a grant through the EPA's Brownfields Assessment, Cleanup, and Revolving Loan Fund grant Program. The EPA's award of this type of grant does not mean that the Agency has a federal interest in the property. Further, eligibility determinations for brownfields grants are not legally binding for other purposes.

[OPTIONAL: If the EPA is aware of the state being involved in the cleanup, insert contact information for state RPM and number, or the State's applicable department name and number].

Reuse of the Property

While the EPA has no federal interest in the Property **[if applicable, insert: "other than the Brownfield grant mentioned above"]**, the Agency does have an interest in facilitating the reuse of contaminated sites for renewable energy projects, particularly when the concern or perception of federal liability may be hindering such projects.

Based on the information provided in your letter, the EPA understands that **[insert name of party]** intends to **[insert brief description of the Development]** at the Property. The EPA understands the Development to involve **[insert brief description of proposed on-site activities]**.

The EPA's RE-Powering initiative offers a range of tools and resources, as well as additional technical support, to facilitate renewable energy development on potentially contaminated lands. For additional information on the available tools, resources, and technical support, please visit the Agency's RE-Powering website at www.epa.gov/renewableenergyland/.

The EPA encourages you to consult with legal counsel and the appropriate state, tribal or local environmental protection agency before taking any action to acquire, clean up, or redevelop potentially contaminated property. It is your responsibility to ensure that the proposed use of the Property complies with any federal, state, local, and/or tribal laws or requirements that may apply. The EPA recommends that you consult with your own environmental professional to obtain advice on the compatibility of the proposed reuse.

If you have any additional questions or wish to discuss this information further, please feel free to contact me **[insert phone number/address]** or **[insert the EPA RE-Powering Rapid Response contact and address]**.

Sincerely,

[Insert regional contact name]

[Insert regional contact title]

[Enclosures (#)]

cc: **[Insert state contact(s)]**

[Insert EPA OSWER contact]

[Insert EPA OSRE contact]



**Model Federal Superfund Interest and No Current Federal Superfund Interest
Comfort/Status Letter
RE-Powering America's Land Initiative**

LETTER OUTLINE

- (I) Introduction
- (II) Property Status
- (III) History and Status of the Site
 - a. Applicable to all sites with additional paragraphs specific to Sites with No Current Federal Superfund Interest
 - i. Archived Sites
 - ii. Partial or full deletions from NPL or a site boundary situation
- (IV) Reuse of the Property
- (V) CERCLA's Bona Fide Prospective Purchaser Liability Protection
 - a. [WHEN REQUESTED] Reasonable Steps: Language applicable to situations where the EPA has sufficient or insufficient information to determine site-specific reasonable steps
- (VI) Conclusion

Note: Sites with "no current Federal Superfund interest" means those sites where the EPA was once interested or involved to some extent at the site, but is no longer interested or involved at the site.

[Insert Addressee]

RE: [Insert name or description of property]

Dear [Insert name of party]:

I am writing in response to your letter dated ["-/-"] to the U.S. Environmental Protection Agency (EPA) concerning the property referenced above (the "Property"). In your letter, you described your intentions to lease the Property for a proposed renewable energy development (the "Development") and requested a comfort/status letter from the EPA. The purpose of this comfort/status letter is to provide you with information the EPA has about the Property and applicable Agency policies, as of the date of this letter. We hope the information in this letter enables you to make informed decisions as you move forward with the Development on the Property.

Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, commonly referred to as Superfund), the EPA's mission is to protect human health and the environment from the risks posed by contaminated or potentially contaminated lands. In doing so, it is an Agency priority to return lands to productive reuse. The EPA views environmentally responsible, renewable energy deployment as a particularly productive reuse of

such lands. The EPA is issuing this letter consistent with the RE-Powering America's Land initiative and with the EPA's current Agency guidance.

Property Status

Information on hazardous waste sites is contained in the Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS). Site-specific documents and fact sheets, if available, can be accessed through CERCLIS at www.epa.gov/superfund/sites/cursites/index.htm.

The Property, at **[insert address; parcel description]**, **[insert one of the following:]**

- [a.]** is defined as
- [b.]** is situated within
- [c.]** may be part of
- [d.]** is located near

the **[insert CERCLIS/NPL site name]** ("Site"). This Site **["is" or "was"]** located in CERCLIS, **[insert one of the following:]**

- [a.]** but is not on the National Priorities List (NPL).
- [b.]** and has been proposed to the National Priorities List (NPL).
- [c.]** and is on National Priorities List (NPL).
- [d.]** but has been archived.
- [e.]** but was **["deleted" or "partially deleted"]** from the National Priorities List (NPL).

[FOR SITES OF FEDERAL SUPERFUND INTEREST, insert: "For the reasons stated below, the EPA is [insert action, e.g., investigating, examining, addressing] the Site under its Superfund authority."]

[FOR SITES WITH NO CURRENT FEDERAL SUPERFUND INTEREST, insert: "For the reasons stated below, the EPA does not presently contemplate additional Superfund action at the Site."]

History and Status of the Site

The following is a summary of the information the EPA has currently regarding the Site.

[OPTIONAL: "More information regarding the Site ["is" or "may be"] available through CERCLIS."] **[OPTIONAL IF EPA REMOVAL OR REMEDIAL ACTION HAS BEEN TAKEN: "You may also wish to view a copy of the Site's Administrative Record which is available at [insert location of site local records repository]."]**

[Insert releasable information related to the specific site history and status, providing as much detail as necessary about the site to serve the addressee's needs. For example, address, characteristics (industrial, commercial, rural, etc.), contamination, the EPA's actions, status, former and current land uses, institutional controls, etc. If appropriate, enclose a copy of the fact sheet on the site.]

[For sites where there is NO CURRENT FEDERAL INTEREST, chose from one of the following sections, inserting other site-specific details as necessary. If all response actions are complete, but the site has not yet been archived or deleted, modify the language appropriately.]

[APPLICABLE TO ARCHIVED SITES – May have been a removal at the site or there may still be RCRA, UST, or OPA interest.]

The EPA has archived the Site from the CERCLIS site inventory because **[insert one of the following:]**

- [a.]** following Site evaluation activities, the EPA determined that conditions at the Site did not warrant further federal Superfund involvement.
- [b.]** a federal removal action was completed at the Site and no further Superfund action is planned for this Site.
- [c.]** environmental conditions at the Site are subject to requirements of **[insert appropriate program (e.g., RCRA, UST, OPA)]**, and no further interest under the federal Superfund program is warranted. **[Insert information on the program status from the appropriate RCRA, UST, or OPA point of contact.]** For further information concerning these requirements, please contact **[name and telephone number]**.

[Add after sentence a, b, or c:] At this time, the EPA does not plan to take additional Superfund enforcement, investigatory, cost recovery, or cleanup action at this archived Site, unless new information warranting further Superfund response action or conditions not previously known to the EPA regarding the Site are discovered.

[APPLICABLE TO PARTIAL OR FULL DELETIONS FROM NPL OR FOR A SITE BOUNDARY SITUATION]

[Insert one of the following:]

- [a.] [Applicable if the property was included in a partial deletion from the NPL]**
The Property **["is" or "appears to be"]** situated within the Site, which is listed on the NPL. The EPA, however, has determined that no further investigatory or cleanup action is appropriate at a portion of the Site under the federal Superfund program. With the [insert state agency] concurrence, the EPA has decided to delete a portion of the Site, which contains the Property, in accordance with the Agency's "Procedures for Partial Deletions at NPL Sites" (OERR Directive Number 9320.2-11, August 30, 1996).
- [b.] [Applicable if the property is contained within the NPL site or is defined as the NPL site and the site has been deleted from the NPL]**
The Property **["is" or "appears to be"]** **["situated within the Site" or "defined as the Site"]** which is included on the NPL. The EPA, however, has determined that no further investigatory or cleanup action is appropriate at the Site under the federal Superfund program. In consultation with the [insert state agency], the EPA has decided to delete this Site, including the

Property, from the NPL in accordance with “Deletion from the NPL” 40 CFR 300.425(e).

[c.] [Applicable if the property is not part of the CERCLIS or NPL site, but is nearby.]

[Insert one of the following:]

[1.] The Site has been placed in the CERCLIS site inventory, but studies or investigations have not been completed yet. Accordingly, the EPA has not yet developed sufficient information relating to the nature and extent of contamination to presently determine whether further federal action is appropriate under Superfund. Additionally, the EPA has not yet determined which properties may be considered part of the Site.

[2.] The Property is located [**“near” or “adjacent to”**] the Site. At this time, **[insert statement as to the status of the site at present time: e.g., preliminary assessment, site investigation, removal, remedial investigation, feasibility study, remedial design, or remedial action is underway or is completed]**. Based upon available information, the Property is not presently considered by the EPA to be a part of the Site. The EPA, therefore, anticipates no need to take [**“any” or “additional”**] investigatory or cleanup action at this Property under the federal Superfund program unless new information warranting further Superfund consideration or conditions not previously known to the EPA regarding the Property are discovered.

[OPTIONAL: If the EPA is aware of specific state actions at the Site, insert the following: “The EPA is only providing you with information regarding the EPA’s actions at the Site and the federal law and guidance with respect to BFPP requirements. [Insert basic information on State actions at the site, including a caveat that there may be additional State activities unknown to the EPA at present.]”]

[END OF HISTORY AND SITE STATUS SECTION]

Reuse of the Property

Based on the information provided in your letter, the EPA understands that **[insert name of party]** intends to **[insert brief description of the Development]** at the Property. The EPA understands the Development to involve **[insert brief description of proposed on-site activities]**. **[OPTIONAL: “As these plans develop further, [insert name of party] should continue to discuss the Development with the EPA, as well as consult with your own legal counsel and environmental professional.”]**

The EPA’s RE-Powering initiative offers a range of tools and resources, as well as additional technical support, to facilitate renewable energy development on potentially contaminated lands. For additional information on the available tools, resources, and technical support, please visit the Agency’s RE-Powering website at www.epa.gov/renewableenergyland/.

CERCLA's Bona Fide Prospective Purchaser Liability Protection

CERCLA was amended in 2002 to allow certain parties who purchase contaminated or potentially contaminated properties to buy such properties and to avoid potential CERCLA liability if they qualify as a "bona fide prospective purchaser" (BFPP). The BFPP provision provides that a person establishing the criteria of CERCLA Sections 101(40) and 107(r)(1) and who purchases after January 11, 2002 is protected from CERCLA liability.

The EPA has issued enforcement discretion guidance regarding the potential applicability of the BFPP protection to tenants leasing contaminated or potentially contaminated sites. See "Revised Enforcement Guidance Regarding the Treatment of Tenants Under the CERCLA Bona Fide Prospective Purchaser" (2012) ("Revised Tenants Guidance") (copy attached). In general, the EPA intends to exercise its enforcement discretion to treat a tenant as a BFPP on a site-specific basis when that tenant meets certain BFPP criteria as described in the Revised Tenants Guidance.

[APPLICABLE WHEN REQUESTED: CHOOSE FROM ONE OF THE FOLLOWING SECTIONS DEPENDING ON THE INFORMATION SUFFICIENT TO BE ABLE TO DETERMINE SITE-SPECIFIC REASONABLE STEPS:]

Among other criteria outlined in the Revised Tenants Guidance, a tenant seeking to be treated as a BFPP must take "reasonable steps" related to stopping continuing releases, preventing threatened future releases, and preventing or limiting human, environmental, or natural resources exposure to earlier releases. You have asked what actions would constitute "reasonable steps" by a tenant of the Property.

[If there is sufficient information available to the EPA to determine reasonable steps, insert the following: "As noted above, the EPA has conducted **[insert most recent/relevant action taken by the EPA]** at the Site and has identified a number of environmental concerns. Based on the information the EPA has evaluated to date, the EPA believes that the following would be appropriate reasonable steps related to the hazardous substance contamination found at the Site:

[Insert paragraphs outlining reasonable steps with respect to each environmental concern.]"]

[If the EPA has insufficient information to determine reasonable steps, insert the following. Language may be modified as needed: "As noted above, **[insert explanation as to why the EPA is lacking information (e.g., the remedial investigation has not yet been completed for the site)]**. Although reasonable steps may be appropriate, the EPA does not have sufficient information about the nature and extent of contamination at the Site to provide **[insert name of party]** with appropriate reasonable steps at this time.""]

This letter is based on the nature and extent of contamination known to the EPA at this time and is provided solely for informational purposes. If additional information regarding the nature and extent of hazardous substance contamination at the Site and/or Property becomes available, additional actions may be necessary to satisfy the reasonable steps criterion. You should ensure

that you are aware of the condition of the Property so that you are able to take reasonable steps with respect to any hazardous substance contamination. In particular, if new areas of contamination are identified, you should ensure that reasonable steps are undertaken.

[END OF REASONABLE STEPS SECTION]

Conclusion

EPA generally issues comfort/status letters to facilitate the cleanup and reuse of contaminated or formerly contaminated properties. This comfort/status letter is intended to help you make informed decisions by providing you with the information that the EPA has about the Property and by identifying the statutory protections, enforcement discretion guidance, resources and tools that may be potentially available at the Property.

As discussed more fully in the Revised Tenants Guidance referenced above, the Agency generally intends to exercise its enforcement discretion to treat tenants as BFPPs on a site-specific basis when they meet certain BFPP criteria, including reasonable steps. **[If the EPA identifies reasonable steps, insert the following:** “This letter also outlines site-specific recommended reasonable steps at the Property that may satisfy the reasonable steps criterion discussed in the above-referenced Revised Tenants Guidance.”]

This letter is not otherwise intended to limit or affect the EPA’s authority under CERCLA or any other law or provide a release from CERCLA liability. The EPA encourages you to consult with legal counsel and the appropriate state, tribal or local environmental protection agency before taking any action to acquire, clean up, or redevelop potentially contaminated property. It is your responsibility to ensure that the proposed use of the Property complies with any federal, state, local, and/or tribal laws or requirements that may apply. The EPA recommends that you consult with your own environmental professional to obtain advice on the compatibility of the proposed reuse.

The EPA remains dedicated to supporting the reuse of contaminated properties and hopes the information in this letter is useful to you. **[OPTIONAL:** “In addition, I have included a copy of the EPA’s latest fact sheet for the [insert Site name].”] If you have any additional questions or wish to discuss this information further, please feel free to contact me **[insert the EPA contact(s) and address(es), including the EPA RE-Powering Rapid Response contact and address]**.

Sincerely,

[Insert regional contact name]

[Insert regional contact title]

[Enclosures (#)]

cc: **[Insert state contact(s)]**
[Insert EPA OSWER contact]
[Insert EPA OSRE contact]



Model State Action Comfort/Status Letter RE-Powering America's Land Initiative

LETTER OUTLINE

- (I) Introduction
 - (II) Property Status
 - (III) State Authority: *Choose from one of the following:*
 - a. State-lead site;
 - b. Site deferred to state authorities;
 - c. Site addressed under a state voluntary clean-up program
 - d. RCRA State-lead site;
 - (IV) Reuse of the Property
-

[Insert Addressee]

Re: [Insert name or description of property]

Dear [Insert name of party]:

I am writing in response to your letter dated [“-/-”] to the U.S. Environmental Protection Agency (EPA) concerning the property referenced above (the “Property”). In your letter, you described your intentions to lease the Property for a proposed renewable energy development (the “Development”) and requested a comfort/status letter from the EPA. The purpose of this comfort/status letter is to provide you with information the EPA has about the Property and applicable Agency policies, as of the date of this letter. We hope the information in this letter enables you to make informed decisions as you move forward with the Development on the Property.

Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, commonly referred to as Superfund), the EPA’s mission is to protect human health and the environment from the risks posed by contaminated or potentially contaminated lands. In doing so, it is an Agency priority to return lands to productive reuse. The EPA views environmentally responsible, renewable energy deployment as a particularly productive reuse of such lands. The EPA is issuing this letter consistent with the RE-Powering America’s Land initiative and with the EPA’s current Agency guidance.

Property Status

Information on hazardous waste sites is contained in the Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS). Site-specific documents and fact sheets, if available, can be accessed through CERCLIS at www.epa.gov/superfund/sites/cursites/index.htm.



The Property is **[insert location, address, or parcel description]**. It is located **[insert relation to the contaminated or potentially contaminated site (e.g., near, adjacent to, within, comprises all of)]** **[insert site name]** (the “Site”).

According to EPA records, the Property is currently **[insert one of the following:]**

- [a]** designated State-lead.
- [b]** deferred to State Authorities.
- [c]** being addressed under a State Voluntary Clean-up Program.

[BEGIN STATE AUTHORITY SECTION]

[INSERT THIS SECTION FOR SITES DESIGNATED STATE-LEAD IN CERCLIS] State-Lead Site

The Site would be subject to CERCLA authority, but has been designated a state-lead site. The Site is subject to **[insert name of document]**, which provides **[insert description]**. The State of **[insert name of state]** is responsible for undertaking the necessary Site activities.

A state-lead designation means that investigations, remedy selection, and the day-to-day activities at a site rest with the State. State-lead sites remain in CERCLIS and may be on the EPA’s National Priorities List (NPL). Currently, this Property **[“is” or “is not”]** listed on the NPL.

The State of **[insert state name]** and the EPA work together closely, pursuant to the terms of a Memorandum of Agreement (MOA), to ensure that site responses are conducted in a timely manner and that interested parties are informed and included in site activities.

[If applicable, describe any early EPA involvement (e.g., removal actions, preliminary assessments and site investigations, etc.) and potential for future listing, if not currently listed.]

Given the EPA’s limited involvement at the Site, the EPA is not in a position to give you additional information about the Site and your responsibilities as a **[“lease holder” or “tenant”]** of the Site. **[Insert name of state, name of state’s environmental program, or name of specific state contact]** is in the best position to be able to provide you with detailed information and public documents regarding activity at the Site. The EPA recommends contacting **[Insert contact information for state RPM and number, or the State’s applicable department name and number]** for additional information.

[INSERT THIS SECTION FOR SITES DESIGNATED “DEFERRED TO STATE AUTHORITIES” PURSUANT TO THE EPA’S SUPERFUND DEFERRAL POLICY] Site Deferred to State Authorities

The Site would be subject to CERCLA authority, but the EPA does not have day-to-day responsibility. The Site is subject to **[insert name of document]**, which defers responsibilities to the authorities of the State of **[insert state name]**.

Therefore, the EPA has agreed not to propose or list the Site on the Agency's National Priorities List (NPL) while the State of **[insert state name]** addresses the environmental conditions at the Site under its own state authorities. While the clean-up is being conducted, the EPA intends to act in accordance with the *Guidance on Deferral of NPL Listing Determinations While States Oversee Response Actions* (OSWER Dir. 9375.6-11, May 3, 1995)¹. A copy of this guidance is enclosed for your review and should help you to better understand the EPA's role and intentions at sites for which activities are deferred to state authorities. I encourage you to contact **[insert name of state, name of state's environmental program, or name of specific state contact and contact information]** for additional information on Site activities.

[INSERT THIS SECTION FOR SITES ADDRESSED UNDER A STATE VCP]

Site Addressed Under a State Voluntary Cleanup Program

The Site is tracked in CERCLIS and is being addressed under the authorities of **[insert name of state's Voluntary Cleanup Program]**. Therefore, currently, this Site is not proposed for or listed on the EPA's National Priorities List (NPL). **[FOR SITES WITH AN MOA IN PLACE, insert: "The EPA and the State of [insert name of state agency] have entered into a Memorandum of Agreement (MOA) to clarify roles and responsibilities and to recognize the capabilities of the [insert name of state's Voluntary Cleanup Program] to oversee the cleanups of certain sites not on the NPL."]**

CERCLA generally prohibits federal CERCLA enforcement against parties who are cleaning up certain lower risk contaminated properties called "eligible response sites" in compliance with a state response program that specifically governs cleanups. This is commonly referred to as the "enforcement bar." CERCLA includes exceptions to this enforcement bar under specific circumstances.²

For specific details regarding the activities at the Site **[when applicable, insert: "or the MOA"]**, you should contact the **[insert state name or department responsible for implementing the VCP and/or the MOA]**.

[INSERT THIS SECTION FOR SITES DESIGNATED STATE-LEAD THROUGH RCRA]

RCRA Site under Authorized State Program

The Site would be subject to the federal Resource Conservation and Recovery Act (RCRA), but is being managed under an authorized state program. The Site is subject to **[insert name of document]**, which provides **[insert description]**. The State of **[insert name of state]** is responsible for undertaking the necessary Site activities.

¹ <http://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=2000L26C.txt>

² CERCLA § 128(b). "Eligible response sites" are defined at CERCLA § 101(41), and CERCLA § 128(b)(1)(B)(i)-(iv) describes the four exceptions to this enforcement bar. For more information regarding "eligible response sites," see EPA's guidance at <http://www.epa.gov/enforcement/cleanup/documents/policies/superfund/reg-determ-small-bus-mem.pdf>.

A state-lead designation generally means that investigations, remedy selection, and the day-to-day activities at a site rest with the State under a hazardous waste program that has been authorized by the EPA. Based on the information in your letter and the letter from **[insert State agency]**, and on the information currently in our possession, the EPA does not currently have plans to pursue any further action at the Site. In addition, the EPA intends to rely on **[insert State agency]** to resolve any current or future issues associated with this facility. Please note, however, that this does not preclude the EPA from undertaking action under RCRA or other statutes administered by the EPA at the Site at a later date in appropriate circumstances.

[END OF STATE AUTHORITY SECTION]

Reuse of the Property

While environmental conditions at this Site are managed through the State of **[insert name of state]**, the EPA does have an interest in facilitating the reuse of contaminated sites for renewable energy projects, particularly when the concern or perception of federal liability may be hindering such projects.

Based on the information provided in your letter, the EPA understands that **[insert name of party]** intends to **[insert brief description of the Development]** at the Property. The EPA understands the Development to involve **[insert brief description of proposed on-site activities]**. **[OPTIONAL: “As these plans develop further, [insert name of party] should continue to discuss the Development with the [insert State agency], as well as consult with your own legal counsel and environmental professional.”]**

The EPA’s RE-Powering initiative offers a range of tools and resources, as well as additional technical support, to facilitate renewable energy development on potentially contaminated lands. For additional information on the available tools, resources, and technical support, please visit the Agency’s RE-Powering website at www.epa.gov/renewableenergyland/.

The EPA encourages you to consult with legal counsel and the appropriate state, tribal or local environmental protection agency before taking any action to acquire, clean-up, or redevelop potentially contaminated property. This letter is not intended to limit or affect the EPA’s authority under CERCLA or any other law or provide a release from CERCLA liability. It is your responsibility to ensure that the proposed use of the Property complies with any federal, state, local, and/or tribal laws or requirements that may apply. The EPA recommends that you consult with your own environmental professional to obtain advice on the compatibility of the proposed reuse.

The EPA remains dedicated to supporting the reuse of contaminated properties and hopes the information in this letter is useful to you. If you have any additional questions or wish to discuss this information further, please feel free to contact me **[insert phone number/address]** or **[insert the EPA RE-Powering Rapid Response contact and address]**.



Sincerely,

[Insert regional contact name]
[Insert regional contact title]

[Enclosures (#)]

cc: **[Insert state contact(s)]**
[Insert EPA OSWER contact]
[Insert EPA OSRE contact]