607:It's Not Easy Being Green, If You Were Once Brown(fields)

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Vincent M. Gonzales is an attorney for Sempra Energy, working in both Los Angeles and San Diego. His provides environmental legal counsel to Sempra Energy's regulated entities (Southern California Gas Company and San Diego Gas & Electric Company) and its unregulated entities. Prior to Sempra Energy, Mr. Gonzales was in-house counsel for Atlantic Richfield Company (ARCO) in Los Angeles. In addition to environmental law, Mr. Gonzales provided counsel in the area of commercial and real estate law for the various ARCO companies. Before ARCO, he was an associate in the corporation department of O'Melveny & Myers.

Mr. Gonzales is on the Board of Directors of the Asian Pacific American Legal Center of Southern California. He is also a member, and former president, of the Philippine American Bar Association of Los Angeles. He is currently serving as vice president of the board of directors of ACCA's Southern California Chapter. He is also a member of the executive committee of ACCA's Environmental Law Committee. Mr. Gonzales has published a number of articles in the areas of environmental law and commercial law, the most recent being "Responding to an Environmental Disaster: The First 48 Hours," which is in the July/August 2003 issue of the *ACCA Docket.* He is also a frequent speaker on environmental subjects, addressing groups such as the ABA's Section of Environment, Energy and Resources, as well as ACCA.

Mr. Gonzales received a BA from Haverford College and an MA in Philosophy from the University of California, San Diego. He is a graduate of the University of Southern California Law School where he served as a staff member and publication editor of the *Southern California Law Review.*

Richard Tom

Richard Tom is the managing attorney for the environmental, property, and local governance section of the Southern California Edison Company law department. His responsibilities include providing legal counsel and managing five attorneys who practice in these areas.

Prior to joining SCE, Mr. Tom served for five years as a deputy attorney general in the environment section, public rights division, of the California Department of Justice. He also served as a law clerk for the Honorable A. Wallace Tashima, in the U.S. District Court for the Central District of California.

Mr. Tom currently serves on the Cultural Heritage Commission for the City of South Pasadena and on the Foothill Workforce Investment Board. He is also a past chair of the environmental law section of the State Bar of California and of the council of state bar sections for the State Bar of California.

Mr. Tom received his BS from Stanford University and is a graduate of the University of Michigan Law School.

Stephanie M. Walter

Stephanie M. Walter is assistant general counsel for ARAMARK Uniform & Career Apparel, Inc., a division of ARAMARK Corporation, which is a worldwide provider of managed services, including uniform and food support services. As assistant general counsel, she advises the company on environmental, real estate, and construction related matters and transactions.

Ms. Walter has specialized in environmental law, beginning with the defense of clients involved in Superfund site litigation. Prior to her current position, she joined O'Melveny & Myers LLP and broadened her experience to include counseling of institutional investors, landowners, lenders, and public utilities with regard to the acquisition and sale of contaminated properties, methods to enhance the marketability of contaminated properties, and compliance with environmental requirements.

The Women Lawyer's Association of Los Angeles recently named her one of the Top Women Lawyers in Business in 2003. Ms. Walter's publications include "Tools to Enhance Marketability of Contaminated Properties" in *Environmental Compliance and Litigation Strategy* and "Talk Policy" in *California Law Business.* Ms. Walter serves on the executive committee of the environmental section of the Los Angeles County Bar Association.

She received a BA from Idaho State University and is a graduate of Georgetown University Law Center.

California Environmental Protection Agency
Department of Toxic Substances Control

The Voluntary Cleanup Program

The California Environmental Protection Agency's Department of Toxic Substances Control (DTSC) has introduced a streamlined program to protect human health, cleanup the environment and get property back to productive use. Corporations, real estate developers, local and state agencies entering into Voluntary Cleanup Program agreements will be able to restore properties quickly and efficiently, rather than having their projects compete for DTSC's limited resources with other low-priority hazardous waste sites. This fact sheet describes how the Voluntary Cleanup Program works.

Prior to initiation of the Voluntary Cleanup Program, project proponents had few options for DTSC involvement in cleaning up low-risk sites. DTSC's statutory mandate is to identify, prioritize, manage and cleanup sites where a release of hazardous substances has occurred. For years, the mandate meant that, if the site presented grave threat to public health or the environment, then it was listed on the State Superfund list and the parties responsible conducted the cleanup under an enforcement order, or DTSC used state funds to do so. Because of staff resource limitations, DTSC was unable to provide oversight at sites which posed lesser risk or had lower priority.

DTSC long ago recognized that no one's interests are served by leaving sites contaminated and unusable. The Voluntary Cleanup Program allows motivated parties who are able to fund the cleanup -- and DTSC's oversight -- to move ahead at their own speed to investigate and remediate their sites. DTSC has found that working cooperatively with willing and able project proponents is a more efficient and cost-effective approach to site investigation and cleanup. There are four steps to this process:

/ Eligibility and Application
/ Negotiating the Agreement
/ Site Activities
/ Certification and Property Restoration

The rest of this fact sheet describes those steps and gives DTSC contacts.

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The Voluntary Cleanup Program

Step 1: Eligibility and Application

Most sites are eligible. The main exclusions are if the site is listed as a Federal or State Superfund site, is a military facility, or if it falls outside of DTSC's jurisdiction, as in the case where a site contains only leaking underground fuel tanks. Another possible limitation is if another agency currently has oversight, e.g., a county (for underground storage tanks). The current oversight agency must consent to transfer the cleanup responsibilities to DTSC before the proponent can enter into a Voluntary Cleanup Program agreement. Additionally, DTSC can enter into an agreement to work on a specified element of a cleanup (risk assessment or public participation, for example), if the primary oversight agency gives its consent. The standard application is attached to this fact sheet.

If neither of these exclusions apply, the proponent submits an application to DTSC, providing details about site conditions, proposed land use and potential community concerns. No fee is required to apply for the Voluntary Cleanup Program.

Step 2: Negotiating the Agreement

Once DTSC accepts the application, the proponent meets with experienced DTSC professionals to negotiate the agreement. The agreement can range from services for an initial site assessment, to oversight and certification of a full site cleanup, based on the proponent's financial and scheduling objectives.

The Voluntary Cleanup Program agreement specifies the estimated DTSC costs, scheduling for the project, and DTSC services to be provided. Because every project must meet the same legal and technical cleanup requirements as do State Superfund sites, and because DTSC staff provide oversight, the proponent is assured that the project will be completed in an environmentally sound manner.

In the agreement, DTSC retains its authority to take enforcement action if, during the investigation or cleanup, it determines that the site presents a serious health threat, and proper and timely action is not otherwise being taken. The agreement also allows the project proponent to terminate the Voluntary Cleanup Program agreement with 30 days written notice if they are not satisfied that it is meeting their needs.

Step 3: Site Activities

Prior to beginning any work, the proponent must have: signed the Voluntary Cleanup Program agreement; made the advance payment; and committed to paying all project costs, including those associated with DTSC's oversight. The project manager will track the project to make sure that DTSC is on schedule and within budget. DTSC will bill its costs quarterly so that large, unexpected balances will not occur.

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Once the proponent and DTSC have entered into a Voluntary Cleanup Program agreement, initial site assessment, site investigation or cleanup activities may begin. The proponent will find that DTSC's staff includes experts in every vital area. The assigned project manager is either a highly-qualified Hazardous Substances Scientist or Hazardous Substances Engineer. That project manager has the support of well-trained DTSC toxicologists, geologists, industrial hygienists and specialists in public involvement.

The project manager may call on any of these specialists to join the team, providing guidance, review, comment and, as necessary, approval of individual documents and other work products. That team will also coordinate with other agencies, as appropriate, and will offer assistance in complying with other laws, such as the Resource Conservation and Recovery Act.

Step 4: Certification and Property Restoration

When remediation is complete, DTSC will issue either a site certification of completion or a "No Further Action" letter, depending on the project circumstances. This means "The Site" is now property that is ready for productive economic use.

To learn more about the Voluntary Cleanup Program, contact the DTSC representative in the Regional office nearest you:

Southern California
Tina P. Diaz
1011 North Grandview Avenue
Glendale, California 91201
(818) 551-2862

Central California
Tim Miles
8800 Cal Center Drive
Sacramento, CA 95826-3200
(916) 255-3710

North Coast California
Lynn Nakashima Janet Naito
700 Heinz Avenue, Suite 200
Berkeley, California 94710-2737
(510) 540-3839 (510) 540-3833

Central California - Fresno Satellite
Tom Kovac
1515 Tollhouse Road
Clovis, California 93612
(209) 297-3939

(Revised 10/18/02)

October 2002

FACT SHEET

California Environmental Protection Agency
DEPARTMENT OF TOXIC SUBSTANCES CONTROL

BROWNFIELDS INITIATIVES

March 1998
(Revised 5/2001)

SUMMARY

- The Department of Toxic Substances Control (DTSC) has created a Brownfields Program using a variety of administrative and legislative tools.
- Key drivers are the Voluntary Cleanup and Senate Bill (SB) 923 Expedited Remedial Action programs.
- Brownfields Initiatives are integrated within DTSC's Site Mitigation Program to ensure statewide consistency, flexibility and streamlining.

BACKGROUND

Brownfields are properties that are contaminated or thought to be contaminated which are underutilized due to perceived remediation costs and liability concerns. When industrial and commercial facilities are built on "Greenfields" (land with no previous commercial or industrial use) roads, sewers, schools, residences and other infrastructure must be developed, and new units of government created to levy the taxes to pay for them. Redundant infrastructure not only wastes scarce tax dollars, it adds to the burden on the environment. Redevelopment of Brownfields properties represents an optimal alternative and is a critical factor in ensuring renewed prosperity in California. To help address Brownfields, DTSC has developed a number of tools and integrated existing tools within the Program.

- **Voluntary Cleanup Program:** Established in 1993, it allows DTSC to provide oversight to motivated parties to assess and/or cleanup lower priority sites. Teamwork is a key component of this streamlined program.*
- **Expedited Remedial Action Program (SB 923):** A pilot voluntary cleanup program which provides numerous incentives to responsible parties to accelerate environmental cleanup work. Program is limited to 30 sites which meet specified criteria.*
- **Prospective Purchaser Policy:** Policy on Prospective Purchaser Agreements (PPAs); includes a model PPA (with covenant not to sue), application form and eligibility criteria.*
- **CalSites Validation Program:** Reevaluation and update of DTSC's automated database which is used to track properties which may be affected by hazardous substances. Reevaluation of the database was conducted in three years (completed in 1996). Over 22,500 erroneous entries were deleted which removed the Brownfields "stigma."*
- **Private Site Management Program (AB 1876):** Will allow qualified individuals to oversee site assessments and cleanups at less complex hazardous substances sites; implementation scheduled 1998.*
- **Local Cleanup Agreements (SB 1248):** Formally recognizes local agency cleanup programs allowing local health agencies to enter into written agreements to supervise cleanups, set cleanup goals and provide certification of cleanup completion.*
- **Management Memo #90-11, Responsible Party - Ownership of Property Over Contaminated Ground Water (December 1990):** Ensures owners of property onto which a plume of contaminated groundwater has migrated that they will not become a target of enforcement or cost recovery action solely on basis of land ownership provided they do not cause or contribute to contamination.
- **Management Memo #92-4, Approval of a Partial Site Cleanup (April 1992):** Allows issuance of "clean parcel letter" for sites where a designated portion of the property has been cleaned up.

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Brownfields Intiatives
California Environmental Protection Agency,
DEPARTMENT OF TOXIC SUBSTANCES CONTROL

- **Unified Agency Review of Hazardous Materials Release Sites (AB 2061):** Established Site Designation Committee for designating a single "administering agency" to oversee response actions for a site if petitioned by responsible party; requires coordination of all State and local agencies with jurisdiction and issuance of certificate of completion.*

- **Hazardous Material Liability of Lenders and Fiduciaries (SB 1285):** Provides limited liability exemption for lenders and fiduciaries for releases of hazardous materials on property in which they have a legal interest, but did not "directly" cause or contribute to release or potential release of hazardous substance.

- **Polanco Legislation for Redevelopment Agencies (AB 3193 & SB 1425):** Grants local redevelopment agencies qualified immunity from state or local laws if cleanup is conducted in accordance with a remedial action plan approved by DTSC, Regional Water Quality Control Board or local agency; liability immunity extends to property successors and lenders.

- **Mello-Roos Community Facilities Act Amendments (AB 2610):** Created first long-term financing options for hazardous substances cleanup by empowering Community Facilities Districts to levy special taxes and issue bonds to provide funds for site cleanups.

* *Cal/EPA - DTSC Fact Sheet available.*

To find out more about the California Environmental Protection Agency, Department of Toxic Substances Control's Brownfields Initiatives, contact:

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Special Assistant for Brownfields
Department of Toxic Substances Control
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Lynn Nakashima OR Janet Naito
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Tina Diaz
Southern California Cleanup
Operations Branch
Department of Toxic Substances Control
1011 North Grandview Avenue
Glendale, California 91201
(818) 551-2862

Additional information is available on Cal/EPA's Internet address:

http://www.calepa.ca.gov

or on DTSC's Internet address:

http://www.dtsc.ca.gov

FACT SHEET

California Environmental Protection Agency
DEPARTMENT OF TOXIC SUBSTANCES CONTROL

PROSPECTIVE PURCHASER POLICY

April 1998
(Revised 5/01)

Many communities contain abandoned or underutilized properties that are contaminated or thought to be contaminated, which have not been redeveloped due to concerns about the perceived cost of remediation and liability. These properties are commonly known as "Brownfields." When industrial and commercial facilities are built on "Greenfields" (land with no previous commercial or industrial use), roads, sewers, schools, residences and other infrastructure must be developed, and new units of government created to levy the taxes to pay for them. Redundant infrastructure not only wastes scarce tax dollars, it adds to the burden on the environment. Redevelopment of Brownfields properties represents an optimal alternative and is a critical factor in ensuring renewed prosperity in California.

The Department of Toxic Substances Control (DTSC) has developed a number of tools for addressing Brownfields. More specific information on this subject can be obtained by reading "Redevelopment and Revitalization of Brownfields, Department of Toxic Substances Control Initiatives," an article authored by Barbara Coler and Steve Koyasako, dated October 1995, and "August 1996 Update" by Barbara Coler. Both articles are available from DTSC.

To address some of the major Brownfields issues and remove or lessen the liability that prospective purchasers face, DTSC has developed a Prospective Purchaser Policy. This policy and procedure discusses how to enter into a Prospective Purchaser Agreement (PPA), includes a model Prospective Purchaser Agreement (which includes a covenant not to sue) and an application form, and outlines eligibility criteria. The process has been streamlined to reduce negotiation and DTSC review time, lower transaction costs, ensure statewide consistency, and promote compliance with current settlement practices and procedures.

As a matter of general policy, DTSC will not pursue site mitigation enforcement against prospective purchasers/ tenants/lessors who become site owners or operators if all of the following conditions are met:

- they do not exacerbate or contribute to the existing contamination;
- their operation will not result in health risks to persons on the site;
- they are not a responsible party (or affiliate of a responsible party) with respect to the existing contamination;
- they allow access for, and do not interfere with, remediation activities;
- unauthorized disposal is not occurring on the site; and
- there are other viable responsible parties who are willing to conduct any necessary remediation.

DTSC also recommends that prospective purchasers do not engage in activities which require use of substances of concern at the site to ensure that no question would arise regarding any contribution to, or exacerbation of, the existing contamination. Generally, DTSC does not participate in private real estate transactions. However, DTSC will consider entering into an agreement with a bona fide prospective purchaser if it will result in substantial benefits for the State, if remediation would not otherwise be conducted without agency action, and if the prospective purchaser satisfies the eligibility criteria stated below.

DTSC acknowledges that a PPA with prospective purchaser of contaminated property, given appropriate safeguards, may result in an environmental benefit through a commitment to perform response actions. Additionally, PPAs can benefit the affected community, or the State as a whole, by encouraging the reuse of properties where the perceived liability may pose a barrier. A critical factor for determining eligibility for a PPA is that the prospective purchaser must establish with DTSC the project benefits to the public in terms of job creation, an increased tax base, and/or opportunities for disadvantaged groups.

All the following criteria will be considered before DTSC contemplates entering into a PPA. These criteria are intended to reflect DTSC's commitment to removing the barriers to proposed redevelopment of property imposed by potential liability, while ensuring the protection of public health and the environment.

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Prospective Purchaser Policy
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1. The site falls under the jurisdiction of DTSC because of an actual hazardous substance release.
2. The prospective purchaser is willing to enter into an agreement with DTSC. The agreement provides that: a) the prospective purchaser is willing to pay DTSC oversight costs and b) the response action will completely remediate the site or will make significant progress toward a complete remedy.
3. Unauthorized disposal of hazardous waste is not currently occurring at the site.
4. The prospective purchaser is not a responsible party or affiliate of a responsible party with respect to the hazardous substance release(s) existing at the time the prospective purchaser agreement is executed.
5. A Preliminary Endangerment Assessment (PEA) or equivalent has been performed and provided to DTSC identifying the hazardous substance releases at the site.
6. The hazardous substance release site is not the subject of an active enforcement action or agreement with another agency with jurisdiction to address the remediation at the site unless that agency transfers oversight to DTSC.
7. A substantial benefit will be received by the public as a result of the prospective purchaser agreement, which would not otherwise be available (e.g., potential environmental benefits, significant progress towards site remediation, value to the community in terms of additional jobs, an increased tax base or opportunities for disadvantaged groups).
8. The continued operation at the site or new site development, with the exercise of due care, will not exacerbate or contribute to the existing contamination or interfere with the investigation of the extent, source and nature of the hazardous substance release(s), and/or the implementation of remedial or removal actions.
9. The effect of continued operation or new development on the site will not result in health risks to those persons likely to be present at the site.
10. The prospective purchaser is financially viable and willing to provide instruments of financial assurance. Financial assurance is needed to ensure that: a) the PP has sufficient funds to complete the agreed upon investigation and remedial action; b) any existing site condition is not exacerbated due to lack of action; and c) DTSC is reimbursed for its oversight.
11. The prospective purchaser is a "bona fide prospective purchaser" (i.e., a person or entity that is purchasing all or part interest in real property, but is not affiliated with any person potentially liable for response actions at a site). The bona fide prospective purchaser must provide evidence of these conditions to DTSC.

Since not all Brownfields properties are eligible for a PPA, the policy also outlines several other options that prospective purchasers may pursue to limit their potential liability. DTSC's objective is to strike a balance between providing sufficient assurance to PPs to foster redevelopment and treating Responsible Parties (RPs) in a reasonable manner. This serves to ensure that RPs will not "warehouse" (keep properties off the real estate market) Brownfields properties. Such "warehousing" would clearly inhibit redevelopment and reuse.

DTSC only has authority to negotiate a PPA on behalf of DTSC and no other State agency. The State Water Resources Control Board has recently issued a similar guidance memo on Prospective Purchaser Agreements.

The Prospective Purchaser Policy is available for review on DTSC's internet address [http://www.dtsc.ca.gov]; additional information may be available at the State Water Board's internet address [http://www.swrcb.ca.gov].

Copies of the policy are also available at a cost of $9.75 from the individuals listed below.

FOR MORE INFORMATION .....

To find out more about the California Environmental Protection Agency, Department of Toxic Substances Control's Prospective Purchaser Policy, obtain a PPA application, or inquire about other Brownfields Initiatives, contact:

Sandy Karinen
Statewide Cleanup Operation Division
Department of Toxic Substances Control
8800 Cal Center Drive, Suite 350
Sacramento, California 95826
(916) 255-3733

Fran Anderson
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Department of Toxic Substances Control
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Berkeley, California 94710
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Tina Diaz
Southern California Cleanup Operations Branch
Department of Toxic Substances Control
1011 N. Grandview Avenue
Glendale, California 91201
(818) 551-2862

For more information, or to apply for enrollment in the study, contact:

Department of Toxic Substances Control

Tina Diaz
(818) 551-2862

Sue Sims
(916) 445-3601

State Water Resources Control Board

Linda Dorn - Sacramento
(916) 341-5780

Regional Water Quality Control Boards

Rebecca Chou - Region 4
(213) 576-6733

Ann Sturdivant - Region 8
(909) 782-4904

John Anderson - Region 9
(858) 467-2975

Additional information available at:
www.calepa.ca.gov
www.dtsc.ca.gov
www.swrcb.ca.gov

California Environmental Protection Agency
1001 I Street
Sacramento, California 95814

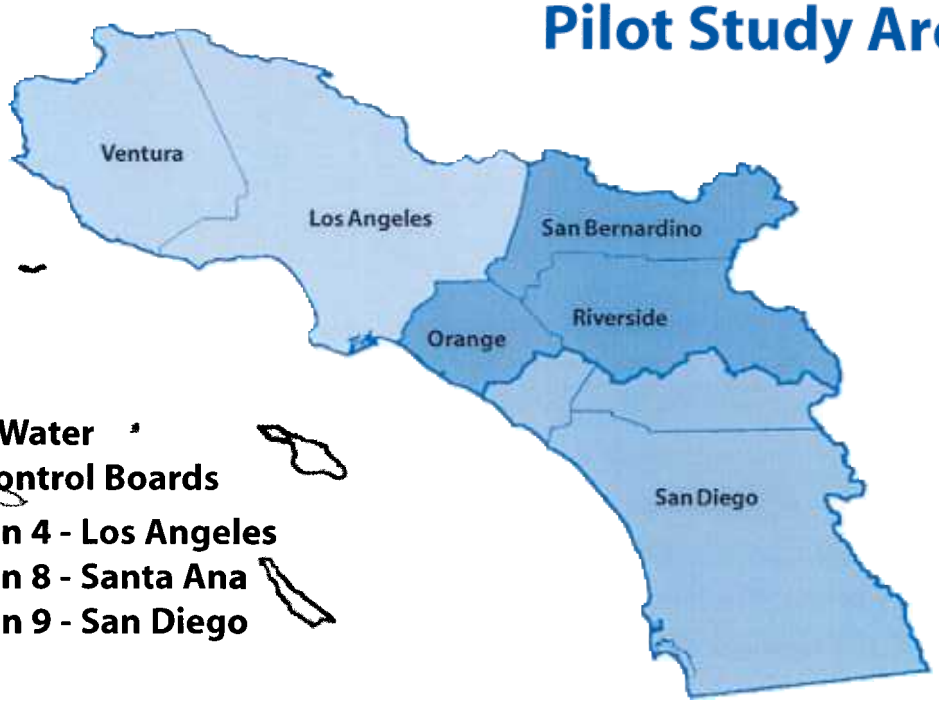
Senate Bill 32 (Escutia)
Chapter 764, Statutes of 2001

California Environmental Protection Agency
Winston H. Hickox, Secretary

State Water Resources Control Board
Celeste Cantú, Executive Director

Department of Toxic Substances Control
Edwin F. Lowry, Director

Pilot Study Area



Regional Water Quality Control Boards

- Region 4 - Los Angeles
- Region 8 - Santa Ana
- Region 9 - San Diego

What is the study?

The California Environmental Protection Agency (Cal/EPA) is conducting a pilot study to evaluate the usefulness of screening numbers in encouraging remediation at contaminated properties in the study area. The study will consist of 25 sites and will examine whether the screening numbers are an adequate basis for determining the effort necessary to remediate contaminated properties, whether the numbers assist with securing funding for site remediation, at what stages in the cleanup process screening numbers are most useful, and other related issues.

What is the study area?

The study area includes the geographic regions covered by the Los Angeles, Santa Ana, and San Diego Regional Water Quality Control Boards.

What sites are eligible?

Properties that are, or may be, eligible for cleanup under the California Land Environmental Restoration & Reuse Act (SB 32) can apply to participate in the study. The text of SB 32, which includes complete property eligibility information, is available at calepa.ca.gov.

What are screening numbers?

Screening numbers are concentrations of chemicals of concern in soil and groundwater that approximate cleanup levels. They are advisory numbers, with no regulatory effect, that can be used as a reference value by citizen groups, community organizations, property owners, developers, and local government officials to estimate the degree of effort that may be necessary to remediate a contaminated property. Screening numbers cannot be used as cleanup levels or 'no further action' levels for contaminated sites.

What screening numbers will be used in the pilot study?

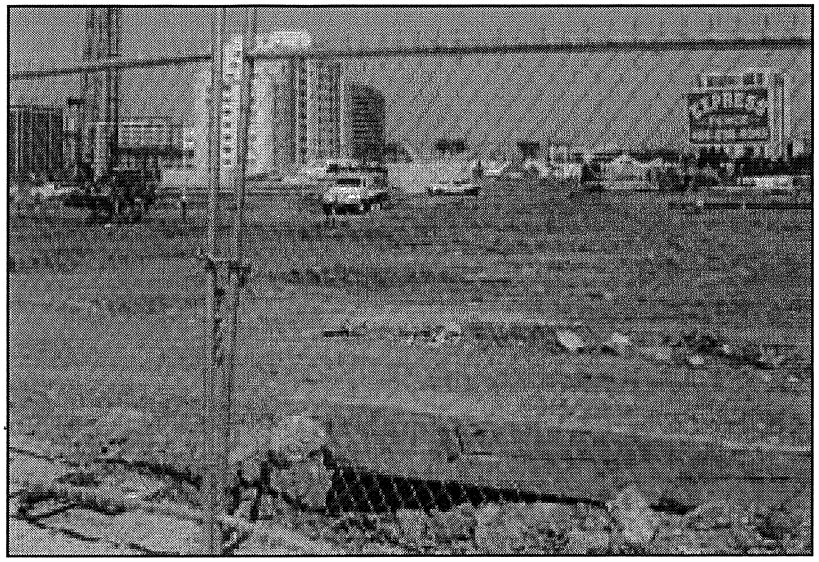
The Risk Based Screening Levels for soil and groundwater sites published by the San Francisco Regional Water Quality Control Board will be used to study the usefulness of screening numbers in promoting site cleanup. Information on these screening numbers is available at www.calepa.ca.gov.

How long is the study period?

The study is being conducted from March 2002 to March 2004. Information and results from 25 sites remediated during this period will be included in the study and published by June 30, 2004.

How do I participate in the study?

For more information, contact the State Water Resources Control Board, the Regional Water Quality Control Board, or the Department of Toxic Substances Control. If your site is selected for the study, staff will be available to assist you and answer your questions throughout the study period.



DEPARTMENT OF TOXIC SUBSTANCES CONTROL

BROWNFIELDS REMEDIATION

Land Recycling

State of California

California Environmental Protection Agency

Department of Toxic Substances Control

DEPARTMENT OF TOXIC SUBSTANCES CONTROL

BROWNFIELDS REMEDIATION PROGRAM

DTSC Brownfields Vision
Brownfields Initiatives
Brownfields Projects

Gray Davis
Governor,
State of California

Winston Hickox
Secretary, California
Environmental Protection Agency

Edwin F. Lowry,
Director, Department of
Toxic Substances Control

The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption. For a list of simple ways you can reduce demand and cut your energy costs, see our Web-site at www.dtsc.ca.gov.

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To find out more about the California Environmental Protection Agency, Department of Toxic Substances Control's Brownfields Initiatives:

www.dtsc.ca.gov
www.calepa.ca.gov

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Sacramento
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California State Water Resources Control Board
(916) 341-5254

Nat'l Brownfields Association
(773) 714-0407

or your local community redevelopment agency

DTSC BROWNFIELDS PROGRAMS

- **The Cleanup Loans and Environmental Assistance to Neighborhoods (CLEAN) Program** was enacted in 2000. Implemented by DTSC, the program provides low interest loans to help owners, developers, schools, local governments and others accelerate the pace of cleanup and redevelopment of abandoned and underused urban properties. The first component of the CLEAN Program offers loans of up to $100,000 to conduct investigations of qualified urban brownfields. If a site is found to be so contaminated that redevelopment doesn't make economic sense, up to 75 percent of the loan amount can be forgiven. The second component of the CLEAN Program offers low interest loans of up to $2.5 million for cleanup and removal of hazardous materials at qualified urban properties where redevelopment is likely to boost property values, economic viability and quality of life of a community.

- **The Voluntary Cleanup Program (VCP)** has been DTSC's primary brownfields vehicle since its inception in 1993. It was designed to restore low-risk properties quickly and efficiently when the responsible party has agreed to pay all costs. Site developers with the resources to fund their own site cleanup are able to proceed at their own pace, with DTSC's oversight and in keeping with DTSC processes and standards. VCP allows property owners more flexibility and control over their projects.

- **The Expedited Remedial Action Program (ERAP)** was developed in 1994 to encourage responsible parties to clean up contaminated properties by offering economic and liability incentives. A pilot program limited to 30 sites, ERAP was designed to resolve issues of contention regarding the Comprehensive Environmental Response, Compensation and Liability Act of 1980. ERAP allows the responsible party to clean up the site to its intended land use and incorporates a covenant not to sue, apportionment of liability based on fair and equitable principles and potential state funding for "orphan shares."

- **Prospective Purchaser Agreements (PPAs)** provide legal protection to purchasers or developers who are willing to clean up contaminated sites at their own expense, but are apprehensive about liability for existing contamination. Under a PPA, DTSC provides a covenant not to sue for existing contamination and provides for contribution protection. In exchange, the prospective purchaser agrees to a cleanup plan for the site, access for oversight, a commitment for future land use, and provision of significant public benefits. Public benefits include a significant increase in tax base, creating new jobs, or reuse improved quality of life in the area.

- The **"Unified Agency Review Process"** was enacted in 1994 to limit inconsistency, redundancy and confusion that can result when a variety of federal, state and local agencies have regulatory jurisdiction over cleanups. The statute established a Site Designation Committee at Cal/EPA to designate a single administering agency to oversee response actions for a site, and provides for a "certificate of completion" to be issued at the end of the cleanup process, a means for legal recognition that a cleanup is complete and that liability to all government entities has been satisfied.

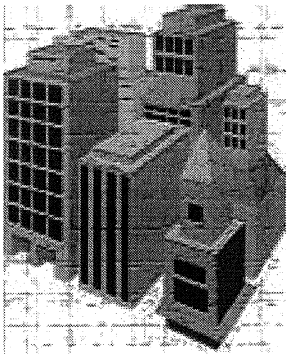
- California's **Lender Liability** law was enacted in 1996 to limit the liability of lenders who have not directly contributed to the release or potential release of hazardous substances on properties in which they have a legal interest. This law helps to alleviate reluctance on the part of lenders to finance the purchase or development of property where contamination is suspected or confirmed.

Public/Private Partnership:
An Important Role In Urban Renewal

DTSC Brownfields Remediation Program

The California known throughout the world for its beautiful scenery, open space, strong property values, environmental advocacy and temperate weather is *also* the lesser known California of abandoned mines, a tight real estate market, contamination hidden in plain sight and ever more rigid environmental regulations. For developers, the golden state is sometimes considered a two-sided coin. California's leadership is transforming that image with a $52 million loan program to complement an existing assortment of initiatives designed to encourage property owners and purchasers to clean up the mess.

Some of the same industries that have long provided for California's economic prosperity now have tarnished images in the world of redevelopment. Even newer industries - foundations for economic growth - carry the baggage of hazardous waste production. A varied history of industrialization, metropolitan expansion, population growth, and closed military bases are just some of the factors that have contributed to California's urban brownfields. Thousands of properties contaminated with hazardous materials, or believed to be contaminated, stand as a legacy to the recent and past history of the Golden State.



While public agencies play a critical role in environmental management, the vast majority of California's brownfields will not be restored without participation by the private sector.

With an estimated 90,000 brownfields sites in California, some people see opportunity where others see blight. Over the past decade, restoring abandoned and underused properties has become a top priority for the State's policymakers, public interest organizations, and property owners. Putting these properties back into productive use works to stimulate redevelopment, protect public health and the environment, attract capital investment, and improve the quality of life in affected communities. Those efforts, combined with a reduction in available land, have spurred a renaissance in many of California's urban centers. While the process for new development in previously undeveloped areas has become more arduous, with more stringent land use policies and tighter real estate markets, the procedures for cleaning up contaminated property for development has been streamlined.

Brownfields projects are now viewed more broadly than just as environmental mitigation, but as a key component of smart growth management. As opposed to initiatives that provide monetary disincentives for urban sprawl, reuse and redevelopment of brownfields can be viewed as an incentive to achieve smart growth objectives.

While public agencies play a critical role in environmental management, the vast majority of California's brownfields will not be restored without participation by the private sector. Discovering mutually beneficial ways to involve investors in the future of these polluted properties is crucial. A truly effective brownfields program requires a variety of tools to address the three primary concerns of potential developers: legal liability, regulatory compliance and the financial burden of investigation and cleanup. We need to be able to develop tools that can be used separately and in concert to encourage capital investment in sites to return them to productive use.

For every successful cleanup, there is some history of frustration and the realization that compromise and flexibility are part of the process. Each project provides everyone involved in California's brownfields an opportunity to learn and improve.

The Voluntary Cleanup Program (VCP)

DTSC Brownfields Remediation Program

The Voluntary Cleanup Program (VCP) has been DTSC's primary brownfields vehicle since its inception in 1993. It was designed to restore low-risk properties quickly and efficiently when the responsible party has agreed to pay all costs.

Corporations, real estate developers, and local and state agencies entering into Voluntary Cleanup Agreements are able to restore properties quickly, rather than having their projects compete for DTSC's limited resources with other hazardous substance sites. Prior to initiation of the VCP, staff resource limitations meant DTSC was unable to provide oversight at sites which posed lesser risk or had lower priority.

DTSC long ago recognized that no one's interests are served by leaving sites contaminated and unusable. The VCP allows motivated parties who are able to fund the cleanup - and DTSC's oversight - to move ahead at their own speed to investigate and remediate their sites in keeping with DTSC processes and standards. DTSC has found that working cooperatively with willing and able project proponents is a more efficient and cost-effective approach to site investigation and cleanup. There are four steps to this process:

Eligibility and Application

Most sites are eligible unless listed as a Federal or State Superfund site, a military facility, site falls outside of DTSC's jurisdiction, or if another agency currently has oversight. If no exclusions apply, the proponent submits an application to DTSC providing details about site conditions, proposed land use and potential community concerns.

Negotiation and Agreement

The agreement can range from services for an initial site assessment, to oversight and certification of a full site cleanup, based on the proponent's financial and scheduling objectives. The VCP agreement specifies the estimated DTSC costs, scheduling for the project, and DTSC services to be provided.

Site Activities

Prior to beginning any work, the proponent must sign the VCP agreement, make the advance payment, and commit to paying all project costs, including those associated with DTSC's oversight. The project manager will track the project to make sure that DTSC is on schedule and within budget.

Certification and Property Restoration

When remediation is complete, DTSC will issue either a site certification of completion, or a "No Further Action" letter. Either means that "The Site" is now property that is ready for productive economic use.

To learn more about the Voluntary Cleanup Program or to request an application, visit www.dtsc.ca.gov or call DTSC's Statewide Cleanup Operations Division Representative in your area:

Sacramento - Megan Cambridge (916) 255-3727
No. Calif. Coast - Lynn Nakashima (510) 540-3839
No. Calif. Coast - Janet Naito (510) 540-3833
Southern California - Tina Diaz (818) 551-2862
Central Valley Clovis - Tom Kovac (559) 297-3939

Expedited Remedial Action Program

DTSC Brownfields Remediation Program

The California Expedited Remedial Action Program (ERAP) was established as a pilot program under the authority of the "Expedited Remedial Action Reform Act of 1994" (SB 923). This comprehensive program was designed to address many of the problems identified in the Federal Superfund Program established by the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), which has come under criticism for being ineffective, using unfair liability schemes, and restricting opportunities for effective cleanup.

ERAP provides for mitigation rather than litigation by revising the liability scheme based on fair and equitable standards; providing indemnification protection through a covenant not to sue; permitting risk-based cleanup based on the ultimate use of the site; providing a streamlined remediation process; and establishing a dispute resolution process.

Key economic and liability provisions provide incentives to motivated persons to voluntarily remediate their contaminated properties. These incentives are especially applicable to brownfields properties, which are typically abandoned facilities located in older industrial areas. Revitalizing these depressed areas creates a unique opportunity for industry, government, and communities to improve the economic and environmental conditions within their communities.

The Expedited Remedial Action Program focuses on mitigation rather than litigation.

Some of the key features of the ERAP are:

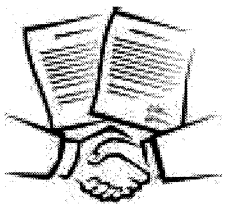
- Land use is designated early in the project
- Remedy selected is based on planned use contingent upon formal land use restrictions.
- Promoted early public notification and input
- Site boundaries may be modified to release clean parcels for development after a Remedial Action Plan has been approved
- Indemnification of participating responsible persons through a covenant not to sue
- Apportionment of liability is based on fair and equitable principles
- Potential State funding for up to ten sites with "orphan" shares (to the extent funding is available), where responsible persons are found to be insolvent, cannot be identified or located
- Formal dispute resolution process available to responsible persons, members of the public and the affected community
- Consolidated permitting and certification for all state and local agencies through DTSC

For more information about DTSC's Expedited Remedial Action Program, or to learn about other brownfields initiatives that can completment the ERAP, visit www.dtsc.ca.gov or call Megan Cambridge, ERAP Unit Chief at (916) 255-3727.

Prospective Purchaser Agreement (PPA)

DTSC Brownfields Remediation Program

One major obstacle that has long prevented the redevelopment of abandoned or underused urban properties is the liability that would accompany any contamination found on the site. Even the perception that the site might be contaminated has been sufficient to make buyers and developers wary of property that may have become contaminated in its previous uses.



The Department of Toxic Substances Control developed the Prospective Purchaser Policy to provide some legal protection for developers who are willing to clean up contaminated sites at their own expense, but are apprehensive about assuming liability for potential contamination that comes with ownership. Under a Prospective Purchaser Agreement (PPA), DTSC provides a covenant not to sue for existing contamination and provides for contribution protection. In exchange, the prospective purchaser agrees to a cleanup plan for the site, access for oversight, a commitment for future land use, and a provision of significant public benefit. Public benefits may include a significant increase in tax base, creating new jobs, and/or reuse that improves the quality of life in the area.

As a matter of general policy, DTSC will not pursue site mitigation enforcement against prospective purchasers/tenants/lessors who become site owners or operators if all of the following conditions are met:

- they do not exacerbate or contribute to the existing contamination;
- their operation will not result in health risks to persons on the site;
- they are not a responsible party (or affiliate) with respect to the existing contamination;
- they allow access for, and do not interfere with, remediation activities;
- unauthorized disposal is not occurring on the site;
- there are other viable responsible parties who are willing to conduct any necessary remediation.

DTSC's objective is to strike a balance between providing sufficient assurance to prospective purchasers to foster remediation and redevelopment, and treating responsible parties in a reasonable manner. This serves to discourage responsible parties from "warehousing" brownfields properties (keeping them off the market), which inhibits redevelopment and reuse. DTSC will consider entering into an agreement with a bona fide prospective purchaser if it will result in substantial benefits for the state, if remediation would not otherwise be conducted without agency action, and if the prospective purchaser satisfies all of the eligibility criteria.

For more information about DTSC's Prospective Purchaser Agreement Program, including a complete list of the eligibility criteria, or for other brownfields initiatives, visit www.dtsc.ca.gov or call DTSC's Statewide Cleanup Operations Division Representative in your area:

Sacramento - Megan Cambridge (916) 255-3727
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Cleanup Loans and Environmental Assistance to Neighborhoods (CLEAN) Program

DTSC Brownfields Remediation Program

California is charting new territory when it comes to programs to stimulate the redevelopment of brownfields -- abandoned, idled or underused urban properties where expansion or redevelopment is complicated by real or perceived environmental contamination. Frequently, these properties, which were at one time the source of jobs and economic benefits to a community, lie abandoned for fear of the contamination and liability it implies.

The State's new $50 million Cleanup Loans and Environmental Assistance to Neighborhoods (CLEAN) Program provides financial assistance to help developers, businesses, schools and local governments accelerate the pace of cleanup and redevelopment at qualifying brownfields sites. The focus of the program is to help revitalize California's urban areas, so properties must meet the eligibility requirements and must be located in one of the three dozen urbanized areas in California, as defined by the U.S. Census (1990). Administered by the Department of Toxic Substances Control, CLEAN offers interest rates for loans equal to the current California Surplus Money Investment Fund (SMIF) rate.

There are two main components to the program:

Investigating Site Contamination Program

- Provides low-interest loans of up to $100,000 to conduct preliminary endangerment assessments of urban brownfields. This work may include soil sampling, a determination of the type and extent of contamination and an evaluation of the risks that may be posed to the public and the environment.

-If redevelopment of the property is determined not to be economically feasible after the preliminary assessment, DTSC may waive up to 75 percent of the loan amount.

Cleanup Loans and Environmental Assistance to Neighborhoods (CLEAN) Program

- Provides low-interest loans of up to $2.5 million for the cleanup or removal of hazardous materials at underused urban properties where redevelopment is likely to have a beneficial impact on the property values, economic viability and quality of life of the surrounding community.

For more information about the CLEAN Loan Programs or for a loan application, visit www.dtsc.ca.gov or call (916) 324-0706.

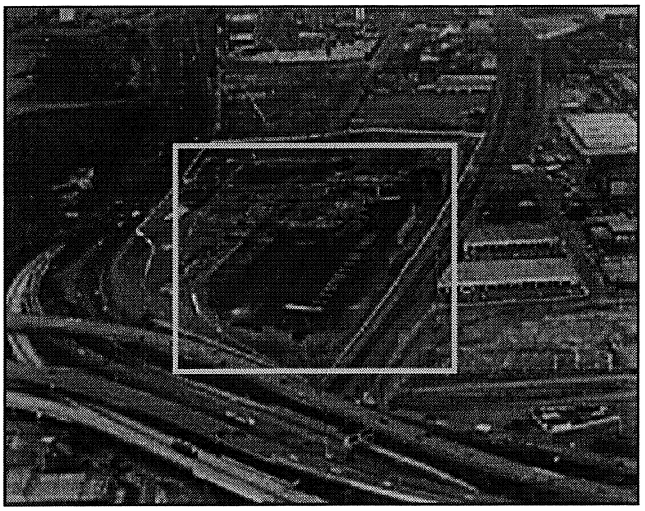
Making a once-toxic property viable again can lead to more jobs, an enhanced tax base, a cleaner environment, improved public health and a greater sense of community pride. Together, these new State programs will provide financial assistance to make it easier and more economical for brownfields sites to be redeveloped, thereby turning today's problems into tomorrow's opportunities.

Barbary Coast Steel Plant/IKEA Inc. Emeryville, California

DTSC Brownfields Remediation Project

IKEA Property, Inc., a Swedish Company which operates an international network of approximately 136 retail stores, broke ground in February 1999 for Phase 1 construction of a new 275,000 square foot retail furniture store and warehouse. Phase 2 of the development added another 40,000 square feet in 2000. The project, located on 15.5 acres in Emeryville and Oakland, is IKEA's first store in Northern California.

DTSC entered into a Prospective Purchaser Agreement (PPA) and Covenant Not to Sue with IKEA in late 1997 which was a key factor in the redevelopment project. The PPA covers the former Barbary Coast Steel Plant site, a steel manufacturing plant that operated from 1882 to until approximately 1991. The previous owner, Barbary Coast Steel Corporation, conducted substantial cleanup activities in 1996 and 1997 under an approved Remedial Action Plan. These activities included: demolition of buildings, site-wide removal of at least two feet of soil contaminated with petroleum hydrocarbons, metals, pesticides, polychlorinated biphenyls (PCBs), volatile organic compounds and semi-volatile organic compounds, installation of additional groundwater monitoring wells and a site cap.



The Barbary Coast Steel Mill property sat unused in a prime location near the San Francisco Bay.

Barbary Coast Steel will continue to monitor groundwater on and off the site, while IKEA has agreed to reconstruct, where necessary, and maintain a permanent site cap after construction activities are completed. DTSC has reviewed the soil management plan, and will provide oversight of related field activities during construction.

The IKEA project created approximately 300 permanent jobs for the local community.

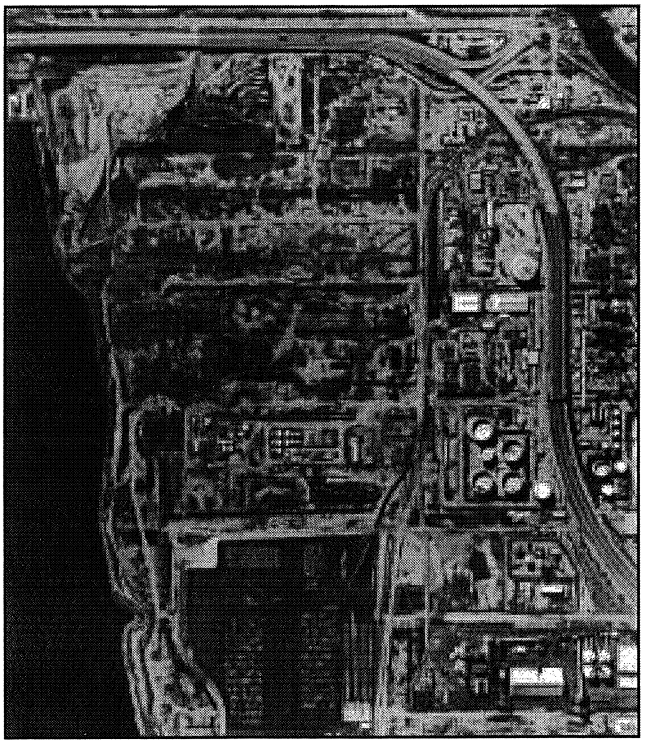
Now the property boasts a popular home furnishings store that contributes to the local economy.

Port of Long Beach/TCL Project Willmington, California

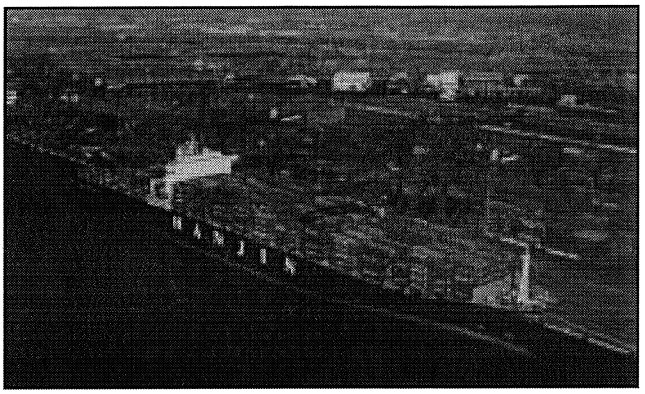
DTSC Brownfields Remediation Project

At the Port of Long Beach, brownfields activities have paved the way for significant redevelopment. Today, more cargo and containers move through the Port of Long Beach than any other port in the United States. It serves as a gateway to the world for 17 million regional residents and for manufacturers and consumers across the country.

The Department of Toxic Substances Control played a major role in recent hazardous waste cleanup and redevelopment activities at the Port. One of the largest projects is the former TCL Corporation Site. Once a State Superfund Site, this 24-acre area was a disposal facility that accepted oil wastes and tank bottom sludge from 1951 to 1972. The site was heavily contaminated with petroleum-based wastes, metals and other hazardous wastes from past activities.



With DTSC oversight and involvement, nearly 500,000 cubic yards of contaminated soil was excavated, treated and stabilized. Rather than transport the soil to an offsite hazardous waste facility, which would have cost more than $200 million, DTSC and others involved in the project were able to develop an innovative plan to clean the contaminated soil on site for less than $20 million. In addition, 2.7 million cubic yards of clean, imported soil was used to regrade the site and cover the treated soil to ensure maximum long-term environmental and public protection. Working around the clock, all remediation work and construction of the container terminal were completed in approximately two years.



Hanjin Shipping Company is one of many cargo shippers at the Port of Long Beach.

The site is now home to a new national distribution center for Toyota Motor Sales, Inc. and the Hanjin Shipping Company marine container terminal. The new terminal generates customs revenues and taxes of $680 million annually in addition to $30 million annually in revenue to the Port of Long Beach.

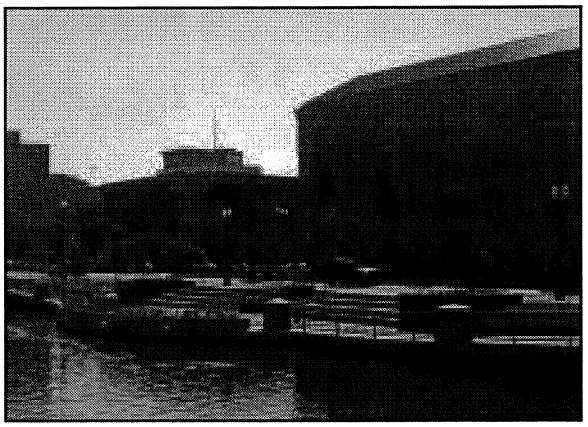
Weber Block Plaza
Stockton, California

DTSC Brownfields Remediation Project

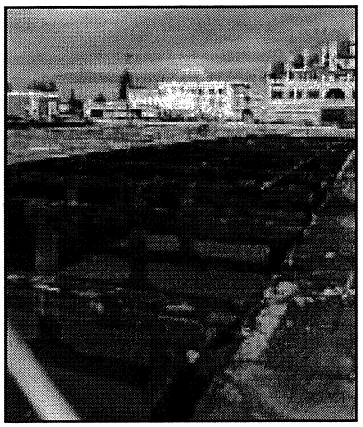
On the edge of Stockton's Central Business District, beneath parked cars and cracked asphalt, lay the final 300 feet of the Stockton Deep Water Channel. Since the early 1950's, it was hidden below an aging parking deck built on treated wood pilings. Now renewed, the property serves residents as a community gathering area -- the latest success in an ambitious revitalization project under way in Stockton.

The one-block area had become an eyesore for the City of Stockton. The area was suspected to be contaminated with gas, diesel fuel, motor oil, lead, arsenic and polycyclic aromatic hydrocarbons. This array of residual contaminants was known to taint much of the land around the channel, left behind from petroleum storage, ship building and repair activities that were the primary function of the entire waterfront area in the early part of the 1900's.

The Weber Block became part of an ambitious effort by the City of Stockton Housing and Redevelopment Agency. The agency has taken advantage of loan programs offered by the U.S. Environmental Protection Agency in support of brownfields initiatives, as well and the U.S. Office of Housing and Urban Development and the Department of Toxic Substances Control. The Weber Block project was performed under DTSC's Voluntary Cleanup Program.



The first step was to conduct a Preliminary Endangerment Assessment on the property to identify the type and concentrations of contaminants and assess their danger. In the case of Weber Block, although a few compounds in soil and groundwater on the site were above regulatory standards, the PEA determined that chemicals did not pose an excessive risk at the site for its proposed use as a public plaza. Based on that finding, remedial action was limited to transporting the creosote treated timber pilings to a proper disposal facility. Additionally, a deed restriction was required to ensure that the property will not be used for residential purposes in the future.



A parking deck over the Stockton Channel.

In less than two years, the parking lot underwent a $6 million conversion and almost two acres of nearly useless space is now the Dean DeCarli Waterfront Square. Additional brownfields projects are planned along the Stockton Waterfront, including a 14.5 acre area on the North Shore and two to three acres on the South Shore. More than $100 million in private and public investment has resulted in the first increase in property values for existing building in the past ten years.

The parking lot was reborn as a pedestrian plaza.

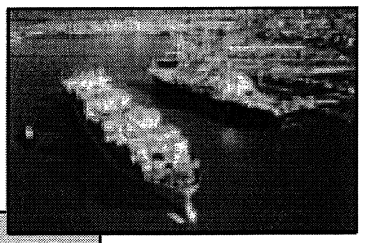
Fleet and Industrial Supply Center Oakland, California

DTSC Brownfields Remediation Project

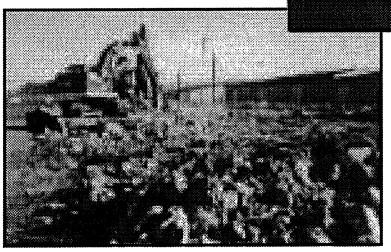
Located on the eastern shore of the San Francisco Bay, the Fleet and Industrial Supply Center, Oakland (FISCO) was commissioned in 1941 to support World War II efforts. With 125 structures on 536 acres of land, FISCO was the Navy's largest West Coast supply point. Until the facility closed in September 1998, hazardous waste storage or staging areas and maintenance and heavy equipment repair shops operated on the site resulting in soil and groundwater contamination including solvents, heavy metals, and petroleum wastes.

In June 1999, the U.S. Navy transferred the FISCO property to the Port of Oakland for development. In accepting the property, the Port agreed to complete environmental investigation and cleanup if contaminants remained from the Navy's 60 years of operation.

Under the transfer agreement the Port of Oakland will conduct remediation activities that focus on the reuse plan and schedule, the Department of Toxic Substances Control will provide environmental regulatory oversight and long-term monitoring, and the U.S. Navy will pay costs. The early transfer agreement presents benefits to the Port of Oakland and the U.S. Navy while revitalizing economic interests and ensuring protection of public health and the environment.



Crews demolish World War II-era buildings to make way for the Port's Vision 2000.



The Port of Oakland will soon boast four new marine terminals.

The FISCO site has become the focal point of the Port of Oakland's Vision 2000 Program, which calls for significant redevelopment of the area. Four new marine terminals to service the newer, larger container vessels will be built, as well as one tugboat marine terminal and a thirty-acre public park. An intermodal rail terminal will also be installed.

The redevelopment project generates considerable economic activity for the community, both for employment and for financial return. The Vision 2000 Program is a $700 million capital investment program that will employ 1,150 construction workers. More than 2,000 full-time permanent jobs will be created with an annual payroll of $300 million. The expansion will contribute $45 million annually to state and local taxes.

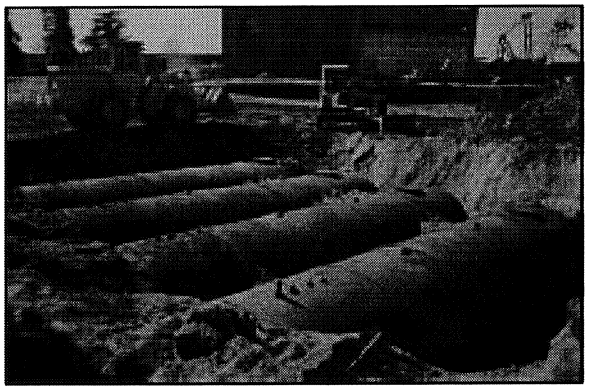
Southern Pacific Rail Yard/ Federal Courthouse, Sacramento

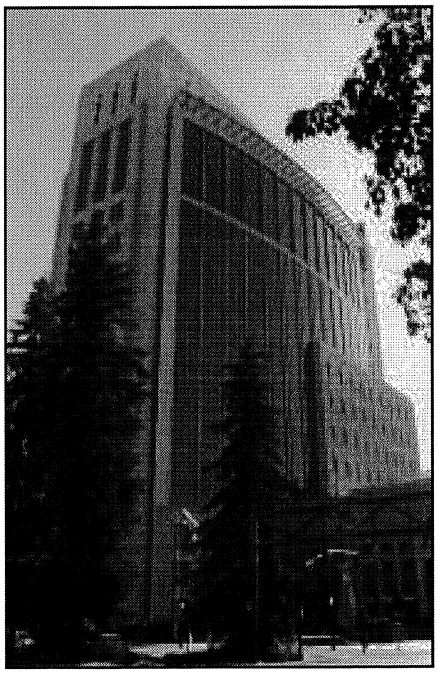
DTSC Brownfields Remediation Project

The cornerstones of the City of Sacramento's successful Brownfields Pilot Grant (awarded by U.S. EPA in July 1995) are two Voluntary Cleanup Program sites: the 220-acre Southern Pacific Rail Yard site, and the three-acre Federal Courthouse site.

The Southern Pacific Rail Yard has been used as a locomotive maintenance yard since its founding in 1863. Historical activity included heavy maintenance and rebuilding of locomotives for the entire Southern Pacific Rail System, foundries, machine shops, painting, and rail car manufacturing. Identified soil and groundwater contamination associated with historical site activity includes: chlorinated solvents, petroleum hydrocarbons, polynuclear aromatic hydrocarbons, and metals. The site as a whole is currently under investigation as a State Superfund site. Given the downtown location of the Southern Pacific Rail Yard, Southern Pacific and the City of Sacramento developed a specific development plan for the area and entered into an innovative three-party Voluntary Cleanup Agreement with DTSC for post-certification remediation and reuse activities at the rail yard. Under the agreement, DTSC will provide oversight of "clean" utility corridors, remediation during redevelopment, and land use change requirements. The proposed land use of the Southern Pacific Rail Yard will preserve its historical core, increase the City of Sacramento's Open Space by 35 percent, provide a state-of-the-art intermodal transportation center, and create 2,800 residential units, 9.6 million square feet of office space and 500,000 square feet of retail and entertainment space.

The Federal Courthouse is the largest construction project in the City of Sacramento's history.





The three-acre Federal Courthouse site is composed of a half-acre area known as "The Sacramento Station Study Area," Southern Pacific Rail Yard Site, and approximately 2.5 acres of City of Sacramento property. The City of Sacramento property was used as a fueling, maintenance and parking facility for the Police Department. Under the VCP, the City of Sacramento remediated petroleum hydrocarbon, motor oil and antifreeze soil contamination during the excavation for the building's underground parking garage. Groundbreaking for the Federal Courthouse began in August 1995 for the $142 million, 380,000 square-foot building that will produce more than 1,000 new construction jobs and 200 permanent jobs.

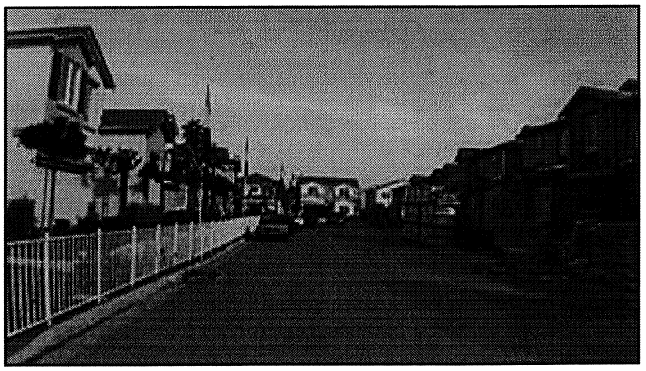
Robert's Landing
San Leandro, California

DTSC Brownfields Remediation Project

The Roberts Landing Site in San Leandro borders the San Francisco Bay. Approximately 480 acres, the site was formerly the Trojan Powder Works, an explosives manufacturing plant which operated from the turn of the century until 1965. After the plant was closed, the new property owners proposed to construct up to 3,000 homes; however, this development never occurred.

The property was resold and the new owners proceeded with new development plans. After languishing for decades, developer's found that DTSC's Voluntary Cleanup Program was the smoothest road to completing required remediation work in a way that met public concerns about wetlands restoration.

In March 1994, the developer, Heron Bay, signed a Voluntary Cleanup Agreement to ensure that remedial work was conducted in and environmentally safe manner. A Removal Action Workplan was developed, approved and implemented in the summer of 1995. As part of the plan, 400 acres were redeveloped into permanent open space and wildlife habitats. A major feature of this property is the salt marsh that has been restored and made into a public access walking and educational trail. The other 80 acres were remediated to residential standards where 600 single family homes have been constructed in a development called Heron Bay. The developer has taken former industrial land, restored most of it to its natural habitat and cleaned up the most heavily contaminated portion to residential standards.



Heron Bay now offers homes for 600 Bay Area families, as well as habitat for other species.

The goals of a brownfields project were achieved as jobs were provided during construction, the tax base to the City of San Leandro was increased, badly needed new housing was provided within an already urbanized area rather than through urban sprawl, and property that was previously unused due to actual or perceived contamination was put back into useful service.

Open space, especially in near natural state, is at a premium in the San Francisco Bay Area making the recovered Roberts Landing property all the more appreciated.

Kaiser Steel Mill/California Speedway Fontana, California

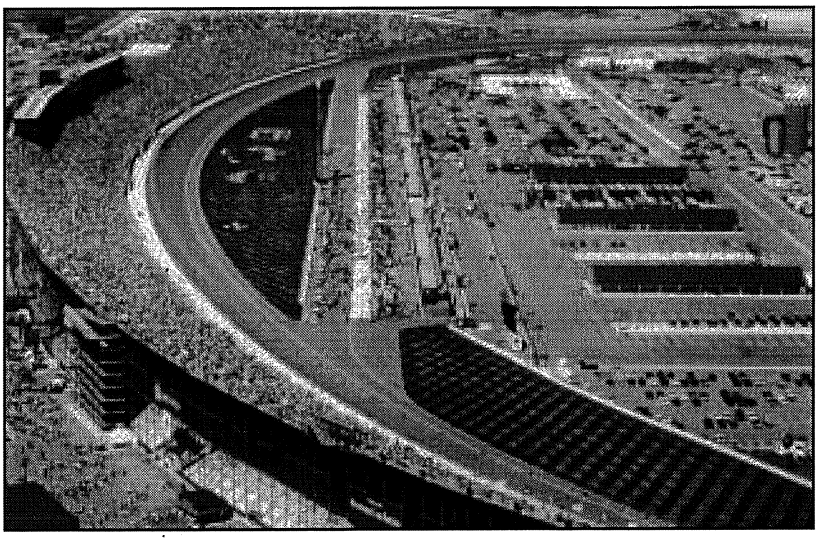
DTSC Brownfields Remediation Project

The roar of NASCAR race cars heard today at the California Speedway in Fontana is a far cry from the clanking of the old Kaiser Steel Mill which once occupied the same spot. Having sat idle since 1983, the property was awash in petroleum and metal contaminates.

Remediating this site was the result of a tremendous partnership between public and private sectors, including DTSC, which earned Kaiser Ventures Inc. the 1996 "Governor's Award for Environmental and Economic Leadership." Additionally, California's Brownfields Initiative received national recognition from Renew America and the National Awards Council for Environmental Sustainability.

Kaiser Steel operated a large facility at this site from 1942 to 1983. Now, the Speedway sits on the portion of the site where coal was turned into coke by burning it in high-temperature furnaces. The gases from these furnaces were trapped and recovered as by-products such as coal tar. As was often the case in those days, environmental protection was not the first consideration in industrial operations and tons of hazardous materials were produced and left behind for future cleanup.

Once Kaiser reached preliminary agreement with Penske Motorsports for the project, they approached DTSC to help expedite site cleanup so development could proceed as quickly as possible. DTSC committed the resources and staff to expedite review of the cleanup plans and work activities. Within five months, the site was characterized, hazardous waste removed, an environmental cap constructed and the lad was ready for reuse -- record time for a site of this size and complexity. The Inaugural Race of the California Speedway was held June 22, 1997. The California Speedway, is the largest sports venue in Southern California and hosts the NASCAR Winston Cup California 500 in addition to other sporting events.



Before its redevelopment, the Kaiser Steel Mill site, located 50 miles east of Los Angeles, was an industrial wasteland littered with thousands of tires and idled blast furnaces.

The California Speedway generated $125 million in economic activity annually and $2.5 million in new tax revenue for the State of California and the County of San Bernardino. Approximately 1,200 new jobs were also created. DTSC and Kaiser continue their partnership to remediate and redevelop property at the Kaiser Steel Mill. Recent successes include remediating a 23-acre parcel and developing it into the West Valley Material Recycling Facility.

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(619) 278-3734

It is DTSC's mission to restore, protect and enhance the environment, to ensure public health, environmental quality and economic vitality, by regulating hazardous waste, conducting and overseeing cleanups, and developing and promoting pollution prevention.

California Environmental Protection Agency

Brownfields Insurance Program

BACKGROUND:
Last year, California Governor Gray Davis introduced his Urban Cleanup Initiative, intended to partner the State with local agencies and developers to clean up and redevelop brownfield sites.

The first component of that initiative, SB 667 (Sher, Chapter 912, Statutes of 2000) established the Cleanup Loans and Environmental Assistance to Neighborhoods Program. Through the program, the Department of Toxic Substances Control provides low-interest loans to investigate and clean up brownfield sites.

The "CLEAN" Program is a critical first step in removing obstacles to brownfield redevelopment. It provides a means to get the "information" about a site that is necessary to make informed development decisions. Information is not always enough, however.

Open-ended liability continues to cause uncertainties and dissuade lending institutions from providing financing and private developers from investing in brownfields. Environmental insurance policies, an effective tool that can help to reduce those uncertainties, may not be available or affordable, especially for smaller brownfield development projects.

WHAT IS THE "FAIR" PROGRAM?

SB 468 (Sher, Chapter 549, Statutes of 2001), the second part of Governor Davis' Urban Cleanup Initiative, established the California Financial Assurance and Insurance for Redevelopment Program (FAIR Program). Through it, Cal/EPA will make environmental insurance coverage available and affordable to stimulate private investment in brownfield development.

Modeled after the successful Massachusetts program, the FAIR Program has two parts:

- A pre-negotiated package of discounted environmental insurance products; and
- Subsidies to be used to offset the costs of premiums and deductibles.

Environmental Insurance Products To Be Offered
The environmental insurance products to be offered under FAIR include:

- Pollution Legal Liability Insurance (to address unforeseen conditions and third party liability for property damage and personal injury from pollution at a site);
- Cost Overrun Insurance (to cover costs of cleanups that are over and above cleanup cost estimates); and
- Secured Creditor Insurance (to cover loan default or foreclosure that may occur due to pollution conditions).

Selection of Insurance Carrier
Cal/EPA is to conduct workshops to develop a request for proposal to which interested, qualifying insurance companies are to respond. Through a competitive bidding process, the Secretary of Cal/EPA will select the insurance company or companies (depending upon whether the request for proposal specifies one or more than one company), which will provide the insurance products for a three-year period.

Subsidies for Environmental Insurance
Cal/EPA, with money appropriated by the California Legislature, will make the following subsidies available to persons conducting response actions at eligible properties who purchase the prenegotiated environmental insurance products:

- Up to 50% of the cost of environmental insurance policy premiums.
- Up to 80% of the self-insured retention amount of the cost overrun insurance policies, up to a maximum of $500,000.

Properties Eligible to Receive FAIR Program Subsidies
Persons conducting response actions at the following types of properties may apply for the environmental insurance subsidies under the FAIR Program:

- Abandoned, urban brownfields
- Underutilized properties

Note: Current economic conditions have made funding for subsidies temporarily unavailable. Cal/EPA and DTSC continue their efforts to provide FAIR Program subsidies.

For more information, contact:

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California Environmental Protection Agency
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Cal/EPA

Department of Toxic Substances Control

Brownfields Initiatives

Megan Cambridge
October 2003
(916) 255-3727

Profile of a Brownfields Site

- **14.5 acre site located along I- 580 Emeryville, Ca**
- **steel manufacturing for over 100 years**
- **vacant until bought by IKEA, Inc in 1997**

IKEA Site, Emeryville

- **$125 million annual sales**
- **300 new jobs**
- **$1.4 million sales tax**

Has brought new economic hope to a traditionally industrial area

Who are the Key Players

- **Governmental Environmental Agencies**
- **Economic and Planning Agencies**
- **Technical Consultants**
- **Legal Professionals**
- **Commercial Lenders**
- **Real Estate Professionals**
- **Investors and Developers**
- **Citizens and Community Groups**

DTSC's Brownfields Program

" Mission is to protect public health and the environment *and to assist communities in the restoration of contaminated properties* "

DTSC's Action Agenda creates opportunities for greater efficiencies, direction and coordination

Hercules Properties Ltd.

- **167-acre property occupied by nitroform fertilizer plant and explosives manufacturer**

Transformation: Walkable City

Site will include residential and commercial units, and an office development is underway

- **$2 million/ year- increased property taxes**
- **1,000 new jobs**
- **207 single-family homes**
- **840 multi-family and live/work units**
- **commercial-retail and office/research**
- **Wildlife restoration**

DTSC's Brownfields Initiatives

- **Voluntary Cleanup Program**
- **Prospective Purchaser Policy**
- **Expedited Remedial Action Program (ERAP)**
- **Polanco Redevelopment Act**
- **CLEAN Program – low interest loan**
- **FAIR Program – Insurance**
- **SB 32 (Escustia), CLERRA**
- **Private Site Manager**
- **Federal Brownfields**

Voluntary Cleanup Program

- **Created Administratively - late 1993**
- **Uses Chapter 6.8 authority**
- **Superfund Sites and federal facilities not eligible**
- **Proponent enters into a Voluntary Cleanup Agreement**
- **Project can be phased**
- **Considers planned property use**
- **Sign-off after remediation**

Cornfields Site, Los Angeles

- **32-acres along LA River**
- **Site currently vacant; railroad ties and other debris have been removed**
- **Chemicals of concern in soil include: lead, arsenic, Volatile Organic Compounds (VOCs) and Total Petroleum Hydrocarbons (TPH)**

Prospective Purchaser Policy

- **Provides liability protection, and**
- **Mutual covenant not to sue**
- **Protection for contribution action or claims**
- **Viable bona fide prospective purchaser; not a Responsible Party**
- **No active disposal or under enforcement action**
- **Agrees to do the cleanup and pay oversight**
- **Development will not result in health risks and will involve substantial benefit to the state**

Expedited Remedial Action Program "ERAP"

- **Health and Safety Code, Chapter 6.85, enacted 1994**
- **Designed as Superfund Reform**
- **Pilot Cleanup Program (Up to 30 Sites)**
  - **18 sites in the program to date**
  - **5 sites certified, two with ongoing O&M**
  - **$4.046 million (3 sites) orphan share funds distributed**

"ERAP" Benefits

- **Flexibility in remedy selection**
  - **based upon planned land use**
  - **contingent upon land use restriction**
- **Provides liability protection through a covenant not to sue**
- **Apportionment of liability based on fair and equitable principles**
- **Potential state funding for "orphan shares"**

Polanco Redevelopment Act

Community Development and Housing H&SC section 33459-33459.8, Division 24

- First enacted in 1990
- Allows RDAs to undertake or require cleanups
- RDA can conduct investigation (RI/FS) activities
  - implement cleanup if the RP fails to within the specified schedule
  - pursue cost recovery including attorney fees
- RDA doesn't have to own property to characterize or cleanup the property

Benefit to RDAs

- Choice in selecting an oversight agency: DTSC, RWQCB, IWMB or a local agency
- No exclusion for petroleum or asbestos
- Cleanup guidance provided upon request
- Provides qualified immunities under state law to RDAs and subsequent landowners
- Injunctive relief against parties to compel action

Brownfields Loan Program (CLEAN Program)

Cleanup Loans and Environmental Assistance to Neighborhoods Program

- Enacted in fall 2000 for $85 million for assessments and cleanup loans
- Reduced significantly by budget constraints
- 6 loans approved totaling $5.2 million:
  - **ISCP Loan ($100,000) for PEAs**
  - **CLEAN (cleanup) loans of $2.5 million**

Crossroad, Murrieta, Ca

- Lead from battery operation
- 20 acres
- School 1960-1977
- 600 tons soil removed; low levels as road base
- Loan of $700,000
- Certified Dec 2002

CLEAN Program

Location	Loan Amount	Cleanup and Planned Redevelopment
Downtown Los Angeles	$1,000,000	Commercial, and possibly loft residences, at a former paint and printing ink manufacturing plant
Vacaville Redevelopment Agency	$400,000	Revitalization of the downtown core with mixed use commercial and retail at the former site of a chrome plating shop
East Bay Habitat	$470,000	20-24 single family residences at a former salvage yard
Richmond Redevelopment Agency	$1,900,000	Commercial, retail, residential, and public access/open space at a former Kaiser shipyard
Santa Fe Springs (Los Angeles County)	$950,000	Commercial and industrial facilities at the site of a former chemical company
Murieta (Riverside County)	$700,000	54 market-rate single-family homes at a former battery storage facility

FAIR Program

- California Financial Assurance and Urban Cleanup Initiative (FAIR) - SB 468 (Sher, 2001)
- Two Components:
  - **A pre-negotiated package of discounted environmental insurance products**
  - **Subsidies to be used to offset the costs of premiums and deductibles**
  - **provide insurance products for a 3-year period**

Environmental Insurance Products to be Offered

- **Pollution Legal Liability Insurance**
  to address unforeseen conditions and third party liability for property damage and personal injury from pollution at a site
- **Cost Overrun Insurance**
  to cover costs above cleanup cost estimates
- **Secured Creditor Insurance**
  to cover loan default or foreclosure that may occur due to pollution conditions

Senate Bill 32

California Land Environmental Restoration and Reuse Act

- **Creates new cleanup program administered by local agencies with oversight by DTSC or Regional Boards or delegated local agency**
- **Peer Review of San Francisco RWQCB' risk based screening levels**
- **Pilot program in Southern California to evaluate use of screening values**
- **Screening Values - Cal/EPA to develop advisory "screening values" for 55 hazardous substances typically found at Brownfields**

Complementary Federal Programs

- **EPA Brownfields Assessment Grants**
- **Showcase Communities**
- **Revolving Loan Funds**
- **Brownfields Tax Incentive enacted August 1997, amended December 2000.**
- **Federal Brownfields Bill (PL 107-118)**
  - **New opportunities for use of federal funding by California and other entities**

Small Business Liability Relief and Brownfields Act

- **Enacted January 11, 2002**
- **Title I – Small Business Liability**
  - **De Micromis Exemption**
  - **Municipal Solid Waste Exemption**
  - **De Minimus Settlements**
- **Title II – Brownfields**
  - **Brownfields Program**
  - **Liability Clarification**
  - **State Response Program**

Brownfields Program

- **Increases grant funding up to $200 million; $50 million for petroleum sites**
- **Competitive grants for assessment, cleanup, and revolving fund**
- **Non-competitive grants to Regions as targeted site assessments**
- **State Response Program provides assistance for assessment and outreach**

Liability Clarifications

- **Contiguous Property**
  - **Defense to liability**
- **Prospective Purchaser/Windfall Liens**
  - **Appropriate inquiry**
  - **Appropriate care**
- **Innocent Landowners**
  - **Did not know or have reason to know**
  - **Involuntary transfer or eminent domain**
  - **Heirs**

Doing Due Diligence

Site Assessment to get Site History

- **ASTM Phase I**

  Criteria for environmental conditions
  - **Satisfy lenders**
  - **Consists of site visit, database and record review, interviews, aerial photos**
- **ASTM Phase II**
  - **Conceptual Site Model**
  - **Sampling**
  - **Risk analysis**

Preliminary Endangerment Assessment (PEA)

"… means an activity that is performed to determine whether current or past waste management practices have resulted in the release or threatened release of hazardous substances that pose a threat to public health or the environment."

H&SC section 25319.5

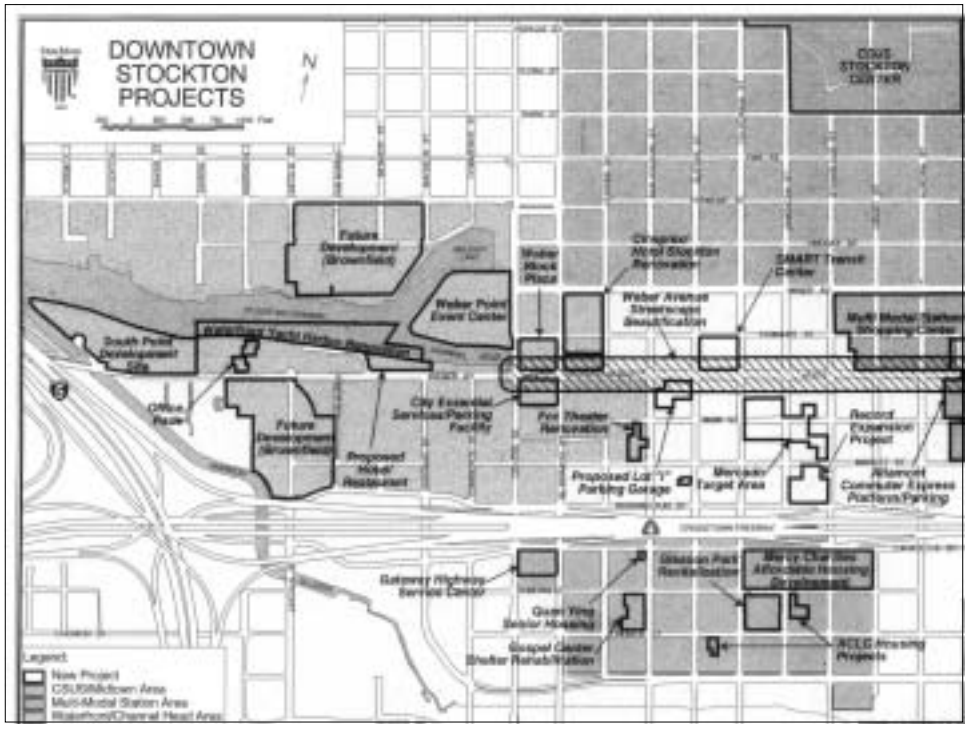
Stockton Waterfront Project:
2002 EPA Region 9 Phoenix Award Winner

Planning For Reuse

- **Nature and Extent of Contamination**
- **Community Considerations**
- **Planned use of the Site**
- **Risk assessment vs. Risk management**
- **Soils Management**
- **Use of Institutional Control**
  - **Run with the land**
  - **Long term monitoring cost and considerations**

Concepts in Managing Data

- **Good quality assurance is key**
- **Systematic approach: TRIAD**
- **Data integration**
- **Multimedia pathway analysis**
- **Address agency requirements**
- **Determining what is background**



Application of Incentives

- **Insurance Policies**
- **VCP with DTSC**
- **Deed restriction**
- **Polanco Action**
- **Federal grants**
  - **EPA Site assessment**
  - **HUD**

Conclusion

DTSC Brownfields Designed to address:

- **Focus on Redevelopment**
- **Address Legal Liability Issues**
- **Acceptance with Agencies**
- **Efficiencies in Investigation and Cleanup Steps and Costs**
- **Creation of public/private/community partnerships**

For More Information

To find out more about Brownfields Initiatives please visit:

www.dtsc.ca.gov/StateCleanup/Brownfields/index.html

www.calepa.ca.gov/Brownfields/

www.epa.gov/brownfields

www.epa.gov/region9

SCE's Remediation of the Santa Barbara I Manufactured Gas Plant: Potential Lessons for Brownfields Projects

Richard Tom
Southern California Edison Co.

Presented at the ACCA 2003 Annual Meeting
San Francisco, California

What are "Brownfields?"

- "The term `brownfield site' means 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." 42 USC 9601(39)(A).
- A lengthy list of exclusions to this definition is found at 42 USC 9601(39)(B).

Past Use as a Manufactured Gas Plant

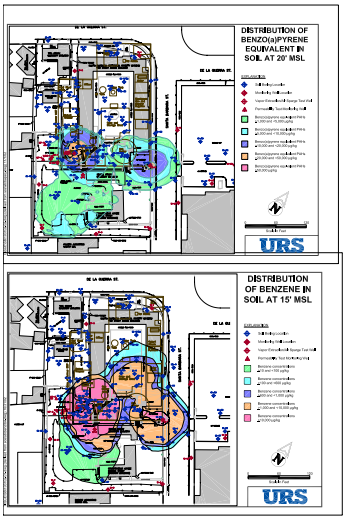
Current Use is as the Santa Barbara Historical Museum

- Located within the historic core of Santa Barbara
- Main museum completed in 1965
  - Adobe building material made from onsite soil
- Courtyard used for gatherings and events
- Two historic adobes dating to 1817
- 3 schools adjacent to site

Areas of Contamination

Highest contaminant levels found:

	Maximum Concentrations (ppb)	
	Soil	Water
Benzene	145,000	59,300
Benzo(a)pyrene	133,137	91
Naphthalene	1,290,000	15,700
TPH	29,400,000	116,000



Key Elements of Selected Remedial Strategy

- Gas Holder Removal
- In Situ Ozone Sparging and Vapor Extraction
- Removal and Replacement of Soil at Surface
- Land Use Covenant

Gas Holder Excavation

- Excavated gas holder using portable tent structure
  - Source of groundwater contamination
  - Portion of holder base under museum wing
  - Vertical excavation next to buildings
- Removed 1,500 cubic yards of soil to 15 foot depth

In-situ Ozone Sparging

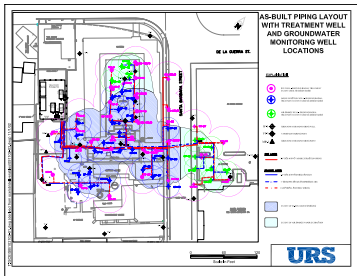
- 27 Ozone sparge wells
- 11 Air sparge wells
- 34 Vapor extraction wells

Rationale

- Essential that remediation not disrupt current land use
- Dewatering and excavation not feasible because of historic structures

Treatment Zone Summary

- 27,000 cubic yards of soil treated by ozone sparging
- 10,000 cubic yards of soil treated by air sparging
- Treatment area of 65,000 square feet
- Depth to groundwater 20-25 feet below ground surface
- Thickness of treatment zone 15-30 feet



Treatment Compound Interior

- Self-enclosed trailers for oxygen and ozone generation and for vapor extraction
- Trailers customized to attenuate sound
- Two 2,000-pound carbon vessels
- Ozone destruct catalyst vessel
- Single permitted emission point from local Air District
- Low-impact electric cart for well sampling and maintenance

Treatment Compound - Exterior

- Wall is consistent with architecture of museum to mitigate visual impacts
- Compound is designed to attenuate noise to 60 decibels at property line
- Sliding gate allows easy access to interior of compound

Ozone Distribution, Monitoring and Control

- Ozone monitoring points positioned at 5 and 12 feet below surface around museum basement
- Continuous VES operation
- Ozone injection shuts down if:
  - Museum HVAC turns off
  - Museum monitors detect 100 ppb ozone
  - Power failure
  - VES shuts down
- Initially tested system with Helium
- Additional vapor wells near museum and screened below basement

Groundwater Remedial Goals

- Based on MCLs and Taste & Odor Thresholds

– VOCs:	Benzene	1 ug/L
	Ethylbenzene	700 ug/L
	Toluene	150 ug/L
	Xylenes (total)	1,750 ug/L
	Styrene	100 ug/L
– PAHs:	Benzo(a)pyrene	0.2 ug/L
	Naphthalene	21 ug/L (taste & odor)
– TPH:	1 mg/L (taste & odor)	

Long Term Remediation Strategy

- Ozone treatment scheduled for two years: July 2002 through June 2004
- In the event MCLs for groundwater are not met within allocated time frame, strategy will switch to monitored natural attenuation
- Land use covenant will be required to address residual deep soil contamination

TOOLS TO ENHANCE MARKETABILITY OF BROWNFIELDS

Presented at the ACCA 2003 Annual Meeting
San Francisco, CA

Stephanie Walter, Assistant General Counsel
ARAMARK Uniform & Career Apparel, Inc.

TOOLS TO ENHANCE MARKETABILITY AND PROTECT YOUR COMPANY FROM LIABILITY

- Agency-approved remediation action plan (RAP)
- Environmental insurance
  - Remediation stop loss
  - Pollution legal liability
- Holdback or escrow account
- Indemnity

TOOLS TO ENHANCE MARKETABILITY AND PROTECT YOUR COMPANY FROM LIABILITY

- Purchase price reduction based on reasonable cost estimate to cleanup
- Prospective purchaser agreement (PPA)
- Fixed cost to closure contracts
- Brownfields development companies

TOOLS TO ENHANCE MARKETABILITY AND PROTECT YOUR COMPANY FROM LIABILITY

Example: land purchase from municipality in redevelopment area

- Escrow
- Remediation stop loss policy
- Indemnity

SELLING CONTAMINATED PROPERTY

- If your company will remain responsible for cleanup, keep control of remediation process
- Include site access agreement and provisions for protection of remediation equipment in agreement
- Have a clear "completion date"

CERCLA LIABILITY

- 4 Categories of PRPs
  - Current owner or operator
  - Past owner or operator (at time of disposal)
  - Arranger (generator)
  - Transporter
- Joint & several liability
- Strict Liability

CERCLA Amendments: Relief for Prospective Purchasers, Contiguous Landowners & Innocent Landowners

- Brownfields Revitalization and Environmental Restoration Act of 2001 (Title II)
- Enacted January 11, 2002
- Protects Bona Fide Prospective Purchasers, Contiguous Landowners and Innocent Landowners

Bona Fide Prospective Purchaser

- Protects Owners and Tenants
- Acquired ownership after January 11, 2002
- Disposal occurred prior to acquisition
- All appropriate inquiry (knowledge of contamination allowed)
- Provides legally required notices

Bona Fide Prospective Purchaser

- Is not liable or affiliated with liable person
- Reasonable steps to stop or prevent continuing release or exposure (appropriate care)
- Provides full cooperation, assistance and access
- Complies with land use restrictions and institutional controls
- Complies with information requests & subpeonas

Bona Fide Prospective Purchaser

All Appropriate Inquiry

- ASTM Phase I Environmental Site Assessment
- EPA guidance reaffirms that ASTM Phase I (2000) is appropriate inquiry until regulations are issued (see attached Federal Register notice)
- Regulations are expected January 2004

Bona Fide Prospective Purchaser

Appropriate Care

- Requires that owner take reasonable steps to:
  - Stop continuing release
  - Prevent threatened release
  - Prevent/limit human, environmental, natural resource exposure
- Does this really mean cleanup the property?
  - EPA guidance (3/6/03) says that appropriate care standard requires less than those requirements imposed on PRPs

BFPP and Windfall Lien

- If EPA incurs response costs at a site, EPA "shall" have lien on property up to the value of the increase in the FMV due to the cleanup or may negotiate other assurances of payment
- Unclear whether this lien, if unrecorded, trumps liens filed after response costs were incurred
- Windfall lien settlements are being negotiated by EPA

Innocent Landowners

- Same criteria as Bona Fide Prospective Purchaser
- Exception is that Innocent Landowner did not know about the contamination at the time of acquisition after conducting all appropriate inquiry

Contiguous Landowners

- Protects owners of properties located adjacent to contaminated property
- Criteria is the same as Innocent Landowner

request a retest. If, on the other hand, the variation in test results is judged to reflect normal variability in test measurements, then the rule provides for averaging of three test runs, as is appropriate to enhance the reliability of the results.

III. EPA Action

EPA is approving the revisions to Illinois' rules for emissions averaging. EPA concludes that these rules codify standard practice in preparation and review of test plans and in averaging of three test runs in assessing compliance with mass emission limits.

IV. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This action merely approves state rules as meeting Federal requirements and imposes no additional requirements beyond those imposed under state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing Federal standards, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Congressional Review Act, 5 U.S.C. section 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. section 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 8, 2003. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen oxides, Particulate matter, Reporting and recordkeeping requirements, Sulfur dioxide, Volatile organic compounds.

Dated: April 11, 2003.

Bharat Mathur,

Acting Regional Administrator, Region 5.

■ For the reasons set out in the preamble, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart O—Illinois

■ 2. Section 52.720 is amended by adding paragraph (c)(164) to read as follows:

§ 52.720 Identification of plan.

* * * * *

(c) * * *

(164) On October 9, 2001, the State of Illinois submitted new rules regarding emission tests.

(i) Incorporation by reference.

(A) New rules of 35 Ill. Admin. Code Part 283, including sections 283.110, 283.120, 283.130, 283.210, 283.220, 283.230, 283.240, and 283.250, effective September 11, 2000, published in the Illinois Register at 24 Ill. Reg. 14428.

(B) Revised section 283.120 of 35 Ill. Admin. Code, correcting two typographical errors, effective September 11, 2000, published in the Illinois Register at 25 Ill. Reg. 9657.

* * * * *

[FR Doc. 03–11471 Filed 5–8–03; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 312

[FRL–7496–2]

RIN 2050–AF05

Clarification to Interim Standards and Practices for All Appropriate Inquiry Under CERCLA

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This final rule clarifies a provision included in recent amendments to the Comprehensive

Environmental Response, Compensation, and Liability Act (CERCLA). Specifically, today's final rule addresses the interim standard set by Congress in the Small Business Liability Relief and Brownfields Revitalization Act (''The Brownfields Law'') for conducting ''all appropriate inquiry.'' Today's action clarifies that, in the case of property purchased on or after May 31, 1997, the requirements for conducting ''all appropriate inquiry,'' including the conduct of such activities to qualify as a *bona fide* prospective purchaser and to establish an innocent landowner defense under CERCLA, can be satisfied through the use of ASTM Standard E1527–00, entitled ''Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment Process.'' In addition, recipients of brownfields site assessment grants will be in compliance with the all appropriate inquiry requirements if they comply with either the ASTM Standard E1527–97, or the ASTM E1527–00 Standard.

DATES: This final rule is effective June 9, 2003.

ADDRESSES: The record for this rulemaking has been established under docket number SFUND–2002–0007. Copies of public comments received, EPA response, and all other supporting documents are available for review at the U.S. Environmental Protection Agency Docket Center located at 1301 Constitution Ave., NW., Washington, DC 20004. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. To review docket material, it is recommended that the public make an appointment by calling (202) 566–0276.

FOR FURTHER INFORMATION CONTACT: For general information, contact the RCRA/CERCLA Call Center at 800–424–9346 or TDD 800–553–7672 (hearing impaired). In the Washington, DC metropolitan area, call 703–412–9810 or TDD 703–412–3323. For more detailed information on specific aspects of this rule, contact Patricia Overmeyer, Office of Brownfields Cleanup and Redevelopment (5105T), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460–0002, 202–566–2774. *overmeyer.patricia@epa.gov.*

SUPPLEMENTARY INFORMATION:

Regulated Entities

Entities potentially affected by this action include public and private parties who, as *bona fide* prospective purchasers, contiguous property owners, or innocent landowners, purchase property and intend to claim a limitation on CERCLA liability in conjunction with the property purchase. In addition, any entity conducting a site characterization or assessment with a brownfields grant awarded under CERCLA section 104(k)(2)(B) may be affected by today's action. This includes State, local and tribal governments that receive brownfields site assessment grants. A summary of the potentially affected industry sectors (by NAICS codes) is displayed in the table below.

Industry category	NAICS code
Real Estate	531
Insurance	52412
Banking/Real Estate Credit	52292
Environmental Consulting Services	54162
State, Local and Tribal Government	N/A

The list of potentially affected entities in the above table may be exhaustive. Our aim is to provide a guide for readers regarding those entities that EPA is aware potentially could be affected by this action. However, this action may affect other entities or listed in the table. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding section entitled **FOR FURTHER INFORMATON CONTACT.**

Preamble

I. Statutory Authority

This final rule clarifies provisions included in section 223 of the Small Business Liability Relief and Brownfields Revitalization Act which amends section 101(35)(B) of CERCLA (42 U.S.C. 9601(35)) and clarifies interim standards for the conduct of ''all appropriate inquiry'' for obtaining CERCLA liability relief and for conducting site characterizations and assessments with the use of brownfields grant monies.

II. Background

On January 11, 2002, President Bush signed the Small Business Liability Relief and Brownfields Revitalization Act (''the Brownfields Law''). The Brownfields Law revises CERCLA section 101(35) and provides Superfund liability limitations for *bona fide* prospective purchasers and contiguous property owners, in addition to clarifying the requirements necessary to establish the innocent landowner defense under CERCLA. Among the requirements added to CERCLA is the requirement that such parties undertake ''all appropriate inquiry'' into prior ownership and use of certain property.

The Brownfields Law requires EPA to develop regulations that will establish standards and practices for how to conduct all appropriate inquiry. In addition, in the Brownfields Law, Congress established, as the Federal interim standard for conducting all appropriate inquiry, the procedures of the American Society for Testing and Materials (ASTM) including Standard E1527–97 (entitled ''Standard Practice for Environmental Site Assessment: Phase 1 Environmental Site Assessment Process''). This interim standard applies to properties purchased on or after May 31, 1997, until EPA promulgates Federal regulations establishing standards and practices for conducting all appropriate inquiry.

On January 24, 2003, EPA published a proposed rule (68 FR 3478) that would clarify for the purposes of CERCLA section 101(35)(B), and until the Agency promulgates regulations implementing standards for all appropriate inquiry, parties may use either the procedures provided in ASTM E1527–00, entitled ''Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment Process,'' or the standard ASTM E1527–97. Today's rulemaking constitutes EPA's final action on the proposed rule.

III. Summary of Final Rule

Today's final rule clarifies that persons may use the current ASTM standard, E1527–00 for conducting all appropriate inquiry under CERCLA section 101(35)(B) for properties purchased on or after May 31, 1997. Such property owners also may continue to use ASTM's previous standard, E1527–97 for conducting all appropriate inquiry. In addition, parties receiving federal grant monies for the characterization and assessment of brownfields properties, may use either the 1997 or the 2000 version of the ASTM Phase I Site Assessment Standard when conducting site assessments using brownfields grant monies.

IV. Changes From the January 24, 2003 Proposed Rule

We made one minor change in the rule text. One commenter pointed out that the most recent version of the ASTM Phase I Environmental Site Assessment Standard was incorrectly referenced as ''ASTM E1527–2000'' in the proposed rule. We agree that the

correct nomenclature is ASTM E1527–00 and we made the corresponding correction in today's final rule.

The statutory cite referencing the award of brownfields assessment grants was corrected to reflect the appropriate cite.

V. Response to Comments

On January 24, 2003, EPA published a proposed rule (68 FR 3478) clarifying that both the 1997 and the 2000 version of ASTM's E1527 Phase I environmental site assessment standard may be used to comply with the interim standard for all appropriate inquiry established by Congress in the Brownfields Law. We received several comments on the proposed rule. A discussion of the significant comments follows. A complete copy of the comments and EPA's response are included in the docket for today's final rule.

One commenter, the Utah Professional Environmental Consultants Association, stated that EPA's proposal was inappropriate and biased because the site assessment method cited by EPA (the ASTM–E1527–00 standard) ''excludes methods of site auditing that do not conform to or acknowledge ASTM standards.'' The commenter also stated that ''States should be setting the standards for site assessment, not the Federal EPA, especially when the Agency is using the auditing style of a for-profit organization.''

The Ohio Department of Transportation (ODOT) commented that Ohio did not adopt the ASTM Phase I site assessment standards because it is designed for private commercial/industrial transactions and does not address ODOT's needs.

Section 101(35)(B)(iv)(II) of CERCLA provides that until EPA promulgates the regulations under (B)(ii), ''the procedures of the American Society for Testing and Materials * * * shall satisfy the requirements in clause (i).'' Thus, the decision to accept ASTM procedures was made by Congress, and not by EPA. The narrow purpose of today's rule is to recognize that there is a more recent ASTM standard than the one mentioned in the statute. In addition, EPA is developing a regulation pursuant to section 101(35)(B) that will establish new Federal standards for conducting all appropriate inquiry for the purposes of establishing liability and conducting property assessments with brownfields grants. States also are free to promulgate any standards they feel are appropriate for use in their State programs. To the extent any State has regulations establishing standards for all appropriate inquiry, EPA may consider the merits of such standards during the development of the Federal standard.

Another commenter, INTERTOX, stated that the ASTM standard ''inadequately accounts for regional differences in the availability of historical documents for the characterization of past uses of a site.'' The commenter also stated that all appropriate inquiry ''should vary according to the geographic location of the site under investigation.''

As stated in the proposed rule, the interim ASTM standard, as provided by Congress in the Brownfields Law, will be effective only until EPA promulgates regulations setting a federal standard for all appropriate inquiry. The issue of ''historical sources'' will be addressed in the subsequent rule, consistent with the statutory criteria for those standards and practices. While developing the ''all appropriate inquiry'' standards, EPA intends to consider multiple sources of information regarding technical standards and ''historical sources'' of site use.

Phase Engineering, Inc. submitted a comment pointing out that EPA incorrectly cited the most recent version of the ASTM Phase I site assessment standards as ''ASTM E1527–2000.'' The commenter pointed out that the correct nomenclature is ''ASTM E1527–00.'' Today's final rule includes the correct nomenclature.

VI. Administrative Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and is therefore not subject to review by the Office of Management and Budget.

This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 FR U.S.C. 3501 *et seq.*).

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the APA or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This action will not have a significant impact on a substantial number of small entities because it does not create any new requirements.

Because the purpose of today's action is to make a clarification that does not create any new requirements it has no economic impact and is not subject to sections 202 and 205 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4). In addition, this action does not significantly or uniquely affect small governments or impose a significant intergovernmental mandate, as described in sections 203 and 204 of UMRA.

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). In addition, this rule also does not have tribal implications, as specified by Executive Order 13175 (65 FR 67249, November 6, 2000).

This rule also is not subject to Executive Order 13045 (62 FR 1985, April 23, 1997), because it is not economically significant.

This rule is not subject to Executive Order 13211, ''Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

This action does involve technical standards. Therefore, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272) apply. The NTTAA was signed into law on March 7, 1996, and, among other things, directs the National Institute of Standards and Technology (NIST) to bring together Federal agencies as well as state and local governments to achieve greater reliance on voluntary standards and decreased dependence on in-house standards. It states that use of such standards, whenever practicable and appropriate, is intended to achieve the following goals: (a) Eliminate the cost to the government of developing its own standards and decrease the cost of goods procured and the burden of complying with agency regulation; (b) provide incentives and opportunities to establish standards that serve national needs; (c) encourage long-term growth for U.S. enterprises and promote efficiency and economic competition through harmonization of standards; and (d) further the policy of reliance upon the private sector to supply government needs for goods and services. The Act requires that Federal agencies adopt private sector standards, particularly those developed by standards developing organizations (SDOs), wherever possible in lieu of creating proprietary, non-consensus standards. Today's action is compliant with the spirit and requirements of the NTTAA, given that the interim standard for all appropriate inquiry that is the subject of today's action is a private sector standard developed by a standard developing organization. Today's action

allows for the use of the American Society for Testing and Materials (ASTM) standard known as Standard E1527–00 and entitled ''Standard Practice for Environmental Site Assessment: Phase 1 Environmental Site Assessment Process'' as the interim standard for conducting all appropriate inquiry for properties purchased on or after May 31, 1997, or in the alternative, the use of Standard E1527–97, and entitled ''Standard Practice for Environmental Site Assessment: Phase 1 Environmental Site Assessment Process.''

Today's action does not involve special consideration of environmental justice related issues as required by Executive Order 12898 (59 FR 7629, February 16, 1994).

The Congressional Review Act (5 U.S.C. 801 *et seq.*), as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register.** A major rule cannot take effect until 60 days after it is published in the **Federal Register.** This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective June 9, 2003.

List of Subjects in 40 CFR Part 312

Environmental protection, Administrative practice and procedure, Hazardous substances, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: May 2, 2003.

Christine Todd Whitman,

Administrator.

■ For the reasons set out in the preamble, title 40, chapter I of the code of Federal Regulations is amended as follows:

■ 1. Subchapter J is amended by adding new part 312 to read as follows:

PART 312—INNOCENT LANDOWNERS, STANDARDS FOR CONDUCTING ALL APPROPRIATE INQUIRY

Subpart A—Introduction

Sec.

Subpart B—[Reserved]

Authority: Section 101(35)(B) of CERCLA, as amended, 42 U.S.C. 9601(35)(B).

Subpart A—Introduction

§ 312.1 Purpose and applicability.

(a) *Purpose.* The purpose of this section is to provide standards and procedures for ''all appropriate inquiry'' for the purposes of CERCLA Section 103(35)(B).

(b) *Applicability.* This section is applicable to: potential innocent landowners conducting all appropriate inquiry under Section 101(35)(B) of CERCLA; *bona fide* prospective purchasers defined under Section 101(40) of CERCLA; contiguous property owners under Section 107(q) of CERCLA; and persons conducting site characterization and assessments with the use of a grant awarded under CERCLA Section 104(k)(2)(B).

§ 312.2 Standards and practices for all appropriate inquiry.

With respect to property purchases on or after May 31, 1997, the procedures of the American Society for Testing and Materials (ASTM) 1527–97 and the procedures of the American Society for Testing and Materials (ASTM) 1527–00, both entitled ''Standard Practice for Environmental Site Assessment: Phase 1 Environmental Site Assessment Process,'' shall satisfy the requirements for conducting ''all appropriate inquiry'' under Section 101(35)(B)(i)(I) of CERCLA, as amended by the Small Business Liability Relief and Brownfields Revitalization Act.

[FR Doc. 03–11473 Filed 5–8–03; 8:45 am]

BILLING CODE 6560–50–M

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 209

[Docket No. FRA 1999–6086]

RIN 2130–AB15

Final Policy Statement Concerning Small Entities Subject to the Railroad Safety Laws

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Final rule; final statement of agency policy.

SUMMARY: On August 11, 1997, in compliance with the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), FRA issued an Interim Policy Statement Concerning Small Entities Subject to the Railroad Safety Laws. This document discusses comments received in response to the Interim Policy Statement and adopts the Interim Policy Statement as the Final Policy Statement Concerning Small Entities Subject to the Railroad Safety Laws, with minor edits required to update the language. The Final Policy Statement contains FRA's communication and enforcement policy statements concerning small entities subject to the railroad safety laws. FRA has in place programs that devote special attention to the unique concerns and operations of small entities in the administration of the national railroad safety compliance and enforcement program.

DATES: This policy statement is effective May 9, 2003.

FOR FURTHER INFORMATION CONTACT: (1) *Principal Program Person:* Jeffrey Horn, Office of Safety Planning and Evaluation, Federal Railroad Administration, 1120 Vermont Ave. NW., Mail Stop 25, Washington, DC 20590 (tel: (202) 493–6283) (2) *Principal Attorney:* Melissa Porter, Office of Chief Counsel, Federal Railroad Administration, 1120 Vermont Ave., NW., Mail Stop 10, Washington, DC 20590 (tel: (202) 493–6034) (3) *Enforcement Issues:* Douglas Taylor, Operating Practices Division, 1120 Vermont Ave., NW., Mail Stop 25, Washington, DC 20590 (tel: (202) 493–6255).

SUPPLEMENTARY INFORMATION:

I. Background

On August 11, 1997, FRA issued an Interim Policy Statement Concerning Small Entities Subject to the Railroad Safety Laws (62 FR 43024, August 11, 1997) (Interim Policy Statement) in compliance with the requirements of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121) (SBREFA). SBREFA establishes requirements for federal agencies to follow with respect to small businesses, creates duties for the Small Business Administration (SBA), and amends portions of the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*) and the Equal Access to Justice Act (EAJA) (5 U.S.C. 501, *et seq.*). The primary purposes of SBREFA are to implement recommendations developed at the 1995 White House Conference on Small Business, to provide small businesses enhanced opportunities for judicial review of final agency action, to encourage small business participation in the regulatory process, to develop accessible sources of information on

U.S. Environmental Protection Agency

"COMMON ELEMENTS" GUIDANCE

REFERENCE SHEET

INTRODUCTION

This reference sheet highlights the main points made in EPA's March 6, 2003 guidance entitled *"Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for the Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability "Common Elements")*, available at:
http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf

The "Common Elements" are the statutory threshold criteria and ongoing obligations landowners must meet to qualify as a:

- bona fide prospective purchaser,
- contiguous property owner, or
- innocent landowner.

The 2002 Brownfields Amendments to the Superfund law provide conditional CERCLA liability protection to landowners who qualify as bona fide prospective purchasers, contiguous property owners or innocent landowners. For purposes of EPA's "Common Elements" Guidance and this reference sheet, "innocent landowner" refers only to unknowing purchasers as defined in CERCLA § 101(35)(A)(i).

Who are Bona Fide Prospective Purchasers (BFPPs)?

- Persons who meet the CERCLA § 101(40) criteria and the CERCLA § 107(r) criteria.
- Purchasers who buy property after January 11, 2002.
- BFPPs must perform all appropriate inquiry prior to purchase and may buy *knowing, or having reason to know*, of contamination on the property.

Who are Contiguous Property Owners (CPOs)?

- Persons who meet the CERCLA § 107(q)(1)(A) criteria.
- Owners of property that is *not* the source of the contamination. Such property is "contiguous" to, or otherwise similarly situated to, a facility that is the source of contamination found on their property.
- CPOs must perform all appropriate inquiry prior to purchase and buy *without*

knowing, or having reason to know, of contamination on the property.

Who are Innocent Landowners (ILOs)?

- Persons who meet the CERCLA § 107(b)(3) criteria (including due care) and the CERCLA § 101(35) criteria.
- ILO's must perform all appropriate inquiry prior to purchase and must buy *without knowing, or having reason to know*, of contamination on the property.

THE COMMON ELEMENTS

A person asserting BFPP, CPO or ILO status has to prove that it meets the applicable criteria.

Common Elements of the Brownfields Amendments Landowner Provisions

Threshold Criteria:
< all appropriate inquiry
< no affiliation with a liable party

Continuing Obligations:
< compliance with land use restrictions and institutional controls
< taking reasonable steps with respect to hazardous substances on property
< cooperation, assistance and access
< compliance with information requests and administrative subpoenas
< providing legally required notices

THRESHOLD CRITERIA

To qualify as a BFPP, CPO, or ILO, a person must perform "all appropriate inquiry" before buying the property.

BFPPs and CPOs must *also* demonstrate that they are not potentially liable nor "affiliated" with any other person who is potentially liable for response costs at the property.

All Appropriate Inquiry

BFPPs, CPOs, and ILOs must perform "all appropriate inquiry" into the previous ownership and uses of property before buying the property.

BFPPs may buy property with knowledge of contamination and maintain their protection from liability. The CPO and ILO liability protections, in contrast, do *not* apply if the purchaser knew, or had reason to know, of contamination prior to purchase.

EPA will publish regulations and guidance on the all appropriate inquiry standard in the future. For property purchased before May 1997, statutory factors are to be applied. CERCLA § 101(35)(B)(iv)(I). For property purchased after May 1997 and until EPA promulgates a regulation establishing the all appropriate inquiry standard, an ASTM Phase I report may satisfy the standard. CERCLA § 101(35)(B)(iv)(II). EPA is to promulgate a regulation establishing the all appropriate inquiry standard by 2004. CERCLA § 101(35)(B)(ii), (iii).

Affiliation
BFPPs or CPOs must not be potentially liable or affiliated with any other person who is potentially liable for the site response costs. "Affiliated with" includes direct and indirect familial relationships and many contractual, corporate, and financial relationships.

ILOs cannot have a contractual relationship with a liable party.

CONTINUING OBLIGATIONS CRITERIA

To maintain liability protection, landowners must meet the following continuing obligations during their property ownership.

Compliance with Land Use Restrictions and Institutional Controls
BFPPs, CPOs and ILO's must:

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

EPA believes the Brownfields Amendments require BFPPs, CPOs and ILOs to:

- comply with land use restrictions and implement institutional controls even if the restrictions/controls were not in place at the time of purchase; and
- comply with land use restrictions relied on in connection with the response action even if restrictions haven't been implemented through an enforceable institutional control.

Reasonable Steps
BFPPs, CPOs and ILO's are required to take reasonable steps to:

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

The reasonable steps requirement balances Congress' objectives of protecting certain landowners from CERCLA liability, and protecting human health and the environment.

As a general matter, EPA does not believe Congress intended BFPPs, CPOs and ILOs to have the same types of response obligations that CERCLA liable parties have (e.g., removal of contaminated soil, extraction and treatment of contaminated groundwater). The required reasonable steps relate only to responding to contamination for which the BFPP, CPO, or ILO is

not responsible. Activities on the property after purchase resulting in *new contamination* can give rise to full CERCLA liability. *See* Attachment B to EPA's guidance for more on reasonable steps in a "question and answer" format.

EPA may provide a comfort/status letter suggesting reasonable steps at a specific site. EPA intends to limit these letters to sites where EPA has sufficient information to form a basis for suggesting reasonable steps (e.g., the site is on the National Priorities List or EPA has conducted or is conducting a removal action on the site). Providing such a letter is a matter of Regional discretion. *See* Attachment C to EPA's guidance for a sample "reasonable steps" comfort/status letter.

Cooperation, Assistance, and Access

BFPPs, CPOs and ILOs must provide full cooperation, assistance, and access to persons authorized to conduct response actions or natural resource restoration, including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action or natural resource restoration.

Compliance with Information Requests and Administrative Subpoenas

BFPPs and CPOs must comply with CERCLA information requests and administrative subpoenas.

Provision of Legally Required Notices

BFPPs and CPOs must provide legally required notices related to the discovery or release of hazardous substances at the facility.

"Legally required notices" may include those required under federal, state, and local laws. Examples of federal notice requirements include: CERCLA § 103 (notification requirements regarding released substances); EPCRA § 304 ("emergency notification"); and RCRA § 9002 (underground storage tanks notification provisions).

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

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

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

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

QUESTIONS

Questions regarding this reference sheet or EPA's Common Elements Guidance should be directed to Cate Tierney in OSRE's Regional Support Division (202-564-4254, Tierney.Cate@EPA.gov), Greg Madden in OSRE's Policy & Program Evaluation Division (202-564-4229, Madden.Gregory@EPA.gov) or to the Landowner Liability Protection Subgroup contacts listed by Region below.

Landowner Liability Protection Subgroup Regional Contacts

Region 1:	Joanna Jerison	617-918-1781
Region 2:	Michael Mintzer	212-637-3168
	Paul Simon	212-637-3152
Region 3:	Joe Donovan	215-814-2483
	Leo Mullin	215-814-3172
	Heather Gray Torres	215-814-2696
Region 4:	Kathleen Wright	404-562-9574
Region 5:	Peter Felitti	312-886-5114
	Thomas Krueger	312-886-0562
	Larry Kyte	312-886-4245
Region 6:	Mark Peycke	214-665-2135
Region 7:	Denise Roberts	913-551-7559
Region 8:	Suzanne Bohan	303-312-6925
	Matthew Cohn	303-312-6853
	Nancy Mangone	303-312-6903
Region 9:	Bill Keener	415-972-3940
Region 10:	Cyndy Mackey	206-553-2569

This reference sheet is intended for employees of EPA and the Department of Justice and it creates no substantive rights for any persons. It is not a regulation and does not impose legal obligations. This reference sheet provides some highlights of EPA's "Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for the Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability" ("Common Elements"). It is not intended as a substitute for reading the statute or the guidance itself.

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

MAR - 6 2003

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

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

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

TO: Director, Office of Site Remediation and Restoration, Region I
Director, Emergency and Remedial Response Division, Region II
Director, Hazardous Site Cleanup Division, Region III
Director, Waste Management Division, Region IV
Directors, Superfund Division, Regions V, VI, VII and IX
Assistant Regional Administrator, Office of Ecosystems Protection and Remediation, Region VIII
Director, Office of Environmental Cleanup, Region X
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

I. Introduction

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

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

- compliance with land use restrictions and not impeding the effectiveness or integrity of institutional controls;
- taking "reasonable steps" with respect to hazardous substances affecting a landowner's property;
- providing cooperation, assistance and access;
- complying with information requests and administrative subpoenas; and
- providing legally required notices.

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

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

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

II. Background

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

The new contiguous property owner provision, CERCLA § 107(q), excludes from the definition of "owner" or "operator" a person who owns property that is "contiguous" or otherwise similarly situated to, a facility that is the only source of contamination found on his property. To qualify as a contiguous property owner, a landowner must meet the criteria set forth in CERCLA § 107(q)(1)(A), many of which are common elements. This landowner provision "protects parties that are essentially victims of pollution incidents caused by their neighbor's actions." S. Rep. No. 107-2, at 10 (2001). Contiguous property owners must perform all appropriate inquiry prior to purchasing property. Persons who know, or have reason to know, prior to purchase, that the property is or could be contaminated, cannot qualify for the contiguous property owner liability protection.[3]

The Brownfields Amendments also clarified the CERCLA § 107(b)(3) innocent landowner affirmative defense. To qualify as an innocent landowner, a person must meet the criteria set forth in section 107(b)(3) and section 101(35). Many of the criteria in section 101(35) are common elements. CERCLA § 101(35)(A) distinguishes between three types of innocent landowners. Section 101(35)(A)(i) recognizes purchasers who acquire property without knowledge of the contamination. Section 101(35)(A)(ii) discusses governments acquiring contaminated property by escheat, other involuntary transfers or acquisitions, or the exercise of eminent domain authority by purchase or condemnation. Section 101(35)(A)(iii) covers inheritors of contaminated property. For purposes of this guidance, the term "innocent landowner" refers only to the unknowing purchasers as defined in section 101(35)(A)(i). Like

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

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

contiguous property owners, persons desiring to qualify as innocent landowners must perform all appropriate inquiry prior to purchase and cannot know, or have reason to know, of contamination in order to have a viable defense as an innocent landowner.

III. Discussion

A party claiming to be a bona fide prospective purchaser, contiguous property owner, or section 101(35)(A)(i) innocent landowner bears the burden of proving that it meets the conditions of the applicable landowner liability protection.[4] Ultimately, courts will determine whether landowners in specific cases have met the conditions of the landowner liability protections and may provide interpretations of the statutory conditions. EPA offers some general guidance below regarding the common elements. This guidance is intended to be used by Agency personnel in exercising enforcement discretion. Evaluating whether a party meets these conditions will require careful, fact-specific analysis.

A. Threshold Criteria

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

1. *All Appropriate Inquiry*

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

The Brownfields Amendments specify the all appropriate inquiry standard to be applied. The Brownfields Amendments state that purchasers of property before May 31, 1997 shall take into account such things as commonly known information about the property, the value of the property if clean, the ability of the defendant to detect contamination, and other similar criteria. CERCLA § 101(35)(B)(iv)(I). For property purchased on or after May 31, 1997, the procedures

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

of the American Society for Testing and Materials ("ASTM"), including the document known as Standard E1527 - 97, entitled "Standard Practice for Environmental Site Assessments: Phase 1 Environmental Site Assessment Process," are to be used. CERCLA § 101(35)(B)(iv)(II). The Brownfields Amendments require EPA, not later than January 2004, to promulgate a regulation containing standards and practices for all appropriate inquiry and set out criteria that must be addressed in EPA's regulation. CERCLA § 101(35)(B)(ii), (iii). The all appropriate inquiry standard will thus be the subject of future EPA regulation and guidance.

2. *Affiliation*

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

The innocent landowner provision does not contain this "affiliation" language. In order

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[5] The bona fide prospective purchaser provision provides, in pertinent part:

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

The contiguous property owner provision provides, in pertinent part:

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

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

B. Continuing Obligations

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

1. *Land Use Restrictions and Institutional Controls*

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

- the person is in compliance with any land use restrictions established or relied on in connection with the response action and

- the person does not impede the effectiveness or integrity of any institutional control employed in connection with a response action.

CERCLA §§ 101(40)(F), 107(q)(1)(A)(V), 101(35)(A). Initially, there are two important points worth noting about these provisions. First, because institutional controls are often used to implement land use restrictions, failing to comply with a land use restriction may also impede the effectiveness or integrity of an institutional control, and vice versa. As explained below, however, these two provisions do set forth distinct requirements. Second, these are ongoing obligations and, therefore, EPA believes the statute requires bona fide prospective purchasers, contiguous property owners, and innocent landowners to comply with land use restrictions and to implement institutional controls even if the restrictions or institutional controls were not in place at the time the person purchased the property.

Institutional controls are administrative and legal controls that minimize the potential for human exposure to contamination and protect the integrity of remedies by limiting land or

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

Generally, EPA places institutional controls into four categories:

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

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

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

An institutional control may not serve the purpose of implementing a land use restriction for a variety of reasons, including: (1) the institutional control is never, or has yet to be, implemented; (2) the property owner or other persons using the property impede the effectiveness of the institutional controls in some way and the party responsible for enforcement of the institutional controls neglects to take sufficient measures to bring those persons into compliance; or (3) a court finds the controls to be unenforceable. For example, a chosen remedy might rely on an ordinance that prevents groundwater from being used as drinking water. If the local government failed to enact the ordinance, later changed the ordinance to allow for drinking

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

water use, or failed to enforce the ordinance, a landowner is still required to comply with the groundwater use restriction identified as part of the remedy to maintain its landowner liability protection. Unless authorized by the regulatory agency responsible for overseeing the remedy, if the landowner fails to comply with a land use restriction relied on in connection with a response action, the owner will forfeit the liability protection and EPA may use its CERCLA authorities to order the owner to remedy the violation, or EPA may remedy the violation itself and seek cost recovery from the noncompliant landowner.

In order to meet the statutory criteria of a bona fide prospective purchaser, contiguous property owner, or innocent landowner, a party may not impede the effectiveness or integrity of any institutional control employed in connection with a response action. See CERCLA §§ 101(40)(F)(ii), 107(q)(1)(A)(v)(II), 101(35)(A)(iii). Impeding the effectiveness or integrity of an institutional control does not require a physical disturbance or disruption of the land. A landowner could jeopardize the reliability of an institutional control through actions short of violating restrictions on land use. In fact, not all institutional controls actually restrict the use of land. For example, EPA and State programs often use notices to convey information regarding contamination on site rather than actually restricting the use. To do this, EPA or a State may require a notice to be placed in the land records. If a landowner removed the notice, the removal would impede the effectiveness of the institutional control. A similar requirement is for a landowner to give notice of any institutional controls on the property to a purchaser of the property. Failure to give this notice may impede the effectiveness of the control. Another example of impeding the effectiveness of an institutional control would be if a landowner applies for a zoning change or variance when the current designated use of the property was intended to act as an institutional control. Finally, EPA might also consider a landowner's refusal to assist in the implementation of an institutional control employed in connection with the response action, such as not recording a deed notice or not agreeing to an easement or covenant, to constitute a violation of the requirement not to impede the effectiveness or integrity of an institutional control.[7]

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

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

2. *Reasonable Steps*

a. Overview

Congress, in enacting the landowner liability protections, included the condition that bona fide prospective purchasers, contiguous property owners, and innocent landowners take "reasonable steps" with respect to hazardous substance releases to do all of the following:

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

CERCLA §§ 101(40)(D), 107(q)(1)(A)(iii), 101(35)(B)(i)(II).[8] Congress included this condition as an incentive for certain owners of contaminated properties to avoid CERCLA liability by, among other things, acting responsibly where hazardous substances are present on their property. In adding this new requirement, Congress adopted an approach that is consonant with traditional common law principles and the existing CERCLA "due care" requirement.[9]

By making the landowner liability protections subject to the obligation to take "reasonable steps," EPA believes Congress intended to balance the desire to protect certain landowners from CERCLA liability with the need to ensure the protection of human health and the environment. In requiring reasonable steps from parties qualifying for landowner liability protections, EPA believes Congress did not intend to create, as a general matter, the same types of response obligations that exist for a CERCLA liable party (e.g., removal of contaminated soil,

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

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

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

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

extraction and treatment of contaminated groundwater).[10] Indeed, the contiguous property owner provision's legislative history states that absent "exceptional circumstances . . . , these persons are not expected to conduct ground water investigations or install remediation systems, or undertake other response actions that would be more properly paid for by the responsible parties who caused the contamination." S. Rep. No. 107-2, at 11 (2001). In addition, the Brownfields Amendments provide that contiguous property owners are generally not required to conduct groundwater investigations or to install ground water remediation systems. CERCLA § 107(q)(1)(D).[11] Nevertheless, it seems clear that Congress also did not intend to allow a landowner to ignore the potential dangers associated with hazardous substances on its property.

Although the reasonable steps legal standard is the same for the three landowner provisions, the obligations may differ to some extent because of other differences among the three statutory provisions. For example, as noted earlier, one of the conditions is that a person claiming the status of a bona fide prospective purchaser, contiguous property owner, or innocent landowner must have "carried out all appropriate inquiries" into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices. CERCLA §§ 101(40)(B), 107(q)(1)(A)(viii), 101(35)(B). However, for a contiguous property owner or innocent landowner, knowledge of contamination defeats eligibility for the liability protection. A bona fide prospective purchaser may purchase with knowledge of the contamination and still be eligible for the liability protection. Thus, only the bona fide prospective purchaser could purchase a contaminated property that is, for example, on CERCLA's National Priorities List[12] or is undergoing active cleanup under an EPA or State

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

[11] CERCLA § 107(q)(1)(D) provides:

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

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

cleanup program, and still maintain his liability protection.

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

The required reasonable steps relate only to responding to contamination for which the bona fide prospective purchaser, contiguous property owner, or innocent landowner is not responsible. Activities on the property subsequent to purchase that result in new contamination can give rise to full CERCLA liability. That is, more than reasonable steps will likely be required from the landowner if there is new hazardous substance contamination on the landowner's property for which the landowner is liable. See, e.g., CERCLA § 101(40)(A) (requiring a bona fide prospective purchaser to show "[a]ll disposal of hazardous substances at the facility occurred before the person acquired the facility").

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

The reasonable steps determination will be a site-specific, fact-based inquiry. That

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

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

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

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

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

3. *Cooperation, Assistance, and Access*

The Brownfields Amendments require that bona fide prospective purchasers, contiguous property owners, and innocent landowners provide full cooperation, assistance, and access to persons who are authorized to conduct response actions or natural resource restoration at the vessel or facility from which there has been a release or threatened release, including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action or natural resource restoration at the vessel or facility. CERCLA §§ 101(40)(E), 107(q)(1)(A)(iv), 101(35)(A).

4. *Compliance with Information Requests and Administrative Subpoenas*

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

5. *Providing Legally Required Notices*

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

"Legally required notices" may include those required under federal, state, and local laws. Examples of federal notices that may be required include, but are not limited to, those under: CERCLA § 103 (notification requirements regarding released substances); EPCRA § 304 ("emergency notification"); and RCRA § 9002 (notification provisions for underground storage tanks). The bona fide prospective purchaser and contiguous property owner have the burden of ascertaining what notices are legally required in a given instance and of complying with those notice requirements. Regions may require these landowners to self-certify that they *have provided* (in the case of contiguous property owners), or *will provide* within a certain number of days of purchasing the property (in the case of bona fide prospective purchasers), all legally required notices. Such self-certifications may be in the form of a letter signed by the landowner as long as the letter is sufficient to satisfy EPA that applicable notice requirements have been met. Like many of the other common elements discussed in this memorandum, providing legally required notices is an ongoing obligation of any landowner desiring to maintain its status as a bona fide prospective purchaser or contiguous property owner.

IV. Conclusion

Evaluating whether a landowner has met the criteria of a particular landowner provision will require careful, fact-specific analysis by the regions as part of their exercise of enforcement discretion. This memorandum is intended to provide EPA personnel with some general guidance on the common elements of the landowner liability protections. As EPA implements the Brownfields Amendments, it will be critical for the regions to share site-specific experiences and

information pertaining to the common elements amongst each other and with the Office of Site Remediation Enforcement, in order to ensure national consistency in the exercise of the Agency's enforcement discretion. EPA anticipates that its Landowner Liability Protection Subgroup, which is comprised of members from various headquarters offices, the Offices of Regional Counsel, the Office of General Counsel, and the Department of Justice, will remain intact for the foreseeable future and will be available to serve as a clearinghouse for information for the regions on the common elements.

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

V. Disclaimer

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

Attachments

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Attachment A

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

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

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

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

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

Attachment B

Reasonable Steps Questions and Answers

The "reasonable steps" required of a bona fide prospective purchaser, contiguous property owner, or section 101(35)(A)(i) innocent landowner under CERCLA §§ 101(40)(D), 107(q)(1)(A)(iii), and 101(35)(B)(i)(II), will be a site-specific, fact-based inquiry. Although each site will have its own unique aspects involving individual site analysis, below are some questions and answers intended to provide general guidance on the question of what actions may constitute reasonable steps. The answers provide a specific response to the question posed, without identifying additional actions that might be necessary as reasonable steps or actions that may be required under the other statutory conditions for each landowner provision (e.g., providing cooperation and access). In addition, the answers do not address actions that may be required under other federal statutes (e.g., the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq*.; the Clean Water Act, 33 U.S.C. § 1251, *et seq.*; and the Toxic Substances Control Act, 15 U.S.C. § 2601, *et seq*.), and do not address landowner obligations under state statutory or common law.[14]

Notification

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

A1: Yes. First, bona fide prospective purchasers may have an obligation to provide notice of the discovery or release of a hazardous substance under the legally required notice provision, CERCLA § 101(40)(C). Second, even if not squarely required by the notice conditions, providing notice of the contamination to appropriate governmental authorities would be a reasonable step in order to prevent a "threatened future release" and "prevent or limit . . . exposure." Congress specifically identified "notifying appropriate Federal, state, and local officials" as a typical reasonable step. S. Rep. No.107-2, at 11 (2001); see also, Bob's Beverage Inc. v. Acme, Inc., 169 F. Supp. 2d 695, 716 (N.D. Ohio 1999) (failure to timely notify EPA and Ohio EPA of groundwater contamination was factor in conclusion that party failed to exercise due care), *aff'd*, 264 F. 3d 692 (6th Cir. 2001). It should be noted that the bona fide prospective purchaser provision is the only one of the three landowner provisions where a person can purchase property with knowledge that it is contaminated and still qualify for the landowner liability protection.

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

Site Restrictions

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

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

Containing Releases or Threatened Releases

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

A3: Yes, segregation and identification of potential hazards would likely be appropriate first steps. Reasonable steps must be taken to "prevent any threatened future release." CERCLA §§ 101(40)(D)(ii), 107(q)(1)(A)(iii)(II), 101(35)(B)(i)(II)(bb). To the extent the drums have the potential to leak, segregation and containment (e.g., drum overpack) would prevent mishandling and releases to the environment. For storage and handling purposes, an identification of the potential hazards from the material will likely be necessary. Additional identification steps would likely be necessary for subsequent disposal or resale if the material had commercial value.

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

A4: One of the reasonable steps obligations is to "stop any continuing release." CERCLA §§ 101(40)(D)(i), 107(q)(1)(A)(iii)(I), 101(35)(B)(i)(II)(aa). In general, the property owner should take actions to prevent contaminant migration where there is a breach from an existing containment system. Both Congress and the courts have identified maintenance of hazardous substance migration controls as relevant property owner obligations. For example, in discussing contiguous property owners' obligations for migrating groundwater plumes, Congress identified "maintaining any existing barrier or other elements of a response action on their property that

address the contaminated plume" as a typical reasonable step. S. Rep. No. 107-2, at 11 (2001); see also, Franklin County Convention Facilities Auth. v. American Premier Underwriters, Inc., 240 F.3d 534, 548 (6th Cir. 2001) (failure to promptly erect barrier that allowed migration was not due care); United States v. DiBiase Salem Realty Trust, No. Civ. A. 91-11028-MA, 1993 WL 729662, *7 (D. Mass. Nov. 19, 1993) (failure to reinforce waste pit berms was factor in concluding no due care), *aff'd*, 45 F.3d 541, 545 (1st Cir. 1995). In many instances, the current property owner will have responsibility for maintenance of the containment system. If the property owner has responsibility for maintenance of the system as part of her property purchase, then she should repair the breach. In other instances, someone other than the current landowner may have assumed that responsibility (e.g., a prior owner or other liable parties that signed a consent decree with EPA and/or a State). If someone other than the property owner has responsibility for maintenance of the containment system pursuant to a contract or other agreement, then the question is more complicated. At a minimum, the current owner should give notice to the person responsible for the containment system and to the government. Moreover, additional actions to prevent contaminant migration would likely be appropriate.

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

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

Remediation

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

A6: Generally not. Absent exceptional circumstances, EPA will not look to a landowner whose property is not a source of a release to conduct groundwater investigations or install groundwater remediation systems. Since 1995, EPA's policy has been that, in the absence of exceptional circumstances, such a property owner did not have "to take any affirmative steps to investigate or prevent the activities that gave rise to the original release" in order to satisfy the innocent landowner due care requirement. See May 24, 1995 "Policy Toward Owners of Property Containing Contaminated Aquifers." ("1995 Contaminated Aquifers Policy"). In the Brownfields Amendments, Congress explicitly identified this policy in noting that reasonable

steps for a contiguous property owner "shall not require the person to conduct groundwater investigations or to install groundwater remediation systems," except in accordance with that policy. See CERCLA § 107(q)(1)(D). The policy does not apply "where the property contains a groundwater well, the existence or operation of which may affect the migration of contamination in the affected area." 1995 Contaminated Aquifers Policy, at 5. In such instances, a site-specific analysis should be used in order to determine reasonable steps. In some instances, reasonable steps may simply mean operation of the groundwater well consistent with the selected remedy. In other instances, more could be required.

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

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

Site Investigation

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

A8: Generally, where the property owner is the first to discover the contamination, she should

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

Performance of EPA Approved Remedy

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

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

Attachment C

Sample Federal Superfund Interest Reasonable Steps Letter

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

[Insert Addressee]

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

Dear **[insert name of requester]:**

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

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

As noted above, EPA has conducted a **[insert most recent/relevant action to "reasonable steps" inquiry taken by EPA]** at **[insert property name]** and has identified a

number of environmental concerns. Based on the information EPA has evaluated to date, EPA believes that, for an owner of the property, the following would be appropriate reasonable steps with respect to the hazardous substance contamination found at the property:

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

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

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

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

Sincerely,

[insert name of EPA contact]

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

March 6, 2003 **OSWER Directive 9230.0-107**

MEMORANDUM

SUBJECT: Regional Determinations Regarding Which Sites are Not "Eligible Response Sites" under CERCLA Section 101(41)(C)(i), as Added By the Small Business Liability Relief and Brownfields Revitalization Act

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

Mike Cook, Director
Office of Emergency and Remedial Response

Linda Garczynski, Director
Office of Brownfields Cleanup and Redevelopment

TO: Director, Office of Site Remediation and Restoration, Region I
Director, Emergency and Remedial Response Division, Region II
Director, Hazardous Site Cleanup Division, Region III
Director, Waste Management Division, Region IV
Directors, Superfund Division, Regions V, VI, VII and IX
Assistant Regional Administrator, Office of Ecosystems Protection and Remediation, Region VIII
Director, Office of Environmental Cleanup, Region X
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

I. Introduction

The *Small Business Liability Relief and Brownfields Revitalization Act*, Public Law No. 107-118, amends the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675. The amendments to CERCLA include a new definition of "eligible response site" in section 101(41). This memorandum provides guidance to the Regions

on implementing authorities to determine whether a site should be excluded from being an "eligible response site" under section 101(41)(C)(i).

This memorandum is divided into four parts. Part II provides background on the definition of an eligible response site, the determinations the Regions will make in respect to this definition, and the implications of those determinations. Part III of this memorandum provides guidance to the Regions for making these determinations in conjunction with future site assessment decisions (see also the flowchart provided in Attachment A). Part IV of this memorandum provides guidance to the Regions on making a single determination for sites with past site assessment decisions.

This policy and any internal procedures adopted for its implementation are intended exclusively as guidance for employees of the U.S. Government. This policy is not a rule and does not create any legal obligations. Whether and how the United States applies the policy to any particular site will depend on the facts at that site.

II. Background

The term eligible response site is defined in CERCLA section 101(41). Generally, section 101(41)(A) defines an eligible response site as a site that meets the definition of a "brownfield site" in section 101(39).[1] Section 101(41)(B) includes certain sites otherwise excluded from the definition and authorizes EPA to include certain additional sites as eligible response sites based on site-specific statutory criteria. Section 101(41)(C), *the focus of this guidance*, authorizes EPA to exclude certain sites from the definition of an eligible response site.

Under section 101(41)(C)(i), eligible response sites do not include sites at which EPA "conducts or has conducted a preliminary assessment (PA) or site inspection (SI) and, after consultation with the State, determines or has determined that the site obtains a preliminary score sufficient for possible listing on the National Priorities List or otherwise qualifies for listing on the National Priorities List." Section 101(41)(C)(i) also provides that a site excluded under this provision may become an eligible response site again if EPA determines no "further federal action will be taken."[2]

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[1] The definition of a "brownfield site" contains a number of exclusions that should be reviewed to determine if a site in question meets the base definition of an eligible response site. *See* CERCLA, 42 U.S.C. § 9601(39)(A).

[2] EPA expects that the President will delegate the authority to make determinations under section 101(41)(C) to the Administrator of U.S. EPA through forthcoming changes to Executive Order 12580. We anticipate that the Administrator will redelegate, through EPA Delegation 14-17, the authorities in section 101(41)(C)(i) to the Regional Administrators with the authority to

The definition of eligible response site affects sections 105(h) and 128(b). Section 105(h) outlines circumstances when EPA should conditionally defer an eligible response site from final listing on the National Priorities List (NPL).[3] Generally, section 128(b) limits EPA's authority at eligible response sites to take enforcement or cost recovery actions against persons who are conducting or have conducted a response action in compliance with a State program that governs response actions for protection of public health and the environment. If the Region excludes a site from being an eligible response site, that site will not be subject to the deferral provisions in section 105(h) and the limitations on EPA's enforcement and cost recovery authorities under section 128(b) will not apply at that site.[4]

III. Making Determinations under Section 101(41)(C)(i)

Section 101(41)(C)(i) provides authority to make two determinations affecting a site's eligible response site status. First, a determination after a PA or an SI that a site obtains a preliminary score sufficient for possible listing or otherwise qualifies for listing operates to exclude a site from the definition of eligible response site. Second, the Region may make a determination that "no further federal action will be taken" at a site previously excluded; thus, making that site an eligible response site.

EPA will make these determinations only for sites that are entered in CERCLIS,[5] meaning the site warrants EPA assessment.[6] This part sets forth EPA's general policy regarding when and

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further delegate to the Branch Chief level. This guidance assumes this delegation structure will be made final and we will notify the Regions if this guidance is inconsistent with the final version of Delegation 14-17.

[3] The NPL is "the list compiled by EPA pursuant to CERCLA section 105, of uncontrolled hazardous substance releases in the United States that are priorities for long-term remedial evaluation and response." 40 C.F.R. § 300.5 (2001).

[4] Determinations under section 101(41)(C)(i) to exclude a site from the definition of an eligible response site have no affect on EPA's authority to provide grant or loan funding under sections 104(k) (brownfields funding) and 128(a) (state and tribal response program funding).

[5] "CERCLIS is the abbreviation of the CERCLA Information System, EPA's comprehensive data base and data management system that inventories and tracks releases addressed or needing to be addressed by the Superfund program." 40 C.F.R. § 300.5.

[6] Generally, sites assessed using brownfields grant funds or under Targeted Brownfields Assessment program will not enter the CERCLIS universe.

how in the current assessment process the Regions generally should make these determinations.[7] Additionally, this part addresses the EPA/State consultation requirement under section 101(41)(C)(i).

A. Determinations to Exclude a Site

1. The Decision Point

Typically, Regions should exclude a site from the definition of an eligible response site only after an SI has been conducted,[8] and the site has achieved a preliminary score sufficient for possible listing on the NPL.[9] The nature and quality of the information available after an SI should allow Regions to make these determinations with a high level of confidence. However, since the information available at the time of a PA or SI will vary from site to site, Regions may be able to determine that a site has a preliminary score sufficient for possible listing at an earlier stage in the assessment process. Regions should make the determination of whether a site's preliminary score is sufficient for possible listing at the point in the site assessment process when the information regarding site conditions allows the decision to be made with a high level of confidence. By focusing on the nature and quality of the information as the basis for this decision, EPA hopes to minimize situations where a Region excludes a site but after further assessment determines that the site conditions do not actually warrant a preliminary score sufficient for possible listing. Therefore, in order to make the determination after a PA and before the SI, a Region generally should have enough information to conclude with a high level of confidence that the site has achieved a preliminary score above the current NPL threshold of 28.5. For example, a pre-SI determination generally should be appropriate when monitoring data demonstrate that there is human exposure (*e.g.*, drinking water contaminated by a release at the site, contaminated soils on residential properties, etc.).

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[7] References to the determinations by the "Regions" in this guidance refer to determinations made by the person in any particular Region who has the delegated authority to make determinations under CERCLA section 101(41)(C)(i).

[8] This would include a combined PA/SI or an integrated assessment. Additionally, section 101(41)(C)(i) applies to PAs or SIs conducted by States through agreement with EPA.

[9] Score refers to a numeric calculation made under the Hazard Ranking System (HRS) that will reflect the potential risk associated with a site. 40 C.F.R. pt. 300, Appendix A (2001). Various tools have been developed that will provide an early indicator of whether a site "scores" sufficient for possible NPL listing. Under the current assessment process, "a preliminary score sufficient for possible listing" would be a preliminary score of 28.5 or greater.

Section 101(41)(C)(i) also provides that the term eligible response site does not include sites for which EPA determines that the site "otherwise qualifies for possible listing on the NPL." There are two methods, in addition to qualifying based on an HRS score, by which a site may be added to the NPL. First, a site may be added to the NPL if a State designates it as the State's highest priority. 42 U.S.C. § 9605(a)(8)(B), 40 C.F.R. § 300.425(c)(2). Second, a site may be added to the NPL if the Agency for Toxic Substances and Disease Registry issues a health advisory recommending disassociation of individuals from the release; EPA determines that the release poses a significant threat to public health; and, EPA decides it will be more cost-effective to use its remedial rather than its removal authority. 40 C.F.R. § 300.425(c)(3). Under these circumstances a Region should make a determination to exclude the site from the eligible response site definition.

Regions should review their decision-making procedures for preliminary assessment and site inspection reports. This review should evaluate whether changes are appropriate to ensure timely decision making on sites relative to section 101(41)(C)(i). Regions should also ensure that adequate procedures exist for creating a record for section 101(41)(C)(i) determinations. Delegation 14-17 delegates the authority to make these determinations to the Regional Administrator with authorization to redelegate this authority to the Branch Chief level. The Region should have a clearly identified document that displays this determination that is signed by the regional official delegated the authority to make these determinations. The Regions should modify the appropriate decision documents as needed to include this determination. If a determination to exclude a site from the definition is based on State priority or an ATSDR health advisory (i.e., the site otherwise qualifies for listing) this information should be clearly identified in the determination.

2. Policy for Consultation with States and Indian Tribes

When the Region believes a site has obtained a preliminary score sufficient for possible listing, or otherwise qualifies for the NPL, the statute requires that the Region consult with the State prior to making the determination to exclude the site from the eligible response site definition. The Region should also consult with a Tribe in accordance with this policy when a site is on or near Indian tribal land. Regions should agree with States and Tribes upon a process for notification and consultation for sites that EPA proposes to exclude pursuant to section 101(41)(C)(i), including appropriate time frames for response. In some Regions, States or Tribes perform some or all of EPA's PAs and SIs under a cooperative agreement; thus, the consultation requirement should be easy to satisfy through existing information exchanges. Where EPA conducts the PA or SI, the PA or SI reports supporting a determination should be forwarded to the relevant State and Tribe for review. To avoid any misunderstandings, the Regions, States, and Tribes should document these communications in writing. This might be accomplished through a form letter to accompany each report or by keeping internal records of any communications.

The Regions should ensure that States, Tribes, and the public can easily determine the status of a particular site. Regions can accomplish this goal in several ways. The Regions could compile and update quarterly a publicly available list (preferably online) of sites in each State, indicating those sites that the Region has determined are not eligible response sites, and any sites for which the Region has determined there will be no further federal action. This information might also be conveyed through regional online site descriptions or other online databases and non-electronic sources to make the information available to those without internet access. EPA intends to modify codes in CERCLIS to capture these determinations. The Regions should also consider how they intend to handle site-specific inquiries regarding the status of a site.

B. Determinations that No Further Federal Action will Be Taken

Section 101(41)(C)(i) authorizes EPA to designate a site previously excluded because it had obtained a preliminary score sufficient for possible listing or otherwise qualified for listing, an eligible response site by making a determination that "no further federal action will be taken" (NFFA determination). Depending on site-specific circumstances, the Regions generally should make this determination at one of two points in the current assessment process. First, if a Region determines that No Further Remedial Action is Planned (NFRAP) and the regional removal and legal enforcement programs do not anticipate removal and/or cost recovery actions with respect to the site, then it may be appropriate to make a NFFA determination in conjunction with the NFRAP decision. Second, where the Region makes a NFRAP determination and refers a site for removal assessment a NFFA determination generally should be made when the site is Archived from CERCLIS.[10] Also, if consultations with the removal and legal enforcement programs prior to a NFRAP determination reveal current or potential removal, enforcement, or cost recovery actions, then a NFFA determination generally should be made when the site is Archived from CERCLIS and not in conjunction with a NFRAP determination.

Sites at which the Region has conducted a PA or SI and determined that the site has achieved a preliminary score sufficient for possible listing but have been referred or deferred to another program for cleanup generally should not receive a NFFA determination until the Region is confident that these sites will not require action under CERCLA. This would include sites Archived and deferred to RCRA or the Nuclear Regulatory Commission (NRC). Also, the Region generally should not make a NFFA determination for active CERCLIS sites being addressed under a State program until the response action is complete and the Region believes that no further federal action under CERCLA will be taken at that site.

To implement this provision of section 101(41)(C)(i), Regions should add a NFFA determination to determinations documenting either NFRAP or Archive decisions, as outlined above, and ensure that consultation with the legal enforcement and removal programs takes place

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[10] See the definition of "CERCLIS" for a description of "Archive". 40 C.F.R. § 300.5.

prior to NFFA determinations. Delegation 14-17 delegates the authority to make NFFA determinations to the Regional Administrator with authorization to redelegate the authority to the Branch Chief level. When a Region decides to NFRAP or Archive a site and a NFFA determination is appropriate the regional official delegated this authority must sign a document indicating that "no further federal action will be taken." Delegation 14-17 also requires consultation with the Regions legal enforcement office prior to making a NFFA determination. Consultation should also take place with the removal program.[11] The Regions generally should not make a NFFA determination at a site with ongoing or potential enforcement, cost recovery, or removal actions.

IV. Implementation of Section 101(41)(C)(i) at Sites Where EPA has Previously Conducted a Preliminary Assessment or Site Inspection

This section provides guidance on steps the Regions should take to make a determination to exclude sites from the eligible response site definition where the Region *has already conducted* an SI and for which a current site assessment decision indicates that the site has a preliminary score of 28.5 or greater, or otherwise qualifies for listing on the NPL. In the current CERCLIS universe, hundreds of sites have advanced beyond this assessment decision point and may warrant exclusion from the eligible response site definition but the delegated official under section 101(41)(C) has yet to make a formal determination. This part provides guidelines that the Regions generally should follow to have the delegated official make a single determination for a group of sites listed in CERCLIS sites that warrant exclusion from the eligible response site definition. While the process for excluding these existing sites is different, the basis for excluding these sites is the same as set forth in part II of this guidance for site-specific determinations – these sites have either achieved a preliminary score sufficient for possible listing on the NPL, or otherwise qualify for listing.

Whether a site is excluded through this initial determination or on a site-specific basis as outlined in part II is based on the timing of when the list of existing CERCLIS sites to be excluded from the definition is generated and shared with the states for consultation. Once the Regions have generated a list of existing CERCLIS sites warranting exclusion, as explained below, this list should be shared with the States to satisfy the consultation requirement. At the time the Region shares this list with the States, the Region should ensure that the process to exclude sites on a site-specific basis, as outlined in part II of this guidance, is in place to handle determinations for ongoing and future assessment decisions.

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[11] While the statute does not require consultation with the State prior to a NFFA determination, a Region may want to communicate with the State, or Tribe, prior to making a NFFA determination for sites that have obtained a preliminary score sufficient for possible listing on the NPL.

To help provide certainty regarding the status of these sites, the Regions should capture as many of these current CERCLIS sites within a single determination as soon as practicable. This initial determination should be tailored to exclude from the definition of eligible response sites only those sites that would not warrant a NFFA determination under the guidelines listed in part II. The goal is to make a determination to exclude sites that would have been excluded if the statute was in place at the time the original assessment decisions were made. The Regions should generally use the following two step process to accomplish this goal:

1) Generate a preliminary list using the CERCLIS database of:

- All ***active*** CERCLIS sites at which an SI has been conducted that have an assessment decision indicating that the site has a preliminary score of 28.5 or greater, *except* for sites where the decision made at the last completed assessment was that "no further remedial action is planned" (NFRAP)(some NFRAP sites may be captured under the guidelines set forth in the second bullet under (2)).

  This list should be easily generated from CERCLIS and will capture those sites past the SI stage with a preliminary score sufficient for possible listing on the NPL that are still in the assessment pipeline, or have been referred to a State program, or have a NFRAP determination but have been referred to the removal program, enforcement, or for cost recovery.

- ***All*** sites at which a SI has been conducted, that have an assessment decision indicating that the site has a preliminary score of 28.5 or greater, and have been deferred to RCRA or NRC.

  This list should also be easily generated from CERCLIS and will include all sites, including Archived sites, that have a preliminary score sufficient for possible listing and have been deferred to RCRA or NRC.

2) Add to the list by identifying those additional sites that fall within the part II guidelines:

- Identify active CERCLIS sites at which a PA has been conducted ***and*** there is a reasonably high degree of confidence that the site's preliminary score is above the current NPL threshold of 28.5 (*e.g.*, when monitoring data demonstrates that there is human exposure).

  Regional assessment managers should work to identify these sites.

- Identify active CERCLIS sites at which a PA or SI has been conducted, that have an assessment decision indicating that the site has a preliminary score of 28.5 or greater, and for which the Region has determined that "no further remedial action is planned" ***but*** may have current or future removal, enforcement, or cost recovery actions associated with the site.

  Regional assessment, removal, and legal enforcement staff should work to identify these sites.

- Identify all sites that would otherwise qualify for listing as described in part II.A.1 but have not yet been proposed for listing or listed on the NPL.

When the Region has identified those sites that should be excluded, the list of sites should be compiled in a memorandum for signature by the official within the Region who has been delegated the authority to make section 101(41)(C)(i) determinations. The memorandum should communicate the Region's decision to exclude certain sites pursuant to section 101(41)(C)(i) at which a PA or SI has been conducted and the Region has documented that the site obtained a preliminary score sufficient for possible listing on the NPL or the Region has determined otherwise qualifies for listing on the NPL.

This list may not be exclusive. Even if the Region follows the above process, it may later discover sites in the existing CERCLIS universe that should have been excluded from the definition based on section 101(41)(C)(i). Making the initial determination as outlined above does not preclude the Region from excluding existing CERCLIS sites in the future that the Region may not have excluded under this initial determination.

This initial determination should be made after coordination with State and Tribal counterparts and EPA Headquarters. Section 101(41)(C) requires consultation with the State prior to making a determination to exclude a site. The Regions should share and discuss with States and Tribes the list of sites to be excluded and document the results of this consultation for the record. Furthermore, because EPA will be making these determinations for the first time, and on a larger scale than future site-specific determinations, we request that Regions, for purposes of this initial determination, coordinate with our staff.[12]

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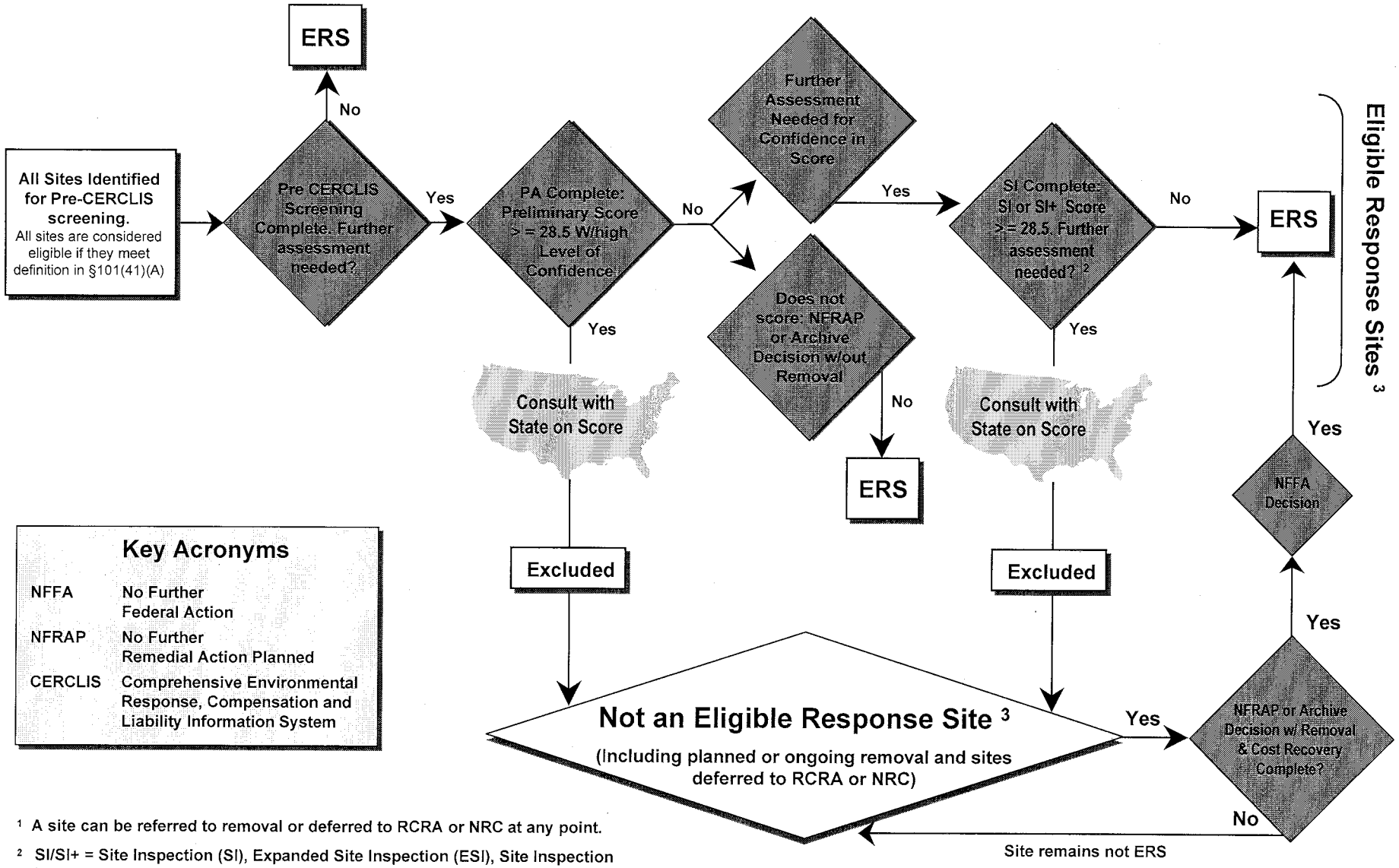
[12] For purposes of this initial determination and for questions related to implementation of this guidance please contact Sue Sladek, OSWER/OERR by phone at (703)603-8848 or by email to sladek.susan@epa.gov; and, K.C. Schefski, OECA/OSRE by phone at (202)564-8213 or by email to schefski.kenneth@epa.gov. If you have questions regarding federal brownfields funding at eligible response sites or sites excluded from the definition, please contact Patricia Overmeyer by phone at (202)566-2774 or by email to overmeyer.patricia@epa.gov.

cc: Brownfields Amendments Implementation Steering Committee
Eligible Response Site Workgroup
Regional Brownfields Coordinators (Regions I-X)
Regional Site Assessment Managers (Regions I-X)
Jewell Harper (OSRE)
Paul Connor (OSRE)
Sandra Connors (OSRE)
Betsy Southerland (OERR)
Joanna Gibson (OERR)
Steve Caldwell (OERR)
Charles Openchowski (OGC)
Nancy Riveland (Region IX)

Attachment A

Site Assessment Process to Determine Whether or not a site is an Eligible Response Site (ERS)[1]



Key Acronyms

NFFA	No Further Federal Action
NFRAP	No Further Remedial Action Planned
CERCLIS	Comprehensive Environmental Response, Compensation and Liability Information System

[1] A site can be referred to removal or deferred to RCRA or NRC at any point.

[2] SI/SI+ = Site Inspection (SI), Expanded Site Inspection (ESI), Site Inspection Prioritization (SIP), Combined Preliminary Assessment (PA)/(SI), (ESI)/Remedial Investigation (RI), Site Reassessment

[3] Any changes in site status may result in reevaluation.

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NOV - 6 2002

MEMORANDUM

SUBJECT: Revised Settlement Policy and Contribution Waiver Language Regarding Exempt De Micromis and Non-Exempt De Micromis Parties

FROM: Barry Breen, Director
Office of Site Remediation Enforcement
U.S. Environmental Protection Agency

Bruce S. Gelber, Chief
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice

TO: Director, Office of Site Remediation and Restoration, Region I
Director, Emergency and Remedial Response Division, Region II
Director, Hazardous Site Cleanup Division, Region III
Director, Waste Management Division, Region IV
Directors, Superfund Division, Regions V, VI, VII and IX
Assistant Regional Administrator, Office of Ecosystems Protection and Remediation, Region VIII
Director, Office of Environmental Cleanup, Region X
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
Assistant Section Chiefs, Environmental Enforcement Section, U.S.

On January 11, 2002, President Bush signed into law the *Small Business Liability Relief and Brownfields Revitalization Act* (SBLRBRA), Public Law No. 107-118. Among its provisions the law added a new Section 107(o) to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9607(o), which provides a qualified exemption from liability for de micromis parties, as defined therein. Section 107(o) provides a statutory exemption for de micromis parties that is similar, but not identical, to the protection previously afforded by the United States Environmental Protection Agency (EPA) and United States Department of Justice (DOJ) policy regarding settlements with de micromis parties at Superfund sites. The purpose of this memorandum is to revise that policy in light of this statutory change. This policy also revises the model contribution waiver language that has been used in CERCLA agreements to waive private contribution claims against parties that contributed only very small amounts of waste.

This settlement policy addresses the United States' position regarding those parties that fall within the statutory definition of de micromis (referred to herein as "exempt de micromis parties"), and those parties that fall outside the statutory definition, but who may be deserving of similar treatment based on case-specific factors (referred to herein as "non-exempt de micromis parties"). Non-exempt de micromis parties fall outside the protection of the de micromis exemption under Section 107(o), even though their waste volume is extremely small compared to the traditional *de minimis* party's volume addressed by Section 122(g). EPA believes such non-exempt de micromis parties should not be pursued or otherwise compelled to expend transaction costs to resolve potential CERCLA liability. For these parties, the administrative costs of determining and verifying the party's share, if any, and the cost of collecting the small payment, usually far exceed that share. Therefore, as a matter of national policy, EPA intends to use its enforcement discretion, as necessary, to achieve settlements that provide appropriate relief for those non-exempt de micromis parties that are being sued in contribution or threatened with a suit by responsible parties.

This policy supersedes the "Revised Guidance on CERCLA Settlements with De Micromis Waste Contributors" (June 3, 1996), and "Inclusion of Contribution Waiver by Private Parties in CERCLA Administrative and Judicial Settlements" (October 2, 1998).[1] It consists of a

[1] In 1995, EPA announced Superfund Administrative Reform 3-14: Revised De Micromis Guidance. The intent of the reform was to discourage responsible parties from bringing contribution litigation against the smallest volume waste contributors at Superfund sites (referred to as de micromis waste contributors) by entering into settlements with de micromis parties, when appropriate, to resolve their liability, and provide them with contribution protection. For de micromis waste contributors covered by EPA reform policies, the Agency recognized that legal and other transaction costs may actually exceed a party's settlement share of response costs. Under the reform, if private parties sued or threatened to sue these parties, EPA would consider entering into settlements providing contribution protection. To implement this reform, EPA and DOJ jointly issued guidance on how to help protect these parties from

memorandum and five attachments designed to provide guidance on using CERCLA, 42 U.S.C. § 9601, *et seq*., settlement authorities to resolve the liability of non-exempt de micromis parties. This policy document is not intended to affect current guidances addressing settlements with *de minimis* parties and is not applicable to owners or operators of Superfund sites.

II. CERCLA De Micromis Party Exemption

The de micromis exemption enacted by Congress is similar to, and largely drawn from EPA/DOJ's de micromis party settlement policy. Section 107(o) amends CERCLA to provide a qualified statutory exemption from liability for response costs for de micromis parties where: 1) the total amount of material containing hazardous substances contributed by the party to a site was less than 110 gallons of liquid materials or less than 200 pounds of solid materials; 2) the site is listed on the NPL; and 3) all or part of the party's disposal, treatment, or transport occurred before April 1, 2001.[2]

The exemption does not apply, however, if the President determines that: 1) the person sent materials that contributed or could contribute significantly, either individually or in the aggregate, to the cost of the response action or natural resource restoration; 2) the person has failed to comply with an information request or administrative subpoena; 3) the person has impeded, through action or inaction, a response action or natural resource restoration;[3] or 4) the person has been convicted of a criminal violation for conduct related to the exemption. For more specifics on the de micromis exemption to CERCLA liability, please refer to Section 107(o).

As previously mentioned, Section 107(o) is largely consistent with the goals of EPA's de micromis reform effort; however, Section 107(o) defines a de micromis party more narrowly than the definition used in EPA/DOJ guidance.[4] For example:

(a) The law codified EPA/DOJ's numerical guidelines of 110 gallons and 200 pounds, but it did not include the additional eligibility guideline of 0.002% of total volume of the

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CERCLA liability [See guidances cited above].

[2] As with other exempt parties under CERCLA, these newly exempt parties are not "orphans" and, therefore, their assigned share in an allocation would not be eligible for consideration under EPA's "Interim Guidance on Orphan Share Compensation for Settlors of Remedial Design/Remedial Action and Non-Time-Critical Removals" (June 3, 1996).

[3] This policy addresses CERCLA costs only and does not address natural resource damages.

[4] Because the definition of a person eligible for the de micromis exemption is not identical to the definition provided for in past EPA/DOJ de micromis policies, EPA is amending its use of the term "de micromis contributor" to apply only to statutorily exempt de micromis parties under Section 107(o).

materials containing hazardous substances also used in past guidance;
(b) The statutory exemption is available only at NPL sites, while EPA/DOJ's de micromis policy also applied to non-NPL sites; and
(c) The statutory exemption does not apply when any disposal, treatment, or transport occurred after April 1, 2001, while EPA/DOJ's policy had no such limitation.

III. Settlement Authority

CERCLA Section122(g)(1)(A) provides discretionary authority to enter into administrative and judicial settlements with certain *de minimis* contributors of hazardous substances.[5] To qualify for a *de minimis* settlement under Section 122(g)(1)(A), the settling party's contribution of hazardous substances must be minimal in its amount and toxicity in comparison to other hazardous substances at the facility. In addition, the statute requires that each party's settlement involve only a minor portion of the total response costs at the site. Finally, the settlement must be practicable and in the public interest.[6]

The United States considers settlements with non-exempt de micromis parties to be a subset of *de minimis* settlements under CERCLA Section 122(g)[7]. They are appropriate for parties that contributed very small amounts of hazardous substances to a site, but who are not protected by the statutory de micromis exemption of Section 107(o). Like other *de minimis* settlements, the non-exempt de micromis settlement generally will contain an immediately effective covenant not to sue by EPA for past and future liability at the facility under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607, and, where appropriate, Section 7003 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6973. In addition, the settlement will provide contribution protection for matters addressed as set forth in Sections 113(f) and 122(g)(5) of CERCLA, 42 U.S.C. §§ 9613(f) and 9622(g)(5). Further, in accordance with Section 122(g)(8)(A) of CERCLA, 42 U.S.C. § 9622(g)(8)(A), the non-exempt de micromis settlement will include a waiver of CERCLA claims against all other PRPs at the site.

A non-exempt de micromis settlement may be done administratively or judicially under Section 122(g). Typically, a judicial consent decree should be used if the settling party has already been named as a defendant in a contribution action or if the United States has already initiated a CERCLA judicial action with respect to other parties at the site. In other situations, resolution by administrative settlement is often preferable because it usually can be accomplished more quickly and inexpensively than judicial settlements. The following models

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[5] A Section 122(g) settlement entered into by the United States does not preclude a State from asserting its own Section 107 claim for State response costs.

[6] For additional information on existing *de minimis* guidances, visit EPA's web page at http://www.epa.gov/compliance/resources/policies/cleanup/index.html.

[7] See, e.g., United States v. Keystone Sanitation Co., Inc., et al., No. 1:CV-93-1482 (M.D. Pa. Apr. 29, 1996).

are attached to assist staff with drafting non-exempt de micromis settlements: Attachment 1: Model CERCLA §122(g)(4) Non-Exempt De Micromis Party Administrative Order on Consent (AOC); Attachment 2: Model CERCLA §122(g)(4) Non-Exempt De Micromis Party Consent Decree (CD); Attachment 3: Model CERCLA §122(i) Non-Exempt De Micromis Party Federal Register Notice; and Attachment 4: Federal Register Typesetting Request Form. The AOC and CD are brief in length, are written in plain English, and are designed to be self-explanatory and non-threatening to the potential settlor. These attachments are designed to increase the efficiency of the non-exempt de micromis party settlement process. We encourage staff to adhere as closely as possible to their terms.

IV. Policy Discussion[8]

Because Section 107(o) provides a qualified de micromis exemption to de micromis parties, there is no need for de micromis settlements where the exemption applies. We will, however, enter into a settlement with non-exempt de micromis parties if (1) they are sued in contribution, or threatened with a suit; (2) contributed very small amounts of hazardous substances to a site (smaller than the traditional *de minimis* party's volume); and (3) based on case-specific factors may be deserving of similar treatment to that given to exempt de micromis parties.

A. NPL Sites

At NPL sites, parties that meet the requirements of the Section 107(o) de micromis exemption will not be pursued by EPA and should no longer be pursued by PRPs. As a result, EPA will not need to enter into settlements with de micromis parties who fall within the scope of the exemption.[9]

The United States still retains its enforcement discretion under Section 122(g), based on site-specific factors, to settle with any potentially liable party who meets the *de minimis* settlement criteria. Thus, at certain NPL sites, EPA may determine it to be appropriate, based on factors concerning the site, to enter into a settlement with non-exempt de micromis parties who disposed of waste in excess of the numerical cutoffs provided by the statutory de micromis exemption. For instance, in a case in which a minuscule volume waste contributor at a NPL site disposed of waste in excess of the numerical cutoffs provided by the statutory de micromis

[8] EPA does not intend to reopen any agreements or settlements with the United States. Pursuant to Section 103 of SBLRBRA, Section 107(o) does not apply to "concluded actions," which are defined by the Act to include any settlement lodged in, or judgment issued by, a United States District Court, or any administrative settlement or order entered into or issued by the United States or any State prior to January 11, 2002.

[9] Under SBLRBRA, PRPs have the burden of proof and are subject to attorney fees and costs for unsuccessful efforts to pursue these exempt parties.

exemption, EPA may determine, based on factors surrounding the site, such as total waste volume sent to the site, that a non-exempt de micromis settlement is nevertheless appropriate.

B. Non-NPL Sites

At non-NPL sites, EPA generally intends to exercise its enforcement discretion not to pursue parties who satisfy the requirements for exempt status under Section 107(o), except for the requirement that the site in question be listed on the NPL. These parties could be pursued in contribution by other PRPs because they do not qualify for the statutory exemption to CERCLA liability. When this occurs, the United States expects to enter into Section 122(g) settlements with these parties to provide contribution protection, where otherwise appropriate.

C. Offer Protection Only if Threatened

EPA's Regional offices have discretion to decide whether and when to offer a non-exempt de micromis settlement to parties that have contributed extremely small amounts of waste to a site. As previously mentioned, EPA believes non-exempt de micromis parties should not be pursued, and as a matter of national policy, EPA intends to use its enforcement discretion, as necessary, to achieve settlements that provide appropriate relief for those non-exempt de micromis parties. For purposes of applying this policy at Superfund sites, the Region should consider offering a settlement to non-exempt de micromis parties only if: (1) such parties have been sued by other PRPs at the site; or (2) such parties face the concrete threat of litigation from other PRPs at the site.

V. Non-Exempt De Micromis Settlement Procedures

A. Eligibility

The Region should consider several factors in determining if a party is eligible for a non-exempt de micromis settlement under Section 122(g) of CERCLA. Regions should consider the criteria described in the de micromis exemption language found in Section 107(o), and summarized above in Section II (CERCLA De Micromis Party Exemption). With regard to volume, Regions have the flexibility to consider cutoff amounts higher than 110 gallons or 200 pounds, on a site-specific basis, for settlements at either non-NPL or NPL sites. For example, there may be a case in which a party contributed more than 110 gallons or 200 pounds of materials containing hazardous substances, but the facts of the case warrant a settlement nonetheless (e.g., in situations where a party's contribution is still a minute percentage of the total waste volume sent to the site). It may also be appropriate to consider a settlement with a party whose disposal, treatment or transport occurred after April 1, 2001.

Other factors the Region should consider include: a settlor's contribution of hazardous substances in relation to the total volume of waste at the site, the toxic or other hazardous effects of such hazardous substances, and the effect of multiple non-exempt de micromis settlements on the remaining parties at the site.

Consistent with the model administrative order and consent decree attached to this memorandum, the Regions should generally not require any monetary payment as part of a non-exempt de micromis settlement. This approach reflects EPA's position that it would be inequitable to require parties sending such small volumes of waste to participate in financing or performing cleanup at the site because their allocable share of cleanup costs is negligible at most. Moreover, because a non-exempt de micromis party's actual connection to the site is extremely small, the administrative costs of executing a settlement will likely equal or exceed the non-exempt de micromis party's proportional share of response costs at the site, if any. Given this inequity, it is fair, and thus, in the public interest, for Regions to offer a zero dollar settlement to non-exempt de micromis parties.

B. Site-Specific Information

The Region should evaluate the following site information before pursuing a non-exempt de micromis settlement: (1) information regarding the hazardous substances sent to the site by the non-exempt de micromis party, and (2) the total estimate of waste at the site. The Region may use a variety of site-specific information to evaluate the appropriateness of a settlement with a party. Sources of information include: state records, manifests, site records, canceled checks, interviews, waste-in lists, other allocation documents, or Section 104(e) information request responses. The Region may not have to produce a waste-in list prior to entering into a settlement if the Region has sufficient information in its possession to determine that a non-exempt de micromis settlement is appropriate. However, the Region should use a prepared waste-in list if it is available and complete.

C. Consultation with EPA Headquarters and DOJ

Regardless of the small amount of waste contributed, a CERCLA Section122(g) settlement is not appropriate where the toxic or other hazardous effects of the contributor's waste are not minimal in comparison to the other hazardous substances at the facility. Furthermore, under Section 107(o)(2), EPA may pursue enforcement action against parties at NPL sites who claim to qualify for the Section 107(o) statutory de micromis exemption where their waste contributed significantly to the cost of cleanup or natural resource restoration. If a Region determines that a party falls under the Section 107(o)(2) exceptions to the de micromis exemption provision, consultation with the Director of the Regional Support Division, Office of Site Remediation Enforcement, is required prior to proceeding with an enforcement action against that party.[10]

In addition, DOJ must approve all administrative non-exempt de micromis settlements where total site costs are expected to exceed $500,000 and all non-exempt de micromis consent decrees. If the settlement requires DOJ approval, the Region should consult with DOJ as early in

[10] At the time of publication of this policy, the OSRE contact is Victoria van Roden. She can be reached by phone at 202-564-4268 or by e-mail at vanroden.victoria@epa.gov.

the process as possible, and keep the Department apprised of progress toward settlement and any significant departures from this policy or its attachments. Within thirty days of receiving the Region's referral of the proposed settlement, DOJ will advise the Region whether the settlement is approved.

VI. Waiver of Claims Against Non-Exempt De Micromis Parties

A. Background

The EPA and DOJ guidance entitled "Inclusion of Contribution Waiver by Private Parties in CERCLA Administrative and Judicial Settlements," dated October 2, 1998, encouraged routine use of a waiver of private party contribution claims against parties that contributed only very small amounts of waste. The use of this waiver was encouraged not only in RD/RA consent decrees, but in other types of CERCLA agreements, as well, in order to maximize protection for the small waste volume parties, thereby reducing their transaction costs. On May 18, 2000, EPA and DOJ issued a revised model Remedial Design/Remedial Action (RD/RA) Consent Decree. One of the important changes contained in this revision, and carried forward into the June 15, 2001 RD/RA model revision as well, was the inclusion of a waiver of private party contribution claims against parties that contributed only very small amounts of waste (see Paragraph 100 of the revised RD/RA model). The inclusion of this waiver in settlement documents represented an important component of EPA's Administrative Reform efforts to protect those parties that are on the periphery of the liability scheme. EPA guidance provided that the government would exercise enforcement discretion and decline to pursue these parties, but this did not insulate such parties from contribution actions by other PRPs at the site.

The waiver provision of the 2000 and 2001 RD/RA model consent decree contained two components: (1) a waiver of claims against certain municipal solid waste (MSW) or municipal sewage sludge (MSS) contributors (Subparagraphs a. and b.); and (2) a waiver of claims against very small volume hazardous substance-only contributors (Subparagraph c.).

B. Waiver Language for NPL Sites and Non-NPL Sites

The parties that meet the requirements of Section 107(o) are protected by the statute and should no longer be pursued by PRPs. Such parties no longer need to be protected from contribution claims; therefore, EPA and DOJ generally should not require a waiver of claims against exempt de micromis parties at NPL sites.

However, in exercising enforcement discretion, Regions may negotiate a contribution waiver at any site (both NPL and non-NPL) for any volume amount if the settling parties consensually agree to waive these rights. EPA retains its right to determine which liable parties to pursue, based on site-specific factors. For instance, in a case involving a very small volume waste contributor at a NPL site that disposed of waste in excess of the numerical cutoff amount provided in the statutory de micromis exemption, EPA might determine, based on factors surrounding the site, that a contribution waiver in a settlement with major waste contributors is

nevertheless appropriate. Therefore, Regions have the flexibility to consider other cutoff amounts (e.g., higher than 110 gallons or 200 pounds), on a site-specific basis, in the contribution waiver language for settlements at either non-NPL or NPL sites. In addition to this waiver, negotiators should also evaluate whether the waiver of contribution claims against *de minimis* parties in paragraph 101 of the model RD/RA CD and waivers of claims against any other parties (e.g., inability-to-pay settlors) are appropriate for the case. Accordingly, we have not changed the optional waiver of claims against *de minimis* parties found in Paragraph 101 of the Model RD/RA CD (see Attachment 5).

C. Revised Model Waiver Language for Settlements at Non-NPL Sites

The United States is revising the model waiver provision for use in settlements concerning non-NPL sites in light of the language in Section 107(o) of CERCLA and this policy.[11] For all new agreements at non-NPL sites (such as removal AOCs, cost recovery settlements, etc.), Regions should include this revised waiver language to address the smallest volume hazardous substance contributors at Superfund sites.[12] This waiver is to protect parties at non-NPL sites that otherwise meet the requirements of the Section 107(o) de micromis exemption from contribution claims. Out of fairness and public interest, EPA would like to protect these non-exempt de micromis parties from private party lawsuits.

To be consistent with the Section 107(o) statutory exemption, the waiver language (1) has the presumptive numerical cutoff for material containing hazardous substances at less than 110 gallons or 200 pounds, (2) uses the April 1, 2001 cutoff date, and (3) contains the exceptions included in Section 107(o)(2). The revised waiver provision is shown in Attachment 5 of this memorandum.

VII. Disclaimer

This policy and any internal procedures adopted for its implementation are intended exclusively as guidance for employees of the U.S. Government. This policy is not a rule and does not create any legal obligations. Whether and how the United States applies the policy to

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[11] In accordance with the municipal solid waste exemption found in Section 107(p) of CERCLA, we have eliminated the special categories of MSW/MSS contributors contained in subparagraphs a. and b. of the model waiver. There is a separate workgroup that is currently analyzing enforcement discretion options for addressing the exemption for MSW/MSS contributors. We are deferring issues related to MSW/MSS to that workgroup, and any forthcoming guidance on the subject.

[12] Please note that Section 122(g)(8)(A) of CERCLA generally requires a broader waiver to be included in Section 122(g) *de minimis* settlements under which the settling *de minimis* parties waive CERCLA response cost claims against all PRPs at the site. EPA's peripheral party settlement models also include this broader waiver.

any particular site will depend on the facts at the site.

Attachments
1. Model AOC
2. Model CD
3. FR Notice Procedures and Model FR Notice
4. FR Typesetting Request Form
5. New Model Waiver

ATTACHMENT 1

MODEL CERCLA SECTION 122(g)(4) NON-EXEMPT DE MICROMIS PARTY ADMINISTRATIVE ORDER ON CONSENT

IN THE MATTER OF: [Insert Site Name and Location]	)	U.S. EPA Docket No. ____
Proceeding under Section 122(g)(4) of CERCLA, 42 U.S.C. § 9622(g)(4)	)	**NON-EXEMPT DE MICROMIS PARTY ADMINISTRATIVE ORDER ON CONSENT**

1. **Jurisdiction/Parties Bound.** This Administrative Order on Consent ("Consent Order") is issued under Section 122(g)(4) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA" or "Superfund"), 42 U.S.C. § 9622(g)(4). This Consent Order is binding upon the United States Environmental Protection Agency ("EPA") and upon the parties who are identified in Attachment __ who are signatories to this Consent Order ("Settlors"). Settlors do not admit any liability.

2. **Purpose.** The purpose of this Consent Order is to reach a final "non-exempt de micromis party" settlement with Settlors which: a) resolves Settlors' potential civil liability to the United States under Superfund for payment of response costs and for performance of cleanup at the **[insert site name]**; and b) protects Settlors from any lawsuits seeking recovery of Site cleanup costs.

3. **Statement of Facts.** The **[insert site name]** ("the Site") is located at **[insert address or location]** in **[city, county, state]**, and is generally **[shown on/described by]** the **[map/property description]** attached to this Consent Order as Attachment __. Under Section 104 of CERCLA, 42 U.S.C. § 9604, EPA has incurred **[approximately $_____ in]** response costs at the Site and **[will/may]** incur additional costs. EPA currently estimates that total past and future response costs at the Site, including the costs of EPA and CERCLA potentially responsible parties, will be **[insert either "$_____" or "between $_____ and $_____" or "in excess of $_____"]**. Each Settlor may have contributed hazardous substances to the Site which are not in excess of **[insert number of pounds or gallons]** of materials containing hazardous substances **[or, stated as a percentage, ___% of the hazardous substances at the Site]** and which are not significantly more toxic or of significantly greater hazardous effect than other hazardous substances at the Site.

4. **Determinations.** EPA determines that: a) in accordance with Section 122(g) of CERCLA, 42 U.S.C. § 9622(g), it is practicable and in the public interest to reach this final settlement, involving only a minor portion of the response costs at the **[insert site name]** facility, with Settlors who may be potentially responsible parties who each may have contributed a minimal amount of hazardous substances to the Site, the toxic or other hazardous effects of which are minimal in comparison to other hazardous substances at the Site; and b) Settlors are eligible for a non-exempt de micromis party settlement because they each contributed no more

than a minuscule amount of hazardous substances to the Site, an amount which is so minor that it would be inequitable to require them to help finance or perform cleanup at the Site[.] **[Insert if applicable: "; and c) total past and projected response costs of the United States at the Site will not exceed $500,000, excluding interest."]**

5. **Certification.** Each Settlor certifies that to the best of its knowledge it: a) has conducted a thorough, good faith search for documents, and has fully and accurately disclosed to EPA all information currently in its possession, or in the possession of its officers, directors, employees, contractors or agents, if any, which relates in any way to the generation, treatment, transportation, storage or disposal of a hazardous substance at or in connection with the Site; b) has not altered, destroyed or disposed of any records, reports, or information relating to its potential liability at the Site since notification of potential liability by the United States or the State or the filing of suit against it regarding the Site; and c) has and will continue to fully comply with any and all EPA requests for information concerning the Site pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

6. **United States' Covenant Not to Sue.** In consideration of Settlors' agreement to this Consent Order, and except as specifically provided in Paragraph 7, the United States covenants not to sue or take administrative action against Settlors under Sections 106 or 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607, [and Section 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6973,] relating to the Site.

7. **United States' Reservations of Rights.** The United States reserves the right to seek additional relief from any Settlor if: 1) information is discovered indicating that such Settlor's contribution of hazardous substances to the Site is of such greater amount or of such greater toxic or other hazardous effect that it no longer qualifies for settlement under the criteria stated in Paragraph 3; or 2) after Settlor signs this Consent Order, such Settlor becomes an owner or operator of the Site or undertakes any activity with regard to hazardous substances or solid wastes at the Site. The United States also reserves all rights which it may have as to any matter relating in any way to the Site against any person who is not a party to this Consent Order.

8. **Settlors' Covenant Not to Sue.** Settlors covenant not to sue and agree not to assert any claims against the United States or its contractors or employees with respect to the Site or this Consent Order. Settlors also covenant not to sue and agree not to assert any claims with respect to the Site against each other or against any other person who is a potentially responsible party under CERCLA at the Site.

9. **Contribution Protection.** Each Settlor is entitled to protection from contribution claims as provided by Sections 113(f)(2) and 122(g)(5) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(g)(5), for "matters addressed" in this Consent Order. The "matters addressed" in this Consent Order are all response actions taken and to be taken and all response costs incurred and to be incurred, in connection with the Site, by the United States or by any person who is a potentially responsible party under CERCLA at the Site, except for those limited areas in

Paragraph 7 for which the United States has reserved its rights.

10. **[NOTE: Insert if total past and projected response costs at the site will exceed $500,000, excluding interest.]** **Attorney General Approval**. The Attorney General has approved this settlement as required by Section 122(g)(4) of CERCLA, 42 U.S.C. § 9622(g)(4).

11. **Public Comment/Effective Date.** This Consent Order is subject to public comment under Section 122(i) of CERCLA, 42 U.S.C. § 9622(i), and is effective on the date that EPA issues written notice that the public comment period has closed and that comments received, if any, do not require modification of or EPA withdrawal from this Consent Order.

IT IS SO AGREED AND ORDERED:

U.S. Environmental Protection Agency

By: _____ _____
[Name] [Date]
[Insert Title of Delegated Official]

THE UNDERSIGNED SETTLOR enters in to this Consent Order in the matter of [insert U.S. EPA docket number], relating to the [insert site name and location]:

FOR SETTLOR: _____
[Name]

_____
[Address]

By: _____ _____
[Name] [Date]

[NOTE ON USE OF MODEL: This model and any internal procedures adopted for its implementation and use are intended as guidance for employees of the U.S. Environmental Protection Agency. They are not rules and do not create legal obligations. The extent to which EPA uses them in a particular case will depend on the facts of the case.]

ATTACHMENT 2

MODEL CERCLA SECTION 122(g)(4) NON-EXEMPT DE MICROMIS PARTY CONSENT DECREE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF [_____]
[_____] DIVISION[1]

UNITED STATES OF AMERICA, Plaintiff, v. [DEFENDANTS] Defendants.	Civil Action No. _____ Judge _____

NON-EXEMPT DE MICROMIS PARTY CONSENT DECREE[2]

A. **[NOTE: Insert explanation of procedural posture of the case. To the extent applicable, the following language may be used.]** The United States on behalf of the Environmental Protection Agency ("EPA") filed a complaint in this matter under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607, as amended ("CERCLA" or "Superfund"), to recover costs it has spent for the cleanup of the **[insert site name]**. The defendants sued by the United States filed contribution actions against third-party defendants, some of whom are Settlors under this Consent Decree. Settlors do not admit any liability.

B. The **[insert site name]** ("the Site") is located at **[insert address or location]** in **[city, county, state]**, and is generally **[shown on/described by]** the **[map/property description]** attached to this Consent Decree as Attachment __. Under Section 104 of CERCLA, 42 U.S.C. § 9604, EPA has incurred **[approximately $_____ in]** response costs at the Site and **[will/may]** incur additional costs. EPA currently estimates that total past and future response costs at the Site, including costs of EPA and CERCLA potentially responsible parties, will be **[insert either**

[1] Follow local rules for caption format.

[2] As a general rule, a judicial consent decree should only be used if the settlor has already been named as a defendant in a contribution action, or if the United States has already initiated CERCLA litigation at the site.

"$_____" or "between $_____ and _____" or "in excess of $____"]. Each Settlor may have contributed hazardous substances to the Site which are not in excess of **[insert number of pounds or gallons]** of materials containing hazardous substances **[or, stated as a percentage, ___% of the hazardous substances at the Site]** and which are not significantly more toxic or of significantly greater hazardous effect than other hazardous substances at the Site.

C. EPA has determined that: 1) in accordance with Section 122(g) of CERCLA, 42 U.S.C. § 9622(g), it is practicable and in the public interest to reach this final settlement, involving only a minor portion of the response costs at the **[insert site name]** facility, with Settlors who may be potentially responsible parties who each may have contributed a minimal amount of hazardous substances to the Site, the toxic or other hazardous effects of which are minimal in comparison to other hazardous substances at the Site; and 2) Settlors are eligible for a non-exempt de micromis party settlement because they each contributed no more than a minuscule amount of hazardous substances to the Site, an amount which is so minor that it would be inequitable to require them to help finance or perform cleanup at the Site.

THEREFORE, with the consent of the parties to this Decree, it is ORDERED, ADJUDGED, AND DECREED:

1. **Jurisdiction/Parties Bound.** This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345 and 42 U.S.C. § 9613(b) and also has personal jurisdiction over Settlors. Settlors consent to this Consent Decree and this Court's jurisdiction to enter and enforce this Consent Decree. This Consent Decree is binding upon the United States and upon the parties who are identified in Attachment __ who are signatories to this Consent Decree ("Settlors").

2. **Purpose.** The purpose of this Consent Decree is to reach a final non-exempt de micromis party settlement with Settlors, which: a) resolves Settlors' potential civil liability to the United States under Superfund for payment of response costs and for performance of cleanup at the Site; and b) protects Settlors from any lawsuits seeking recovery of Site cleanup costs.

3. **Certification.** Each Settlor certifies that to the best of its knowledge it: a) has conducted a thorough, good faith search for documents, and has fully and accurately disclosed to EPA all information currently in its possession, or in the possession of its officers, directors, employees, contractors or agents, if any, which relates in any way to the generation, treatment, transportation, storage or disposal of a hazardous substance at or in connection with the Site; b) has not altered, destroyed or disposed of any records, reports, or information relating to its potential liability at the Site since notification of potential liability by the United States or the State or the filing of suit against it regarding the Site; and c) has and will continue to fully comply with any and all EPA requests for information concerning the Site pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

4. **United States' Covenant Not to Sue.** In consideration of Settlors' agreement to this

Consent Decree, and except as specifically provided in Paragraph 5, the United States covenants not to sue or take administrative action against Settlors under Sections 106 or 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607, [and Section 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6973,] relating to the Site.

5. **United States' Reservations of Rights.** The United States reserves the right to seek additional relief from any Settlor: 1) if information is discovered indicating that such Settlor's contribution of hazardous substances to the Site is of such greater amount or of such greater toxic or other hazardous effect that it no longer qualifies for settlement under the criteria stated in Paragraph B; or 2) after signing this Consent Decree, such Settlor becomes an owner or operator of the Site or undertakes any activity with regard to hazardous substances or solid wastes at the Site. The United States also reserves all rights which it may have as to any matter relating in any way to the Site against any person who is not a party to this Consent Decree.

6. **Settlor's Covenant Not to Sue.** Settlors covenant not to sue and agree not to assert any claims against the United States or its contractors or employees with respect to the Site or this Consent Decree. Settlors also covenant not to sue and agree not to assert any claims with respect to the Site against each other or against any other person who is a potentially responsible party under CERCLA at the Site.

7. **Contribution Protection.** Each Settling Defendant is entitled to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(g)(5) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(g)(5), for "matters addressed" in this Consent Decree. The "matters addressed" in this Consent Decree are all response actions taken and to be taken and all response costs incurred and to be incurred, in connection with the Site, by the United States or by any person who is a potentially responsible party under CERCLA at the Site, except for those limited areas in Paragraph 5 for which the United States has reserved its rights.

8. **Public Comment/Effective Date.** The United States will lodge this Consent Decree with the Court for a period of not less than 30 days for public notice and comment. Provided that the United States does not withdraw the Consent Decree following such public notice and comment, this Consent Decree shall be effective on the date of entry by this Court.

9. **Service**. For all matters relating to this Consent Decree, each Settlor will personally receive service of process by mail sent to the name and address provided on the attached signature page, unless such Settlor provides the name and address of an agent for service of process on the attached signature page. Settlors agree to accept service in this manner and to waive the formal service requirements of Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including but not limited to, service of a summons.

SO ORDERED THIS ___ DAY OF _____, 20_.

_____

United States District Judge

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of [insert case name and civil action number], relating to the _____ Superfund Site.

FOR THE UNITED STATES OF AMERICA

Date: _____

_____
[Name]
Assistant Attorney General
Environment and Natural Resources
Division
U.S. Department of Justice
Washington, D.C. 20530

_____
[NAME]
United States Attorney
[Address]

_____
[NAME]
Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044-7611

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of [insert case name and civil action number], relating to the _____ Superfund Site.

_____
[Name]
Regional Administrator, Region [ ] U.S. Environmental Protection Agency
[Address]

_____
[Name]
Assistant Regional Counsel
U.S. Environmental Protection Agency
[Address]

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of [insert case name and civil action number], relating to the _____ Superfund Site.

FOR SETTLOR [ ]

Date: _____

_____
[Name and address of Settlor or Settlor's signatory]

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name: _____

Title: _____

Address: _____

[NOTE ON USE OF MODEL: This model and any internal procedures adopted for its implementation and use are intended as guidance for employees of the U.S. Environmental Protection Agency. They are not rules and do not create legal obligations. The extent to which EPA uses them in a particular case will depend on the facts of the case.]

ATTACHMENT 3

MODEL CERCLA SECTION 122(i) NON-EXEMPT DE MICROMIS PARTY FEDERAL REGISTER NOTICE

Proper format is very important for a Federal Register notice. The format is shown in the following model. The notice should be typed on plain paper, not EPA letterhead stationery. Each page, including the first, should be consecutively numbered. The notice should be double-spaced and single-sided. Heading titles may not be varied. The official format requires the top, bottom and right margins to be one inch wide and the left margin to be one and a half inches wide, but minor variations in margin size will not result in rejection of the notice. Legal citations should be written as, e.g., 42 U.S.C. 9622(i) (do not include a section symbol [§] or the word "section.") The notice should be signed by a Regional official authorized to submit documents for publication in the Federal Register by EPA Delegation 1-21. The name and title of the official signing the notice should be typed on the notice. If an acting official will be signing for the authorized official, the acting official's name and the acting official's title, e.g., "Acting Regional Administrator," must be typed on the notice.

To publish the notice, the Region should send 1) the original signed notice, 2) four single-sided copies of the signed notice, 3) a disk containing the file for the notice, and 4) a completed Federal Register Typesetting Request (EPA Form 2340-15) to: Vickie Reed or Leona Proctor, U.S. EPA Headquarters, Mail Code 1806A, Office of Policy, Economics & Innovation, Regulatory Management Staff, 1200 Pennsylvania Avenue, NW, Washington, D.C., 20460. When filling out the Federal Register Typesetting Request, publication costs should be billed to the site-specific Superfund account number. The formula for calculating publication costs on the Typesetting Request is as follows: two double-spaced pages equals one column, and one column costs $155.00 (half pages and half columns should be rounded up; if a disk is not provided, the per column cost increases to $166.00).

Questions about these procedures should be directed to Vickie Reed at (202) 564-6562 or Leona Proctor at (202) 564-6463.

[NOTE ON USE OF MODEL: This model and any internal procedures adopted for its implementation and use are intended as guidance for employees of the U.S. Environmental Protection Agency. They are not rules and do not create legal obligations. The extent to which EPA uses them in a particular case will depend on the facts of the case.]

ENVIRONMENTAL PROTECTION AGENCY

[ ] [NOTE: Leave brackets to left blank.]

Proposed CERCLA Administrative Non-Exempt De Micromis Party Settlement; [Insert name of settling party, or if there are multiple settling parties, insert site name -- capitalize first letter of each word]

AGENCY: Environmental Protection Agency

ACTION: Notice; request for public comment

SUMMARY: In accordance with Section 122(i) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended ("CERCLA"), 42 U.S.C. 9622(i), notice is hereby given of a proposed administrative non-exempt de micromis party settlement concerning the [insert site name] site in [insert site location] with the following settling party(ies): [insert names here or reference list included in Supplementary Information portion of notice]. The settlement is designed to resolve fully [the/each] settling party's liability at the site through a covenant not to sue under Sections 106 and 107 of CERCLA, 42 U.S.C. 9606 and 9607[, and Section 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. 6973]. For thirty (30) days following the date of publication of this notice, the Agency will receive written comments relating to the settlement. The Agency will consider all comments received and may modify or withdraw its consent to the settlement if comments received disclose facts or considerations which indicate that the settlement is inappropriate, improper, or inadequate. The Agency's response to any comments received will be available for public inspection at [insert address of information repository at or near site] and [insert address of Regional public docket]. [If Section 7003 covenant is included insert, "Commenters may request an opportunity for a public meeting in the affected area in

accordance with Section 7003(d) of RCRA, 42 U.S.C. 6973(d)."]

DATES: Comments must be submitted on or before [insert 30 days from date of publication]. [NOTE: Do not fill in date; just type DATES sentence, including bracketed portion, exactly as it appears here.]

ADDRESSES: The proposed settlement and additional background information relating to the settlement are available for public inspection at [insert address of Regional public docket or other Regional office location]. A copy of the proposed settlement may be obtained from [insert name, address, and telephone number of Regional docket clerk or other Regional representative]. Comments should reference the [insert site name, location] and EPA Docket No. ___ [insert EPA docket number for settlement] and should be addressed to [insert name and address of Regional docket clerk or other Regional representative designated to receive comments].

FOR FURTHER INFORMATION CONTACT: [Insert name, address, and telephone number of Regional representative who has knowledge of settlement].

SUPPLEMENTARY INFORMATION: [Use this optional section to, e.g., list parties too numerous to list in Summary portion of notice or to provide further details about settlement].

_____ _____

[Insert typed name and title of Regional official] Date

[Insert billing code]

United States
Environmental Protection Agency
Washington, DC 20460

FEDERAL REGISTER TYPESETTING REQUEST

Requestor: Complete Items 1, 2, 7, 8, 9, 10, 11, 12, and 13. Retain copy number 7 and submit the balance with manuscript copy to the Hq. Federal Register office.
HQ Federal Register Office: Complete items, 3,4 ,5, and 6. Retain copy number 6 and submit balance to Hq. Printing Management.

1. TITLE			
2. SUBMITTING AGENCY		3. ASSIGNED FRL NUMBER (include alpha & numeric characters for identification)	
4. OPEN REQUISITION NUMBER		5. BILLING CODE 6560-50-P	
6. FORWARDED TO GSA, NARS - SIGNATURE			DATE
7. NUMBER OF MANUSCRIPT PAGES	8. ESTIMATED NUMBER OF COLUMNS	9. ESTIMATED COST $	
10. SIGNATURE: (a) REQUESTING OFFICER		11. SIGNATURE: (a) FEDERAL REGISTER DESIGNEE	
(b) DATE	(c) TELEPHONE NUMBER	(b) DATE	(c) TELEPHONE NUMBER
12. FUNDS ARE AVAILABLE NAME OF FUNDS CERTIFYING OFFICER	SIGNATURE OF FUNDS CERTIFYING OFFICER	NUMBER OF FUNDS CERTIFYING OFFICER PHONE	

13. Financial and Accounting Data

Line	DCN (Max 6)	Budget/FYs (Max 4)	Appropriation Code (Max 6)	Budget Org/Code (Max 7)	Program Element (Max 9)	Object Coass (Max 4)	SFO (Max 2)
1							
2							
3							

	Amount (Dollars)	(Cents)	Site Project (Max 8)	Cost/Org/Code (Max 7)
1				
2				
3				

EPA FORM 2340-15 (Rev. 8-94) Electronic and paper versions acceptable
Previous editions are obsolete.

COPY 1 - PRINTING MANAGEMENT OFFICER

ATTACHMENT 5

NON-EXEMPT DE MICROMIS WAIVER LANGUAGE FOR ALL AGREEMENTS AT NON-NPL SITES

100.1 Settling [Defendants/Respondents] agree not to assert any claims and to waive all claims or causes of action that they may have for all matters relating to the Site, including for contribution, against any person where the person's liability to Settling Defendants with respect to the Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of hazardous substances at the Site, or having accepted for transport for disposal or treatment of hazardous substances at the Site, if all or part of the disposal, treatment, or transport occurred before April 1, 2001, and the total amount of material containing hazardous substances contributed by such person to the Site was less than 110 gallons of liquid materials or 200 pounds of solid materials.

100.2. The waiver in Paragraph 100.1 shall not apply with respect to any defense, claim, or cause of action that a Settling [Defendant/Respondent] may have against any person meeting the above criteria if such person asserts a claim or cause of action relating to the Site against such Settling [Defendant/Respondent]. This waiver also shall not apply to any claim or cause of action against any person meeting the above criteria if EPA determines:

(a) that such person has failed to comply with any EPA requests for information or administrative subpoenas issued pursuant to Section 104(e) or 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) or 9622(e), or Section 3007 of RCRA, 42 U.S.C. § 6927, or has impeded or is impeding, through action or inaction, the performance of a response action or natural resource restoration with respect to the Site, or has been convicted of a criminal violation for the conduct to which this waiver would apply and that conviction has not been vitiated on appeal or otherwise; or

(b) that the materials containing hazardous substances contributed to the Site by such person have contributed significantly, or could contribute significantly, either individually or in the aggregate, to the cost of response action or natural resource restoration at the Site.

[Use as appropriate if a <u>de</u> <u>minimis</u> settlement has been concluded at the Site.]

101. Settling [Defendants/Respondents] agree not to assert any claims and to waive all claims or causes of action that they may have for all matters relating to the Site, including for contribution, against any person that has entered into a final CERCLA § 122(g) <u>de</u> <u>minimis</u> settlement with EPA with respect to the Site as of the effective date of this [Consent Decree/Consent Order/Agreement]. This waiver shall not apply with respect to any defense, claim, or cause of action that a Settling [Defendant/Respondent] may have against any person if such person asserts a claim or cause of action relating to the Site against such Settling [Defendant/Respondent].

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

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MAY 31 2002

MEMORANDUM

SUBJECT: Bona Fide Prospective Purchasers and the New Amendments to CERCLA

FROM: Barry Breen, Director
Office of Site Remediation Enforcement

TO: Superfund Senior Policy Managers (Region I - X)
Regional Counsels (Regions I - X)

I. Introduction

Since 1989, EPA has negotiated agreements that provide a covenant not to sue for certain prospective purchasers of contaminated property prior to their acquisition, in order to resolve the potential liability due to ownership of such property. These agreements are known as Prospective Purchaser Agreements ("PPAs")[1]. In January 2002, CERCLA was amended through enactment of Public Law 107-118, titled the Small Business Relief and Brownfield Revitalization Act ("Brownfields Amendments"). Among other things, the Brownfields Amendments provide a limitation on liability for persons who qualify as bona fide prospective purchasers ("BFPPs"). Congress' intent in enacting this provision was to remove certain liability barriers to purchases of property and encourage redevelopment.

EPA believes that, in most cases, the Brownfields Amendments make PPAs from the federal government unnecessary. The following discussion describes when, primarily because

[1] The PPA guidance is available at OSRE's Web page at http://es.epa.gov/oeca/osre/ppa.html . This guidance is titled "Guidance on Settlements with Prospective purchasers of Contaminated Property," dated May 24, 1995, which superceded earlier guidance issued June 6, 1989. The model PPA agreement was last revised on September 30, 1999. Additional guidance documents on the subject of prospective purchasers include a checklist, issued October 1, 1999, of documents likely to be requested from a prospective purchaser seeking a PPA, and a clarification, issued January 10, 2001, of PPA guidance titled "Support of Regional Efforts to Negotiate Prospective Purchaser Agreements (PPAs) at Superfund Sites and Clarification of PPA Guidance." The guidance listed is not being replaced by this memorandum, but is rather being supplemented.

of significant public benefit, EPA will consider providing a prospective purchaser with a covenant not to sue now that the Brownfields Amendments are law.

II. Background

Subtitle B of the new Brownfields Amendments, through the addition of CERCLA section 107(r), provides a limitation on liability for a "bona fide prospective purchaser" whose potential liability is based solely on the purchaser's being an owner or operator of a facility, and provided that the purchaser does not impede the performance of a CERCLA action. New subsection 101(40) defines "bona fide prospective purchaser" as a person, or tenant of that person, who acquires ownership of a facility after the date of enactment of the Brownfields Amendments, January 11, 2002, and by a preponderance of the evidence establishes the following:

1. disposal at the facility occurred prior to acquisition;
2. the person made all appropriate inquiry into previous ownership and uses of the facility in accordance with generally accepted practices and in accordance with the new standards contained in section 101(35)(B);
3. the person provides all legally required notices with respect to hazardous substances found at the facility[2];
4. the person exercises "appropriate care" with respect to the hazardous substances found at the facility by taking "reasonable steps" to:
    a. stop any continuing releases;
    b. prevent any threatened future release;
    c. prevent or limit human, environmental or natural resource exposure to any previously released hazardous substance;
5. the person provides full cooperation and access to the facility to those authorized to conduct response;
6. the person is in compliance with any land use restrictions and does not impede the effectiveness or integrity of any institutional control;
7. the person complies with any information request or administrative subpoena under CERCLA; and
8. the person is not potentially liable for response costs at the facility or "affiliated" with any such person through
    a. direct or indirect familial relationship or
    b. any contractual, corporate or financial relationship (excluding relationships created by instruments conveying or financing title or by contracts for sale of goods or services).

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[2] This requirement is very site specific, and will depend on gaining an understanding of which hazardous substances if any are on the property, through making "all appropriate inquiry" into previous uses of the property. Once the nature of any contamination is more fully understood, then any required notices will be more evident.

The BFPP provisions represent a significant change in CERCLA. For the first time, a party may purchase property with knowledge of contamination and not acquire liability under CERCLA as long as that party meets the BFPP criteria[3]. The new Amendments should provide significant savings of time and transaction costs. Private parties will now be able to avoid the costs associated with negotiating PPAs, and the timing of the transaction will be within the control of the parties to the transaction and need not await federal government approval of the terms of a PPA.

A BFPP may be subject to a "windfall lien" under the newly added CERCLA Section 107(r), up to the amount of unrecovered response costs incurred by the United States at a facility for which the owner is not liable as a BFPP, and where the response action increases the fair market value of the facility. As to the amount and duration of any windfall lien, the Brownfields Amendments state that the amount is not to exceed the increase in fair market value attributable to the response action at the time of sale or other disposition of the property.[4] The windfall lien arises at the time response costs at the facility are incurred by the United States, and shall continue until the earlier of satisfaction of the lien by sale or other means, or, notwithstanding any statute of limitations under CERCLA Section 113, recovery of all response costs incurred at the facility.

III. Discussion

EPA's long-standing policy is not to become involved in purely private real estate transactions. The Brownfields Amendments reinforce the appropriateness of that policy. The Amendments provide a limitation on liability from CERCLA to persons who qualify as BFPPs thereby making a federal covenant not to sue under CERCLA unnecessary. In light of the new Amendments, effective as of the date of enactment, purchasers should no longer need PPAs with the federal government in order to complete the vast majority of real estate transactions involving contaminated property.

While EPA believes the necessity for PPAs has been largely addressed by congressional action, the Agency recognizes that in limited instances the public interest will be served by

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[3] CERCLA section 107(q) creates another category of person, a contiguous property owner, who will not be considered to be an owner or operator of a facility so long as that person makes all appropriate inquiry into previous uses of the property and does not discover that it is contaminated. If such person has knowledge of contamination at the time of acquisition, he may qualify as a bona fide prospective purchaser under CERCLA section 101(40), so long as he meets the other requirements of that section.

[4] Therefore, where the lien arises, the lien shall not exceed the increase in fair market value attributable to the response action.

entering into PPAs or some other form of agreement[5]. First, where there is likely to be a significant windfall lien and the purchaser needs to resolve the lien prior to purchasing the property (e.g. to secure financing), EPA may consider entering into an agreement with the purchaser.[6]

Second, there may be projects in which a PPA is necessary to ensure that the transaction will be completed and the project will provide substantial public benefits to, for example, the environment, a local community because of jobs created or revitalization of long blighted, under-utilized property, or promotion of environmental justice. In these limited circumstances, the following examples may provide some general guidelines on when such an agreement may be considered:

1. Significant environmental benefits will be derived from the project in terms of cleanup, reimbursement of EPA response costs, or new use, and there is a significant need for a PPA in order to accomplish the project's goals.

> Example: The purchasers are committing to perform significant cleanup as they develop the site for a new use and have concerns about facility "owner or operator" liability.
>
> Example: There has been no facility cleanup, no viable potentially responsible party exists who can be required to timely conduct the cleanup (the current owner may be in bankruptcy), and no potential developer is willing to undertake the entire cleanup in order to develop and use the facility, which, without a PPA, may sit idle for years.

2. The facility is currently involved in CERCLA litigation such that there is a very real possibility that a party who buys the facility would be sued by a third party.

> Example: The United States has an enforcement case under CERCLA Sections 106 and 107 pending against potentially responsible parties, and the primary defendants have sued an additional number of third party defendants, and/or there is a private party

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[5] EPA also recognizes that entering into an "agreement" is not necessary in every instance where a party acquiring contaminated property has concerns about managing liability risks. EPA issued its "Policy on the Issuance of EPA Comfort/Status Letters" on November 12, 1996, in an effort to help the public better understand the environmental status of certain properties and the likelihood that EPA would become involved there.

[6] In some cases, where a BFPP and the United States agree to resolve the United States' windfall lien claim in advance of the BFPP's purchase of the real property, such an agreement may be limited to a settlement of the Section 107(r)(2) lien claim. As stated above, Congress intended the new Section 107(r) to obviate the need for most PPAs and, therefore, settlement of the windfall lien claim may be limited to that one issue. It is EPA's present intent to discuss the windfall lien issue more fully in subsequent guidance.

contribution action ongoing, and a prospective purchaser has been threatened with contribution litigation.[7]

3. EPA will consider entering into a PPA or other settlement in unique, site-specific circumstances not otherwise addressed above when a significant public interest would be served by the transaction and it would not otherwise occur without issuance of a PPA.

IV. Conclusion

Subtitle B—Brownfields Liability Clarifications, of the Brownfields Amendments set out the limitations on liability that are now a part of CERCLA. It is the Agency's hope and expectation that most real estate transactions concerning acquisition of brownfields properties will now move forward with no need for EPA involvement. In those unusual circumstances discussed above, EPA remains committed to removing liability barriers to redevelopment of property where it may appropriately do so.

Case specific inquiries as well as general questions regarding this policy should be directed to Helen Keplinger in OSRE's Regional Support Division at (202) 564-4221.

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

cc: Susan Bromm (OSRE)
Paul Connor (OSRE)
Mike Cook (OSWER)
Benjamin Fisherow (DOJ)
Henry Friedman (DOJ)
Linda Garczynski (OSWER)
Bruce Gelber (DOJ)
Bruce Kulpan (OSRE)
Steve Luftig (OSWER)
Earl Salo (OGC)
Alan Tenenbaum (DOJ)
Jack Winder (OSRE)
EPA Brownfields Liability Exemption Subgroup

[7] A party may have acquired property and otherwise qualify as a BFPP before being threatened with contribution action, but there is no prohibition against EPA entering into a settlement with that party after his acquisition of the property.

