

## Liability

### Overview

One reason the principal entities involved in revitalization (owners, purchasers, developers, lenders, investors, and insurers) have been reluctant to pursue revitalization projects is that federal and state environmental laws assign liability to a broad range of entities. A property owner or operator of a contaminated property may be held responsible for the cleanup. Purchasers are concerned about possible liability associated with contaminated wastes caused by the previous owners. In addition, current owners fear the potential for future liability related to the presence of unknown contamination. This liability section discusses: [Liability Risk Concerns](#), [Regulatory Liability](#), [Third Party Liability](#), [Environmental Insurance](#), and [Resources and Tools](#).

Federal government environmental cleanup laws, such as CERCLA, or Superfund, have served a crucial role in protecting human health and the environment. However, the uncertainties associated with liabilities under these laws, as well as the fact that liabilities may arise under both federal (CERCLA) and state law, can create barriers that inhibit stakeholders from investing in, revitalizing, and reusing contaminated properties.

More than 35 states now have Voluntary Cleanup Programs (VCPs) under which private parties that voluntarily agree to clean up a contaminated site are offered some protection from future state enforcement action at the site, often in the form of a “no further action” letter, covenant not to sue, or “certificate of completion” from the state. Such state commitments do not affect EPA’s authority to respond to actual or threatened releases of hazardous substances under CERCLA.

The nature of the properties typically considered for revitalization can lead to uncertainty associated with the legal requirements regarding these properties that have been either dormant or abandoned for many years prior to the current interest in revitalization. Revitalization project teams often require a legal mechanism to assist in reducing or mitigating the possible risks associated with third party claims, claims by previous owners, regulatory issues, real estate law, environmental law, liens, and a variety of other potential legal issues.

As with many of the other aspects of successful revitalization, a thorough assessment of the legal condition of the property prior to initiating the project should be completed. The development of a detailed legal history and the identification of potential legal issues that could impact the revitalization effort are necessary. Unknown legal issues encountered during project implementation may be costly in terms of project schedule and financing. Therefore, it may be critical that this information be uncovered and addressed as early in the process as possible.

### Liability Risk Concerns

A property owner faces liability risks in two broad categories: regulatory liability (federal and state agencies) and third party liability (cost recovery by private parties). Liability concerns are at times cited as obstacles to revitalization. Liability concerns also arise due to unknown contamination that may be found on the site. Other environmental uncertainties in the revitalization process include: the potential

stigma tied to revitalization sites, the uncertainty related to future compliance costs and problems in navigating the regulatory process in a time efficient and effective way.

Remediation-based risk includes the potential that if site contamination exists, the owner and operator will be liable for the costs of cleanup, including site investigation and assessment, legal fees, and regulatory compliance consulting fees. These costs may include:

- Cost of identifying and determining site contamination
- Cost of site remediation
- Cost of complying with federal and state regulations during remediation, such as consulting and legal fees
- Cost of legal fees to defend against lawsuits brought by regulators (federal and state) and third parties

Personal injury risks include the potential that if site contamination exists, the owner and operator will be liable for the costs of lawsuits stemming from bodily injury caused by contamination existing on site or migrating off site. The associated risks include the following factors:

- Cost of personal injury occurring off site caused by migrating contaminants
- Cost of personal injury occurring on site caused by site contamination

Other types of liability concerns include:

- “Reopeners”- occurs when there is a change in standards or requirements that could reopen a previously approved mitigation to demands for further work.
- Property owners or occupants failure to maintain engineered controls or conform to land use control and limits.

## **Regulatory Liability**

This section presents various tools to address regulatory liability related to the purchase, environmental condition, and financial status of revitalization properties.

## **Agreements**

The advent of revitalization associated with contaminated properties has given rise to an increase in the use of legal agreements to protect the parties involved in the endeavor. Agreements are used to apply parameters to issues of the revitalization project that pose a risk to one or more of the parties involved in the transaction. The following sections provide information regarding some commonly used agreements.

### **Purchase Agreements**

The question about whether a potential buyer will be liable for past contamination and who is

responsible if more contamination is discovered after cleanup can hamper the revitalization process. To address these concerns, two types of agreements may be applied at the state or federal level: prospective purchaser agreements (PPAs) and comfort letters.

### **Prospective Purchaser Agreements**

Prospective Purchase Agreements (PPAs) are agreements between EPA or state regulatory agencies, and potential, or prospective purchasers of a revitalization site. Under a PPA, the regulatory agency agrees not to recover future costs from the purchaser in exchange for an agreement by the purchaser either to perform or to pay for an agreed-upon portion of the site remedy.

The [model PPA](#) provides a template for EPA or a purchaser to use in developing a site-specific PPA.

PPAs have yet to be widely used for revitalization sites. They typically only apply to a narrow group of eligible potential or prospective purchasers.

### **Comfort Letters**

EPA may issue comfort letters to prospective purchasers of contaminated properties when the purchasers request information about future liability at a site. Comfort letters clarify the likelihood EPA will be involved at a site or identify whether a party is protected by a statutory or discretionary enforcement policy. While the letters do not release purchasers from future liability, they do describe what EPA currently knows about potential contamination at the site. States may also issue comfort letters for sites under their oversight.

A majority of concerns can be addressed by providing information known about a particular property to EPA, with an explanation of the relevance of that information to the agency. Consequently, EPA has adopted a policy on the issuance of comfort letters. The policy establishes criteria for issuing such letters and contains the following four sample letter types:

- No Previous Federal Superfund Interest Letter – letter that can be provided to parties when there is no historical evidence of federal Superfund involvement at the property
- No Current Federal Superfund Interest Letter – letter that can be provided when the property has been removed from the CERCLIS inventory of sites, deleted from the NPL, or does not fall within the boundaries of a CERCLIS site
- Federal Interest Letter – letter that informs the recipient of the current status of federal involvement and highlights applicable Superfund policy or regulations
- State Action Letter – letter that provides information about a site at which EPA has deferred action to the state agency.

### **Disclosure Requirements**

Federally mandated lead-based paint disclosures and flood zone disclosures are required during property transactions. Many states also have mandated disclosures that vary from state to state and many municipalities have locally mandated disclosure requirements. Check with your state department

of real estate for disclosures required in your state and city planning department for information on local ordinances and disclosures that affect your sale.

These regulations typically require sellers to disclose information regarding the condition of the property to the prospective purchasers. For example, California sellers must give buyers a mandatory disclosure form listing defects in the property. In addition, California sellers must disclose potential hazards from floods, earthquakes, fires, environmental hazards and other problems in a Natural Hazard Disclosure Statement. In most states, it is illegal to fraudulently conceal major environmental impairments or physical defects of a property. When a buyer and seller enter into a contract, the seller has certain obligations to disclose any known defects, needed repairs, and violations of law that may be associated with the property. Sales contracts typically provide the buyer with the opportunity to thoroughly inspect the property, and hire professional inspectors and engineers to inspect the property to determine its condition.

Generally, owners are responsible for disclosing only information within their personal knowledge. However, full disclosure of any property defects will provide the owner protection from legal problems from a buyer who seeks to rescind the sale or sues for damages suffered because important information about the property was carelessly or intentionally withheld.

ASTM provides a guide of a series of options or instructions consistent with good commercial and customary practice in the United States for environmental liability disclosures accompanying audited and unaudited financial state.

It is important for the project team to complete a thorough review of disclosure regulations that may be applicable during the planning phase by contacting state and city real estate departments. This information can be useful in determining purchasing and revitalization decisions and in focusing environmental assessment activities at areas of suspected concern.

## **Environmental Covenants**

An environmental covenant is a restriction on the specific condition and use of a property, such as a requirement that the property will be used only for residential purposes. These covenants, sometimes called deed restrictions and/or deed notices can be found when completing the due diligence process on a potential property being considered for revitalization or reuse. Past restrictions should be identified. There are potential liabilities associated with future owners not conforming to the use constraints of a Risk Based Corrective Action (RBCA) cleanup. The language in an agreement of sale to the effect that the seller is not responsible for any exposures due to failure to conform to the environmental covenants may protect the owner or developer from third-party lawsuits, even though the party remains liable under CERCLA.

## **No Further Action Letter**

After a site assessment determines that cleanup action is required at a property, states can inform a property owner of the level of cleanup that is necessary before a no further action letter can be issued for all or part of a site. The letter is granted only after a cleanup has been completed or a site assessment has determined that no cleanup is necessary. The letter does not release the new owner from liability, but does guarantee that the state will not take any new enforcement actions at the site, barring discovery

of information unknown at the time the letter was issued. The state no further action letter satisfies the Federal EPA requirements.

### **Covenant Not to Sue**

EPA issued guidance outlining situations under which the agency may enter into an agreement not to file a lawsuit against a purchaser of property that was contaminated prior to the purchase. In addition, some states have passed laws that allow for the issuance of a covenant not to sue (CNTS). A CNTS offers protection from future suits by the state for contamination found on the property. In some states, the CNTS may not cover conditions and contamination that were unknown at the time the covenant was granted. In some cases, a CNTS may be contingent on an approved land use for the property. For example, the state may require that the property be maintained in industrial use or that the new use will not exacerbate contamination that already exists. Moreover, some states may issue the CNTS at the time the environmental agency issues no further action certificates or cleanup letters.

### **Certificate of Completion**

Some states issue a certificate of completion after cleanup if the site meets the state cleanup standards that were agreed upon. In some cases, the standards will be individually negotiated for each site, based on a risk assessment or in accordance with a states policies or standards. In other cases, the standards will be voluntary cleanup standards that apply to all sites statewide. The certificate of completion provides assurance to prospective purchasers that the cleanup has occurred and that the state environmental agency participated and was satisfied with the results. In many states, possessing a certificate of completion limits further liability for both potentially responsible parties (PRPs) (laws vary by state on a PRP's eligibility for such a certificate) and parties that do not bear responsibility.

### **Bona Fide Prospective Purchaser**

There is a growing interest in the acquisition of federal Superfund sites that are not classified as brownfield sites under the EPA definition and therefore are ineligible for EPA brownfields funding. 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. The [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 \(Common Elements Guidance\)](#) document provides clarification of the "Common Elements" that 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.

### **Third Party Liability**

Third party (or private) liability is an important insurance issue. In addition to liability risks that insurance can help reduce, a redeveloper (and perhaps other associated financial stakeholders) may obtain through federal and state government officials an appropriate releases from possible liability.

Such releases or clarifications may be incorporated into PPAs, CNTSs, no further action letters, and comfort letters. The documents likely will be tailored to the facts about the specific site and will likely be contingent upon adherence by the redeveloper to certain conditions or commitments.

Accordingly, such documents may provide some legal comfort to those involved in revitalization, but they may not always be available on acceptable terms; they are not uniform from site to site or state to state and may provide protection only against possible liability to the federal or state agencies that co-sign the agreement.

If an individual involved in the revitalization was in some way legally liable for the original contamination at the site, that individual could enter into a CERCLA settlement with EPA which can provide protection against claims by third parties for further financial contributions towards cleanup of the site.

New statutory provisions insulate financial institutions from liability unless they become active managers of the property in which they hold a security interest. This statutory protection should help to alleviate certain concerns that lenders have had about potential liability under CERCLA.

There are distinct elements to liability risks, starting with parties that want to file suit for action or for damages, and continuing into their right to do so, which may be limited by private agreements or public policy and law, and ending with the likelihood of their success in their suit.

However, one type of third-party liability poses a special concern. No legal mechanism exists at present (at either the federal or state level) to totally insulate the redeveloper, its financial backers, or other major participants in the revitalization of potentially contaminated sites from possible liability to a third party who claims to have been injured by contaminants that originate from the site. Such an injured third party may exercise legal rights under CERCLA or applicable state law to seek damages or another remedy against the redeveloper. Some states limit access to the state courts for third-party liability claims based on site conditions after the completion of a state-approved mitigation, entered into specifically to avoid this type of liability. Financial stakeholders in revitalization projects can decrease liability risks through:

- Competent site assessment and due diligence before initiating cleanup and construction activities that can minimize the risk of third-party claims by determining the facts about the nature and extent of contamination of the property and prospects for historical or prospective migration of contaminants to off site locations
- Indemnification provisions or releases from liability under specified circumstances, often contained in major commercial contracts, may provide some legal and financial comfort to the major participants
- Hosting of public meetings and garnering neighborhood support for the mitigation plan

Insurance coverage also is commercially available to cover third-party environmental damage claims and expenses resulting from such claims.

## **Environmental Insurance**

The existence of environmental liabilities can delay or prevent the revitalization of potentially

contaminated sites. This subsection describes how environmental insurance can be used as a tool to overcome potential environmental liability problems in transactions.

The development of environmental insurance since the early 1990's has permitted some revitalizations to reduce financial uncertainty by transferring risks to insurers at a price. Insurance products permit economic risks associated with revitalization to be quantified, thereby making investment decision-making easier for developers and other equity investors. At the same time, insurance provides lenders with a level of certainty that ease investor access to debt capital. Three broad options for coverage are relevant to owners and developers of revitalization sites: cost cap, pollution liability (PL), and secured creditor (SC) policies. Any policy can be written to include or exclude virtually all the clauses, except for legal defense which is mandatory for those conditions covered in other parts of the policy. The three example policies listed may cover only a small subset of risks due to the following: the insurer may refuse to cover some risks, and the insured simply cannot afford the high premium for all the coverages and has to choose the most important. The key to a good insurance buy is including the coverages needed, and not those that are not relevant.

EPA's Office of Brownfields Cleanup and Redevelopment recently updated two helpful reports in 2006. Environmental Insurance Products Available for Brownfields Redevelopment, 2005, is available at <http://www.epa.gov/brownfields/insurebf.htm>. The document provides up-to-date information on pollution liability, cost cap, and secured lender policies, and pre-funded insurance programs. Basic characteristics of the products are discussed including policy dollar limits, premiums, deductibles, and policy periods. The report ends with a discussion of changes in the market since the last review of products was conducted in 1999 such as turnover of insurers and modifications of policy periods and premiums. The information is based on in-depth interviews with representatives of nine insurance companies.

The third report, State Brownfield Insurance Programs, 2006, is also available at <http://www.epa.gov/brownfields/insurebf.htm>. It is a short supplement to the 2004 and 2005 studies of existing state-level programs and efforts in other states to develop or investigate the desirability of a state program. The 2004 report is available at [http://www.epa.gov/brownfields/pubs/state\\_report\\_04\\_revised.pdf](http://www.epa.gov/brownfields/pubs/state_report_04_revised.pdf). The 2005 report is available at [http://www.epa.gov/brownfields/pubs/insurance\\_update\\_2006.pdf](http://www.epa.gov/brownfields/pubs/insurance_update_2006.pdf).

Access to insurers, brokers, and attorneys with specialized capacities to address brownfield insurance matters is located at [www.brownfieldsinsurance.org](http://www.brownfieldsinsurance.org). The listing is easy and free of charge and additional insurers, brokers, and attorneys are invited to add their qualifications and share documents that they have written. The site also offers a library that includes funded reports, journal articles, and case studies of insurance usage, as well as a glossary of terms. Reports currently on the site include “[State Brownfield Insurance Programs – 2006](#)” and “[Environmental Insurance Products Available for Brownfield Redevelopment – 2005](#).”

An additional report, Brownfields Insurance for Public Sector-Led Development Projects: Experience and Methods, 2005, is available at [http://www.epa.gov/brownfields/pubs/bf\\_case\\_studies\\_report.pdf](http://www.epa.gov/brownfields/pubs/bf_case_studies_report.pdf). The document provides some case studies, methodologies, and lessons learned during public sector-led development projects. As such it dispenses valuable information about the insurance process, including determining insurance needs, choosing insurers, selecting needed coverages, as well as insurance negotiation and acquisition. These documents were prepared by Kristen R. Yount and Peter B. Meyer from University of Louisville. An additional resource from University of Louisville is a practice guide,

Utilizing Environmental Insurance for Brownfield Redevelopment.**Cost Cap Policy**

A Cost Cap policy, also referred to as cost overrun or remediation stop-loss insurance, protects against cost overruns above the estimated cost of a planned cleanup at a revitalization site. The premium for the policy is based on a percentage of the estimated cleanup cost. The insurer pays for the costs that exceed the self-insured retention (SIR) or “buffer” to be paid by the insured. For example, on a planned \$2 million cleanup with a \$200,000 SIR, the policy begins paying for costs after the insured party has spent \$2.2 million (the original cost plus the \$200,000). Risks associated with revitalization that generally are covered under a cost cap policy, are presented in [Risk Covered Under Possible Insurance Policies Exhibit](#). These policies may also have time limitations and minimum policy values.

**Pollution Liability Policy**

Pollution liability (PL) policies also are referred to as pollution legal liability, pollution and remediation legal liability, revitalization restoration, environmental response compensation and liability, commercial property revitalization, real estate pollution, real estate environmental liability, and other labels. Some insurance carriers offer more than one PL policy relevant to redevelopers of revitalization sites.

Pollution liability policies provide protection for costs that result from a pollution condition that can be pre-existing (either unknown contamination or known contamination disclosed at the time the policy is written) or current (releases that occur during the policy period). The coverage may be categorized into three basic components. The first consists of protection for the costs of third party claims arising from a pollution condition. The second provides protection for first party cleanup costs and other expenses related to a pollution problem. The final component involves legal defense costs associated with the first two components. Following is a brief explanation of each component:

- Third Party Claims – Claims that refer to assertions, such as lawsuits, alleging legal responsibility for damage. Third parties may include private parties and government entities enforcing environmental regulations. The damages may occur on site (on the property designated in an insurance policy) or off site (at locations beyond the boundaries of the insured property such as nearby parcels where pollution has migrated, disposal sites, properties damaged during transportation of contaminants, the diminution in property values off site, and natural resource damage).
- First Party Cleanup Cost – Coverage that entails protection for the insured against the expense of on site cleanup and related expenses such as business interruptions and property value diminution resulting from pollution. Cleanups may be for newly discovered contaminants that were not addressed in an initial planned cleanup and for cleanup of pollution arising from ongoing operations. Also included is a mechanism that often is referred to as “reopener” coverage. That coverage provides insurance for the costs of additional cleanup ordered by environmental regulators or compelled by law after a cleanup has been completed and a state agency has provided an assurance such as a no further action letter. As noted, such assurances generally indicated that further cleanup was not required at the time the assurance was written. However,

they always include a statement that reserves the right of the agency to re-open a cleanup if circumstances at the site change (such as a modification of property use) or if changes in environmental regulations mandate cleanup levels that are more stringent than those employed in the initial cleanup.

- Legal Defense Costs – These expenses can be substantial, even if the insured is not a major contributor of contamination on a site, in part because of the imposition of joint and several liability and in part because of the complex mix of federal, state, and local regulatory oversight that applies to any given property. The policies generally indicate that the carrier has both the right and the duty to defend the insured. The costs of such defense are included in the policy dollar limits.

Risks associated with revitalization that are generally covered under a PL policy are presented in [Risk Covered Under Possible Insurance Policies Exhibit](#).

### **Secured Creditor Policy**

While liability concerns associated with federal requirements are addressed under the 1996 Lender Liability Law, there are two primary concerns about loans on revitalization sites. First, the ability of the borrower to repay a loan may be jeopardized by unanticipated and extensive cleanup costs. Second, in the event of foreclosure, a lender may not be able to recoup the loan amount if the value of the collateral property has been decreased by actual or perceived contamination, either before or after completion of mitigation.

During the 1990s, insurance companies began offering Secured Creditor (SC) policies to address these concerns. As with PL policies, SC policies offer protection against the costs of third party bodily injury and property damage claims arising from contamination and legal defense costs to defend against these claims. In addition, they provide reimbursement for loan payments if a borrower defaults, as well as compensation to the lender for collateral value loss caused by a pollution condition. The norm in successfully writing PL is writing a "lesser of" policy that pays either the remaining balance on the loan or the cost to complete a remediation such that the property's collateral value would permit the loan to be repaid. If all the lender got was remediation costs, then it might have to engage in "active management" to get the remediation done before it could recover all its capital and therefore lose out on its lender liability exemption.

Risks associated with revitalization that generally are covered under an SC policy, are presented in the [Risks Covered Under Possible Insurance Policies Exhibit](#).

*Exhibit: Risks Covered Under Possible Insurance Policies*

<i>Type</i>	<i>Possible Coverages/Risks</i>
Cost Cap Policy	<ul style="list-style-type: none"> <li>• Discovery of higher concentrations and greater extent of contaminants than identified in the cleanup plan</li> <li>• Discovery of contaminants that were not identified in the cleanup plan</li> <li>• Changes in regulatory requirement</li> <li>• Legal defense associated with unanticipated cleanup</li> </ul>
Pollution Liability Policy - Third Party Claim Costs	<ul style="list-style-type: none"> <li>• Offsite remediation of pollution emanating from insured parties' property</li> <li>• Offsite bodily injury caused by pollution emanating from insured parties' property</li> <li>• Offsite property damage caused by pollution emanating from insured parties' property</li> <li>• Offsite property value diminution caused by pollution emanating from insured parties' property</li> <li>• Offsite business interruption loss caused by pollution emanating from insured parties' property</li> <li>• Contractual liability due to pollution</li> <li>• Natural resource damage</li> <li>• Onsite bodily injury caused by onsite pollution</li> <li>• Onsite bodily injury caused by pollution emanating from adjacent properties</li> <li>• Onsite property damage caused by onsite pollution</li> <li>• Claims due to contamination at or emanating from a known, non-owned disposal site where contaminants were taken</li> <li>• Claims due to contamination at or emanating from an unknown, non-owned disposal site where contaminants were taken</li> <li>• Release of contamination during transportation</li> </ul>

<i>Type</i>	<i>Possible Coverages/Risks</i>
Pollution Liability Policy - First Party Cleanup Costs	<ul style="list-style-type: none"> <li>• Additional remediation, due to regulatory change, of known pollution after cleanup (re-opener coverage)</li> <li>• Remediation, due to regulatory changes, of known pollution originally thought not to require remediation</li> <li>• Remediation of previously unknown, pre-existing pollution</li> <li>• Remediation of current pollution from ongoing operations</li> <li>• Property value diminution due to onsite pollution</li> <li>• Business interruption loss due to onsite pollution</li> <li>• Delayed construction costs due to onsite pollution</li> <li>• Remediation of pollution emanating from adjacent property</li> <li>• Property damage due to pollution emanating from adjacent property</li> <li>• Property value diminution due to pollution emanating from adjacent property</li> <li>• Business interruption loss due to pollution emanating from adjacent properties</li> <li>• Delayed construction due to pollution emanating from adjacent property</li> </ul>
Pollution Liability Policy - Legal Defense Costs	<ul style="list-style-type: none"> <li>• Defend against third party claims arising from cleanup</li> </ul>
Secured Creditor Policy	<ul style="list-style-type: none"> <li>• Compensation for collateral property value diminution resulting from contamination</li> <li>• Reimbursement for loan payment losses due to borrower's default</li> <li>• Cost of third party bodily injury and property damage claims as a result of site contamination</li> <li>• Contract damage costs resulting from contamination</li> <li>• Business interruption costs resulting from contamination</li> <li>• Remediation costs at sites owned by banks</li> </ul>
Note: The coverages listed are possible options.	

## Insurance Improvements

Representatives of the insurance industry report an increased demand for environmental insurance over the past few years as a result of such factors as a highly active real estate market and the refinement of environmental insurance products. The increased demand has provided the industry with the opportunity to make the following improvements in insurance products:

- Increased Policy Dollar Limits – Maximum limits have increased considerably. In the late 1990's, a maximum limit of \$4 million on a PL policy was a rarity. Today, policies having limits of \$200 million may be provided by a single carrier.
- Broader Coverage – The scope of policy protection has expanded. For example, cost cap policies now can cover contaminants that were not identified in a remediation plan.
- Less Stringent Site Assessment Requirements – Insurers today tend to rely on existing site data and rarely charge a separate fee for their own engineering assessments. Stringent assessments should be applied.

The prices of individual policies vary greatly. Many considerations influence the cost of a policy, such as:

- Extent and nature of contamination
- Adequacy of the environmental site characterization performed
- Remediation approach selected
- Intended land use
- Surrounding land use
- Maximum dollar limit, time limit, and deductible included in the policy
- Other factors based on decisions made by the purchaser

For example, a decision to proceed with a cleanup before obtaining approval of the state regulatory agency generally may increase the cost of a cost cap policy covering that cleanup, since the coverage presents a greater risk to the insurer in terms of possible requirements for cleanup beyond that identified in the remediation plan.

## Resources and Tools

A list of resource documents developed by EPA is presented in the EPA Liability Resource Documents Exhibit.

*Exhibit: EPA Liability Resource Documents*

<i>Topic</i>	<i>Document Title</i>	<i>Summary</i>
Brownfields Federal Statutory Overview	<a href="#"><u>Brownfields Handbook: How to Manage Federal Environmental Liability Risks</u></a> EPA, November 2002	<p>This handbook summarizes the statutory and regulatory provisions of CERCLA and RCRA, and the policy and guidance documents most useful in managing environmental cleanup liability risks associated with revitalization sites.</p> <p>The handbook also summarizes related documents and provides copies of relevant fact sheets and other documents, and lists EPA headquarters and regional contacts for cleanup and reuse issues. Designed for use by parties involved in the assessment, cleanup, and reuse of brownfields, this handbook provides a basic description of the purpose, applicability, and provisions of each tool.</p>
Scope and application of certain liability exemptions of the 2002 CERCLA Amendments	<a href="#"><u>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 Guidance)</u></a> EPA, March 6, 2003	<p>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.</p> <p>This guidance document provides clarification of the “Common Elements” that 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.</p>
Windfall Liens	<a href="#"><u>Interim Enforcement Discretion Policy Concerning “Windfall Liens” Under Section 107(r) of CERCLA</u></a> EPA, July 16, 2003	<p>This memorandum discusses the United States Environmental Protection Agency’s (“EPA” or “Agency”) and the Department of Justice’s (DOJ) implementation of new Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Section 107(r), the “windfall lien” provision of the Small Business Liability Relief and Brownfields Revitalization Act (“Brownfields Amendments”), P.L. 107-118. This interim policy describes how EPA and DOJ will generally exercise their enforcement discretion in the context of the new CERCLA § 107(r) windfall lien provision.</p>

<i>Topic</i>	<i>Document Title</i>	<i>Summary</i>
Liability	<a href="#"><u>Liability and Other Guidance Quick Reference Fact Sheet, April 1997. EPA 500-F-97-104.</u></a>	EPA has been working with states and municipalities to develop guidance that will provide some assurance that, under specified circumstances, prospective purchasers, lenders, and property owners do not need to be concerned with CERCLA liability. The guidance clarifies the liability of certain parties' associations with activities at a site, and clearly states EPA's decision to use its enforcement discretion not to pursue such parties. EPA anticipates that these clear statements of their position will alleviate any concerns parties may have in becoming involved in the cleanup and revitalization of sites.
Policy Toward Owners of Property Containing Contaminated Aquifers	<a href="#"><u>EPA Memorandum and Directive: Final Policy Toward Owners of Property Containing Contaminated Aquifers, Office of Site Remediation Enforcement, 60 Fed. Reg. 34790 (July 3, 1995).</u></a>	EPA issued guidance outlining its policy of not suing property owners for groundwater contamination of an aquifer underlying the property if the owner did not cause or contribute to the contamination.
Guidance on Agreements with Prospective Purchasers of Contaminated Property	<a href="#"><u>EPA Memorandum: Guidance on Settlements with Prospective Purchasers of Contaminated Property, May 1995.</u></a>	EPA issued guidance outlining situations under which they may enter into an agreement not to file a lawsuit against a purchaser of property that was contaminated prior to the purchase.

<i>Topic</i>	<i>Document Title</i>	<i>Summary</i>
<p>Model Comfort Letter Clarifying National Priority List (NPL), Uncontaminated Parcel Identifications, and CERCLA Liability Involving Transfers of Federally Owned Property</p>	<p><a href="#"><u>Memorandum: Transmittal of the Revised Model Comfort Letter Clarifying NPL Listing, Uncontaminated Parcel Determinations, and CERCLA Liability Involving Transfers of Federally Owned Property, August 1995.</u></a></p> <p><a href="#"><u>OSWER Guidance, Model Comfort Letter Clarifying NPL Listing, Uncontaminated Parcel Determinations, and CERCLA Liability Involving Transfers of Federally Owned Property, January 1996.</u></a></p> <p><a href="#"><u>EPA Memorandum on Military Base Closures: Guidance of EPA Concurrence in the Identification of Uncontaminated parcels under CERCLA Section 120(h)(4), April 19, 1994, OSWER Directive No. 9345.0-09, EPA 540-F-94-32.</u></a></p>	<p>EPA issued this model comfort letter clarifying common myths about NPL listing and CERCLA liability, and highlighting certain provisions concerning the transfer of federally owned properties.</p>
<p>Policy on the Issuance of Comfort/Status Letters</p>	<p><a href="#"><u>EPA Memorandum: Policy on the Issuance of Comfort/Status Letters, November 12, 1996.</u></a></p> <p><a href="#"><u>Policy on the Issuance of Comfort/Status Letters, November 12, 1996.</u></a></p>	<p>EPA issued this memorandum to describe the policy on requests from parties for some level of “comfort” that if they purchase, develop, or operate on a revitalized property, EPA will not pursue them for the costs to clean up any contamination resulting from the previous use that was not addressed despite good-faith efforts to do so.</p>

<i>Topic</i>	<i>Document Title</i>	<i>Summary</i>
Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996	<a href="#"><u>HR3610; Sections 2501-2505, September 30, 1996.</u></a>	This act includes lender and fiduciary liability amendments to CERCLA, amendments to the secured creditor exemption set forth in Subtitle I of RCRA, and validation of the portion of the CERCLA Lender Liability Rule that addresses involuntary acquisitions by government entities. The amendments made by the act apply to all claims not finally adjudicated as of September 30, 1996, which include all cases that are in the process of being settled.
Policy on CERCLA Enforcement Against Lenders and Government Entities That Acquire Property Involuntarily	<a href="#"><u>Federal Register (Volume 60, Number 237), December 11, 1995.</u></a>	EPA issued guidance describing the agency’s policy of not pursuing for cleanup costs those lenders who provide money to an owner or developer of a contaminated property, but do not actively participate in the daily management of the property. The guidance also clarifies what is meant by “involuntary” acquisition by a government entity.
Underground Storage Tank (UST) Lender Liability Rule	<a href="#"><u>Federal Register (Volume 60, Number 173, Page 46691-46715) [Rules and Regulations], September 7, 1995.</u></a>	EPA issued this rule clarifying when a lender may be exempt from liability for loans on properties containing USTs.
Guidance on Deferral of NPL Listing Determinations While States Oversee Response Actions	<a href="#"><u>EPA Memorandum and Guidance: Transmittal of the “Guidance on Deferral of NPL Listing Determinations While States Oversee Response Actions”, August 1995, EPA 540-F-95-002, OSWER Directive No. 9375.6-11.</u></a>	EPA guidance that provides a framework for Regions, States, and Federally-recognized Tribes to determine the most appropriate, effective, and efficient means to address more sites more quickly than EPA otherwise would address them.

<i>Topic</i>	<i>Document Title</i>	<i>Summary</i>
National Brownfield's Association White Paper on Property Transaction Comfort	<a href="#">Six Steps to Property Transaction Comfort in Ohio</a>	This white paper describes available tools that can define, minimize, and/or avoid the transfer of environmental liabilities and the subsequent environmental costs directly related to acquiring property ownership in Ohio. These available tools are presented as a six-step process designed to achieve the level of property transaction comfort required to manage environmental liabilities, enable project financing, and complete brownfield transactions.

A list of resource links for environmental laws and trends is presented in the Environmental Law Information Exhibit.

*Exhibit: Environmental Law Information*

<i>Organization</i>	<i>Topic</i>
American Bar Association	<a href="#">Section of Environment, Energy, and Resources</a>
Environmental Law Net	<a href="#">Resource for environmental law research and news</a>
EPA	<a href="#">Compliance and Enforcement Home</a>
EPA	<a href="#">Environmental Law for Citizens</a>
EPA	<a href="#">Environmental Law for Businesses</a>
EPA	<a href="#">Environmental Law for Governments</a>
EPA	<a href="#">Major Environmental Laws</a>
EPA	<a href="#">Compliance Assistance</a>
EPA	<a href="#">Enforcement</a>