

Liability

Overview

Why Liability Still Matters

As brownfield sites become more important to the land base of rural and urban communities for housing, commercial and industrial development, buyers and sellers of brownfields are taking greater, more educated risks in the transaction and real estate development processes. The biggest impediment to the redevelopment of a brownfield site is uncertainty. The most significant uncertainties include:

- cleanup standards (how clean is clean or when are we finished)
- pervasive and -inclusive liability (who is liable for what and how do we allocate risk)

The key to a successful brownfield project is managing the risk – that is identifying the scope of the problem and allocating or mitigating the risk.

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.

Under federal and state statutes, a severe economic burden often falls on those who did not create the problem, including those who unwittingly purchase contaminated property. This burden is essentially due to the all-inclusive, retroactive, and strict liability scheme built into both statutes. Although both Federal law and many state cleanup statutes provide for an “innocent landowner” and other narrow exemptions and defenses, those defenses have been extremely difficult to establish. Liability - even the cost of disproving potential liability - has kept prospective purchasers from acquiring and cleaning up contaminated property and financial institutions from lending money for such transactions.

As with many of the other aspects of successful revitalization, a thorough assessment of the legal condition of the property, and adjacent properties, 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.

After 20 Years of Brownfields Programs, How Has Liability Evolved?

Despite truly great progress of brownfield cleanup and reuse from 1990 through 2010, potential liability arising from federal and state “Superfund” laws and the effect of the 2002 amendments to CERCLA

(a.k.a. the “[Brownfields Amendments](#),”[1]) has not significantly changed. CERCLA[2] and state environmental cleanup laws apply concurrently to the same property in most cases. As a result, the brownfield stakeholders and the practitioners advising those stakeholders must consider potential liability under both statutory schemes and pick the right tool to mitigate the uncertainties caused by brownfield liability.

The Brownfields Amendments did not change state cleanup laws, and some of the new federal provisions may be inconsistent with their state counterparts. In addition, despite interpretive memoranda from US EPA, the Brownfields Amendments remain untested in the courts. Still, for the first time, CERCLA attempts to clarify when EPA will not interfere at sites where cleanup has been undertaken pursuant to a state program. Stakeholders, including attorneys and their clients, should decide early in the real estate transaction whether and to what extent it makes sense to try to capture the potential benefits of the Brownfields Amendments.

[1] Small Business Liability Relief and Brownfields Revitalization Act, Pub L No. 107-118, 115 Stat 2356

[2] Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 USC § 9601 to 9675.

Understanding Liability in the Context of Recycling Contaminated Real Estate.

The brownfield concept grew out of a need to mitigate the unintended, adverse effects of CERCLA cleanup and financial responsibility requirements on redevelopment of industrial and commercial property, primarily in the inner cities but also in rural areas. By the late 1980’s, a pattern to avoid potential CERCLA liability was developing in cities across the United States. As older industrial sites and districts continued to deteriorate, industry often relocated to nearby suburban and rural farmlands or, in many cases, to new regions of the country or abroad. Many sites simply suspected of being contaminated were and still are avoided in favor of greenfield development. The resulting loss of jobs weakened tax bases and dampened economic growth in primarily urban areas. The decentralization of industrial properties created pressure for expanded transportation and other utility infrastructure, putting greater fiscal and environmental stress on surrounding communities.

In response to this pattern, federal and state governments began grappling with the brownfield concept in the early 1990’s. As part of the Clinton administration’s Brownfield Initiative, EPA developed guidance documents to “clarify” the liability of prospective purchasers, lenders and current property owners involved in brownfield sites; e.g., the “Model Comfort Letter” used to clarify National Priorities List (NPL or federal superfund site) listings, uncontaminated parcel identifications, and CERCLA liability involving transfers of federally owned property; and the “prospective purchaser guidance” for those interested in buying contaminated land subject to CERCLA.

States were also leading the effort to mitigate the unintended consequences of liability, such as in 1995 when Oregon passed the Recycled Lands Act ([HB 3352](#)) which amended the state superfund law to incorporate brownfield concepts. The goal was to encourage the redevelopment of contaminated lands in a less costly and less cumbersome way than is typical at federal superfund cleanups and to mitigate the risk of undertaking such development. Until the 2002 Brownfields Amendments, however, the liability provisions in the federal statute remained unchanged.

CERCLA (as amended by the Brownfields Amendments) defines a “brownfield site” as “real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.” [42 USC § 9601\(39\)](#). The federal definition is subject to a number of exclusions, including facilities listed or proposed for listing on the NPL, or where cleanup under CERCLA is planned or ongoing. Aside from funding eligibility purposes under the Brownfields Amendments, the term “brownfield” is intended to distinguish developed land from unused suburban and rural land referred to as “greenfield” sites.

What, Me Worry?

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. This is known as “status liability.” A property owner or operator of a contaminated property may be held responsible for the cleanup. Purchasers are concerned about possible liability associated with contamination 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](#), [Reducing Risk of Regulatory Liability](#), [Reducing Risk of Third Party Liability](#), [Environmental Insurance](#), [The CERCLA Brownfields Amendments of 2002](#), and [Resources and Tools](#).

Most states now have Voluntary Cleanup Programs (VCPs) under which public or 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” determination, covenant not to sue, or “certificate of completion” from the state. Such state commitments may not affect EPA’s authority to respond to actual or threatened releases of hazardous substances under CERCLA. There are, however, a variety of collaborative efforts undertaken at current and former federal Superfund sites where protection under federal and state liability schemes is accomplished. Further, many stakeholders are blending federal protections (for example, brownfield prospective purchaser [BFPP] defenses) with state mechanisms such as VCP protections and state prospective purchaser agreements (PPA’s).

Liability Risk Concerns

Who Is Liable?

A wide range of persons are potentially liable based on their status as current or former owners or operators (including lessees), parties who caused or contributed to contamination, and those who arranged for transportation or disposal. The Brownfields Amendments did not modify status liability, but rather attempted to mitigate the effect of status liability on the transfer, redevelopment and lease of contaminated property.

Current Site Owners and Operators.

CERCLA defines current “owners and operators” as potentially liable parties under [42 USC § 9607\(a\)\(1\)](#). Under some state cleanup statutes, a current site owner could be liable depending upon the time of

release – that is, a person will be liable if they are the owner or operator at or during the time of the acts or omissions that resulted in the release – or they will be liable if they knew or reasonably should have known of the release when they first became the owner or operator.

Past Owners and Operators

CERCLA and many state laws also define former owners and operators at or during the time of the disposal or release, or those whose acts or omissions lead to the release as potentially liable persons. [42 USC § 9607\(a\)\(2\)](#). Additionally, in some states those owners or operators who obtained actual knowledge of a release during their ownership or operation but failed to disclose the release in a subsequent transfer of the property to another person will become strictly liable.

Generators, Disposers, “Arrangers” and Transporters

CERCLA provides that any person who arranges for the disposal or treatment of a hazardous substance, or arranges with a transporter for transport of a hazardous substance, is a potentially liable person. [42 USC § 9607\(a\)\(3\)](#). CERCLA also makes persons who accept or have accepted any hazardous substance for transport to a disposal or treatment facility a potentially liable party, subject to certain limitations. [42 USC § 9607\(a\)\(4\)](#).

Amendments to CERCLA in the final days of the Clinton Administration exempted arrangers from liability “who arranged for recycling of recyclable material.” [42 USC § 9627\(a\)\(1\)](#). The exemption applies retroactively, except for concluded or pending judicial or administrative action initiated by the United States prior to its enactment. While some state cleanup laws do not specify “generators” as a class of liable persons, those laws may create a broad liability net for any person whose acts or omissions caused, contributed to, or exacerbated a release. In addition, some state laws does not contain liability provisions for arrangers or transporters.

Most brownfield developers will fall into one of the liable party categories, either because he or she owns or operates the contaminated property or will acquire the brownfield for redevelopment. To mitigate or, depending upon the facts, avoid liability, the tools discussed in the following sections, and the liability defenses and exemptions, should be considered.

Liability For What?

CERCLA and many state cleanup laws create potential liability for remedial action costs incurred by the state or third parties, and for damages to natural resources. See [42 USC § 9607\(a\)](#). The liability is strict (without fault), joint and several, and retroactive. Liability attaches to persons at any “facility” from which there is “disposal” and a “release” or threatened release of a “hazardous substance” into the environment. Once legal liability attaches, a person cannot transfer that liability.

Any liable or potentially liable person may seek “contribution” from any other person who is liable or potentially liable. Recent US Supreme Court decisions have found that in certain circumstances, private parties may also assert cost recovery claims against other private parties, similar to government agencies’ right of cost recovery. Courts can allocate cleanup costs among the liable parties based on equitable factors developed under CERCLA case law.

A “facility” is “any site or area where a hazardous substance has ... come to be located” except for consumer products in consumer use, or vessels. [42 USC § 9601\(9\)\(B\)](#). State laws define a facility similarly. For example, Oregon’s definition includes “any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located and where a release has occurred or where there is a threat of a release.” [ORS 465.200\(12\)](#).

CERCLA applies the definition of “disposal” from the Solid Waste Disposal Act, [42 USC § 6903\(3\)](#), to mean “the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid or hazardous waste” into or on land or water so that the waste or any constituent enters the environment, including air, water or groundwater.

A “release” is specifically defined as “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment.” [42 USC § 9601\(22\)](#).

A “hazardous substance” is broadly defined under both federal and state cleanup laws covering essentially every contaminant. Oil is excluded from the definition under CERCLA, [42 USC § 9601\(14\)](#), but can be the subject of a citizen suit under other federal laws such as the Resource Conservation and Recovery Act or RCRA or the federal Clean Water Act. Oil is specifically included as a hazardous substance under many state laws.

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.

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.

Reducing the Risk of Regulatory Liability

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

Agreements

A number of agreements to allocate liability and protect the parties involved in the transaction have been successful in reducing and allocating risk and uncertainty associated with liability, with the result being an increase in revitalization of contaminated properties. 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.

Prospective Purchaser 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, the most common type of agreement that is typically applied at the state level is the prospective purchaser agreement (PPA).

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. In certain states such as Oregon, PPA's entered by a court in the form of a consent judgment provide for third party contribution protection.

The [model PPA](#) provides a template for EPA or a purchaser to use in developing a site-specific PPA. However, most states have specific criteria and forms for PPA's that will contain more detailed requirements. And remember, typically a state PPA does not protect against federal liability, as a federal PPA would not protect against state liability.

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. Due to the increase in scope and popularity of PPA's and other state mechanisms to limit or manage liability, EPA comfort letters have significantly waned in popularity over the last ten years.

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 may be found when completing the due diligence process on a potential property being considered for revitalization or reuse. Identification of past restrictions is important as there are potential liabilities associated with future owners not conforming to the use constraints set forth in covenants or deed restrictions. 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.

A covenant is simply a contractual agreement between two or more parties, usually a term in a larger agreement or part of a real estate document, where one party pledges to do or refrain from doing something. A covenant also usually contains a stipulation of certain facts for which the parties are in agreement. There is no specific covenant unique to brownfields, although there are some common covenants in deals concerning topics such as completing remediation, carrying certain kinds of insurance, not disturbing existing caps, or not disrupting any institutional controls.

The primary benefit of a covenant, if made a part of or itself is a fully enforceable contract, is that the covenant binds the parties to the obligations under law. The primary limitation is that the ability to enforce the obligation depends on the party's financial standing who is bound to carry out the covenant. Also, changing conditions over time may make the covenant more or less important, and may impact the viability of the promise made at the time the covenant was created. A covenant won't work in the long run if the burden to one party is too lopsided. There are many different types of covenants, and each may be governed by common law or statute, depending on the jurisdiction. Good legal advice is critical to crafting an effective, enforceable covenant.

Like covenants, there are as many types of deed restrictions as there are issues at a brownfield site. Certain deed restrictions are required as a matter of law such as those under the Toxic Substances Control Act [insert citation] for cleanup of polychlorinated biphenyls (PCB's) where certain residual PCB contamination remains on site. Other deed restrictions will be required by regulatory agencies to allow residual contamination or other conditions to remain on site that may pose a risk to human health or the environment. To be effective in putting the public on notice, deed restrictions are typically filed in the property records for the site in the county where the site is located. The benefit of deed restrictions is that they are a reliable mechanism for insuring that information about residual contamination will be noticed to third parties through appropriate inquiry and due diligence (e.g., an ASTM Phase I environmental site assessment). The down side is that such restrictions are just that – restrictions on the use of the property to which the restriction applies – and to many prospective purchasers who are looking for a site, deed restrictions put up a red flag for potential problems that could impair future development.

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.

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 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.

Reducing Risk of Third Party Liability

This section presents various tools to address third party liability related to the purchase, environmental

condition, and financial status of revitalization properties.

Indemnification.

Indemnity attempts to address all claims and damages from known and unknown environmental conditions, cover breaches of representations and warranties, and damages incurred by the indemnified party for liabilities assumed contractually by the indemnifying party. (Note: The indemnity is only as good as the indemnifying party's pockets are deep.)

Promises to Take or Not to Take Specific Actions.

The parties agree to such things as completing remediation, carrying certain kinds of insurance, not disturbing existing caps, or not disrupting any institutional controls.

Specific Assumption of Suspected, Potential or Unknown Risks.

The parties need to identify and allocate all unconfirmed and unknown risks. If one party assumes the liability for unknown risks, generally it releases the other party for the same.

Allocation Deductibles.

Seller takes all potential, unknown risks after a certain dollar amount has been paid by buyer to address those risks. Therefore, the seller takes the risk subject to the buyer's "deductible."

Thresholds.

Under this strategy, the cost of future environmental problems must reach a predetermined amount of money or "threshold" before seller's indemnification is triggered. Generally, seller's obligations will begin at the time the first dollar is spent or first damage is incurred once the trigger is activated.

Liability Caps.

Seller caps its liability at a specified amount. Generally, this strategy is used when seller assumes broad environmental liability.

Time and Geographical Limits.

When seller's liabilities are expected to manifest, if at all, within a relatively short time period, seller limits its liability to a specific time period. This works best when buyer is continuing in the same business as sellers. Seller's representations, warranties and indemnification ceases when the time period has run out. Geographically, seller can limit its liability exclusively to the property, excluding migration of contaminants.

Environmental Insurance

For more detail on this topic, see the section on environmental insurance. Generally, the more known about a property, the lower the total costs of coverage. It is not uncommon for companies to “buy” or otherwise assume all environmental liabilities after such liabilities are sufficiently identified.

Generally, experts in quantifying environmental liabilities and problems will contract with a potentially responsible party (PRP) to assume all future monetary obligations of the PRP for a negotiated fee. The deal could also include the outright purchase of contaminated properties. Insurance programs usually are a part of these deals, and many of these transactions involve a consortium of developers, insurers, and environmental consultants.

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 those identified in the remediation plan.

Environmental Insurance

This subsection describes how environmental insurance can be used as a tool to overcome potential environmental liability problems in transactions. Note, however, that due to a variety of factors, the growing trend is away from significant investment in environmental insurance. Many purchasers, sellers and developers are choosing to keep their resources “on the ground” and in the site characterization or cleanup activities rather than deal with policy caps, higher premiums, exclusions and other limitations of environmental insurance. The environmental insurance industry has also seen significant restructuring, with one result being fewer insurance products with more limited choices for the consumer.

The development of environmental insurance since the early 1990’s has permitted some revitalization 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 may provide

lenders or other investors 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 provides several helpful reports. Environmental Insurance Products Available for Brownfields Redevelopment, 2005, is available at <http://www.epa.gov/brownfields/insurance>. The document provides 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 State Brownfield Insurance Programs, 2006, is also available at [here](#). 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.

An additional report, Brownfields Insurance for Public Sector-Led Development Projects: Experience and Methods, 2005, is available at <http://www.epa.gov/brownfields/insurance>. 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

| Type | Possible Coverages/Risks |
|--|--|
| Cost Cap Policy | <ul style="list-style-type: none"> • Discovery of higher concentrations and greater extent of contaminants than identified in the cleanup plan • Discovery of contaminants that were not identified in the cleanup plan • Changes in regulatory requirement • Legal defense associated with unanticipated cleanup |
| Pollution Liability Policy - Third Party Claim Costs | <ul style="list-style-type: none"> • Offsite remediation of pollution emanating from insured parties' property • Offsite bodily injury caused by pollution emanating from insured parties' property • Offsite property damage caused by pollution emanating from insured parties' property • Offsite property value diminution caused by pollution emanating from insured parties' property • Offsite business interruption loss caused by pollution emanating from insured parties' property • Contractual liability due to pollution • Natural resource damage • Onsite bodily injury caused by onsite pollution |

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

| Type | Possible Coverages/Risks |
|--|--------------------------|
| Note: The coverages listed are possible options. | |

The CERCLA Brownfields Amendments of 2002

Capping off nearly a decade of efforts by EPA’s Office of Solid Waste and Emergency Response under the Clinton Administration to correct the damaging and unintended consequences of CERCLA’s liability scheme, on January 11, 2002 the Brownfields Amendments were signed into law [1]. The Brownfields Amendments were intended to facilitate the cleanup and revitalization of brownfield sites in three primary ways: 1) authorizing additional funding for popular brownfields programs, 2) addressing specific liability concerns through limited exemptions and defenses, and 3) attempting to streamline federal-state program issues. The amendments are divided into two titles: Title I, Small Business Liability Protection; and Title II, Subtitle A, Brownfields Revitalization Funding; Subtitle B, Brownfields Liability Clarifications; and Subtitle C, State Response Programs.

Title I: Small Business Liability Protection

De Micromis Exemption: 42 USC § 9607(o)

This provision exempts persons whose liability is solely based on 42 USC § 9607(a)(3)-(4) [2] at NPL sites who arranged for the disposal, treatment or transportation of less than 110 gallons of liquid or 200 pounds of solid materials. All or part of the disposal, treatment or transport must have occurred before April 1, 2001. The exemption may be lost if EPA determines the hazardous substances could or did contribute significantly to response costs or natural resource damages, if the person fails to comply with EPA information requests, impedes a response action, or if the person has been convicted of a criminal violation relating to the conduct to which the exemption would apply. A determination by EPA that the exemption does not apply is not subject to judicial review. In contribution actions, the burden of proof that the exemption does not apply is on the private party bringing the action.

Municipal Solid Waste Exemption: 42 USC § 9607(p)

This provision exempts persons from liability for response costs arising from Municipal Solid Waste (MSW) disposed of at an NPL site if the party meets certain conditions. MSW is defined at 42 USC § 9607(p)(4) essentially as household solid waste. The MSW exemption applies to an owner, operator, or lessee of residential property that generated municipal solid waste, businesses generating MSW that employed 100 or fewer workers during the three taxable years preceding receipt of a Potentially Responsible Party (PRP) notice and qualify as a small business concern under the Small Business Act; and 501(c)(3) non-profit organizations that employed fewer than 100 paid individuals. The MSW exemption does not apply to transporters of municipalities that own or operate an MSW landfill. The same provisions as the de micromis exemption regarding EPA determinations of non-applicability apply to the MSW exemption, except that the disposal does not have to occur in whole or part before April 1, 2001. The law shifts the burden of proof to the private party bringing a contribution action if the disposal occurred after April 1, 2001, and to the public and private parties bringing a contribution action for disposals prior to April 1, 2001. Contribution actions by private parties against residential MSW generators are prohibited. Liability for all reasonable costs of defending the action, including attorney’s fees and expert witness fees, rest with the private party bringing a contribution action if the

defendant asserting the MSW exemption prevails.

Expedited Settlement: 42 USC § 9622(g)

The Brownfields Amendments codify EPA policy allowing expedited de minimis settlements if a person can demonstrate an inability or a limited ability to pay response costs. EPA must consider the ability of the person to pay response costs and still maintain basic business operations. Conditions of the expedited settlement include promptly providing EPA with all relevant information to determine the ability to pay, and a requirement to waive all claims against other PRPs unless EPA determines such a waiver would be unjust. EPA's decision to enter or refuse to enter into a limited ability to pay settlement is not subject to judicial review. On November 6, 2002, EPA issued a memorandum revising EPA's and the US Department of Justice settlement policy concerning de minimis parties [3].

Title I: Brownfields

Subtitle A: Brownfields Revitalization Funding

The Brownfields Amendments increase the funding authorization for assessment and cleanup of brownfields sites up to \$250 million a year for fiscal years 2002 through 2006. Of this amount, up to \$150 million is authorized for localities, states and tribes to support site assessment and cleanup. Another \$50 million is authorized to establish and enhance state and tribal cleanup programs. Up to \$50 million is authorized to clean up sites contaminated with petroleum. Eligible entities are defined at 42 USC § 9604(k) to include state or local governments or Indian Tribes, and eligible sites must meet the new definition of a "brownfield site". The flexibility of the EPA grant programs was enhanced in certain respects (e.g., grant or loan proceeds may be used to purchase environmental insurance; and compliance with National Contingency Plan or NCP requirements is limited to the extent the NCP is relevant and appropriate), and limited in other respects (e.g., costs of administering grant programs is excluded).

Subtitle B: Brownfields Liability Clarifications

The Brownfields Amendments modified CERCLA's third party defenses, including the innocent landowner defense, by modifying the "all appropriate inquiry" requirements, and created new liability exemptions for contiguous property owners and bona fide prospective purchasers. In a new twist, the Brownfields Amendments apply the expanded all appropriate inquiry standard to the new bona fide prospective purchaser exemption which, unlike the innocent landowner defense, only applies where contamination is confirmed prior to purchase. Each of these liability limitations has threshold criteria, continuing obligations and common conditions. On March 6, 2003, EPA issued "interim guidance" to EPA and US Department of Justice staff involved in CERCLA programs concerning the liability limitations [4]. The March 6 guidance attempts to elaborate on some of the gray areas in the new liability limitations, such as how far a person must go in taking "reasonable steps" with respect to hazardous substances or in providing "legally required notices."

New Due Diligence Standards and Innocent Landowners:

42 USC § 9601(35); § 9607(b)(3)

The innocent landowner defense theoretically protects a property owner who acquires a contaminated site without knowledge of the contamination after conducting the requisite level of due diligence. In order to establish the innocent landowner defense, the property must be acquired after disposal and the

release or threatened release must be solely caused by a third person who is not in a “contractual relationship” with the person asserting the defense. See 42 USC § 9607(b)(3) and 42 USC § 9601(35). In addition, the person must exercise due care and take precautions against foreseeable acts or omissions of a third party, and must conduct “all appropriate inquiry” into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability.

Despite the fact that few parties have ever successfully asserted this innocent landowner defense to liability, Congress added new conditions to the defense under the Brownfields Amendments. As modified by the Brownfields Amendments, in addition to elements of CERCLA’s third party defense discussed above, a person must take reasonable steps to stop a continuing release, prevent a future release, and prevent or limit exposure to previous releases. Of particular interest to the residential real estate community, in the case of property “for residential use or other similar use purchased by a nongovernmental or noncommercial entity,” a facility inspection and title search that reveal no basis for further investigation satisfies the “all appropriate inquiry” standard.

Bona Fide Prospective Purchaser Exemption:

42 USC § 9601(40); § 9607(r)

Persons who qualify as Bona Fide Prospective Purchasers (“BFPPs”), including tenants, are exempt from CERCLA owner/operator liability for properties acquired after January 11, 2002. All hazardous substances disposal must have occurred prior to acquisition, and the BFPP must establish the following seven elements by a preponderance of the evidence: (1) “all appropriate inquiry” was conducted according to the new standards at the time of acquisition, (2) the BFPP is not potentially liable or “affiliated with” any other potentially liable person through family or business relationships, (3) compliance with land use restrictions and institutional controls; (4) the BFPP exercises appropriate care after purchase by taking “reasonable steps” (the same required under the new “all appropriate inquiry” standard), (5) cooperation, assistance and access is provided to persons authorized to conduct response actions or natural resource restoration (generally EPA or DEQ); (6) compliance with information requests and administrative subpoenas, and (7) the BFPP provides all legally required notices concerning discovery or release of hazardous substances at the facility. Items (3) through (7) are continuing duties.

If EPA incurs or has incurred response costs on the property purchased by a BFPP, a “windfall lien” is created in favor of EPA. The amount of the lien is limited to the amount by which EPA’s response action increases the fair market value of the property.

The good news is that EPA has interpreted the BFP defense as eliminating the need for Prospective Purchaser Agreements (PPAs) at the federal level. See Memorandum from Barry Breen to Superfund Managers and Regional Counsel (May 31, 2002). The bad news is that EPA’s interpretation is optimistic and not yet supported by judicial precedent. As discussed below, practitioners still do not know how much inquiry meets the “all appropriate inquiry” standard or how reasonable the “reasonable steps” must be to stop, prevent or limit exposure to the release of hazardous substances discovered at a site.

Although neither a new defense to nor an exemption from liability, state PPAs are still available. A PPA is a contract between a prospective purchaser and the state agency for limited liability release.

Using Oregon's PPA as an example, pursuant to ORS 465.327, DEQ may approve PPAs if all of the following criteria are met:

- the prospective purchaser is not currently liable under ORS 465.255 for an existing release of hazardous substances at the property to be purchased;
- contamination exists and a cleanup action is necessary at the property ("removal or remedial action is necessary");
- the proposed use of the property will not contribute to or exacerbate existing contamination, increase health risks or interfere with necessary site remedial action measures;
- a substantial public benefit will result from the PPA; and
- DEQ must consult with the local land use jurisdiction and consider reasonably anticipated future land uses at and around the property.

One challenge to practitioners who pursue PPAs from state agencies is matching the state PPA requirements with the conditions of the federal BFP exemption. As a practical matter, most of the federal factors will be, or can be incorporated into the state PPA. (One potential pitfall concerns the "all appropriate inquiry" requirements.) Parties intending to take advantage of the liability limitations under the Brownfields Amendments should refer to the March 6, 2003 EPA guidance. The PPA does not protect from third party or CERCLA liability, and the agreement is binding on future owners and operators. Nonetheless, the PPA is a popular mechanism for limiting future liability of prospective purchasers.

Contiguous Property Owner Exemption: 42 USC § 9607(q)

This section provides an exemption from owner/operator liability if a person's property is contaminated by a release from "contiguous to or otherwise similarly situated" property not owned by that person; the person did not cause, contribute to or consent to the release or threatened release; and the contiguous owner meets the other seven conditions listed above for the BFPP exemption, including all appropriate inquiry at the time of acquisition. If the inquiry results in knowledge or reason to know of contamination at the contiguous site, the contiguous property owner exemption will not apply but the person may be eligible for the BFPP exemption. See 42 USC § 9607(q)(1)(C). An additional element is that the contiguous owner can not be liable or affiliated with a liable party as a result of a reorganization of a potentially liable business entity. Congress also determined that the "reasonable steps" requirement does not require investigation or remediation of groundwater where the contamination is solely the result of subsurface migration in an aquifer. EPA may issue assurance to any person who qualifies for the contiguous property owner defense that no enforcement action will be initiated under CERCLA and provide protection against claims for contribution or cost recovery.

Subtitle C: State Response Programs

Enforcement Bar: 42 USC § 9628(b)

Because most contaminated properties are not on the NPL, most properties will be cleaned up under state standards and programs. Subtitle C of the Brownfields Amendments attempts to address the problem of concurrent federal and state cleanup liability by directing EPA not to take enforcement

action against sites which have completed or are conducting response actions under a state program meeting certain minimum criteria. While rare in practice, the authority of EPA under CERCLA to disregard a state cleanup decision and require a more stringent cleanup can significantly increase the transaction costs and uncertainty to the parties attempting to redevelop the site. Attorneys who discount the potential application of CERCLA to a state cleanup site do so at their own and their clients' peril. The enforcement bar under the Brownfields Amendments helps mitigate this problem by prohibiting EPA from exercising its authority under CERCLA §106 to compel a cleanup or §107 to recover response costs except in specific cases.

Only an "eligible response site" can take advantage of the enforcement bar. Eligible sites include those defined as a "brownfield" and those sites that EPA determines are eligible for brownfields financial assistance on a case-by-case basis. The bar may be ignored if the state requests a response action, if new information arises that the site is a threat requiring further cleanup and the information was not known to the state at the time of the state's decision, if contaminants have migrated or will migrate across state lines or to property under federal control, or if federal response actions are necessary to prevent imminent and substantial endangerment to public health or welfare or the environment.

Sites specifically excluded from this definition are NPL sites and those sites where EPA has conducted or is conducting a preliminary assessment and site inspection, and where EPA determines after consulting with the state that the preliminary score of the site makes it eligible for inclusion on the NPL. However, if EPA determines not to take any further action, the property may be classified as an eligible response site. Sites that pose a threat to a sole-source drinking water aquifer or a sensitive ecosystem may not be an "eligible response site."

If EPA decides to take a response action at an eligible response site, the agency must notify the state of the proposed action at least 48 hours before taking the action. The state has 48 hours to notify EPA if the eligible response site is or has been subject to a cleanup conducted under a state program or if the state is planning to abate the release or threatened release, and identify the actions that are planned. If the state fails to respond within the 48-hour period, EPA may take immediate action. However, if EPA determines that more than one of the exceptions to its enforcement bar applies, the agency may take immediate action after notifying the state.

NPL Deferral of Brownfield Sites: 42 USC § 9605(h)

The Brownfields Amendments authorize EPA to defer final listing of an eligible response site to the NPL if requested by a state under certain circumstances, including where (1) EPA determines that the state or another party under an agreement or order from the state is conducting a response action at the site in compliance with an eligible state response program, or (2) the state is actively pursuing an agreement to perform a response action at the site with a person that the state has reason to believe is capable of conducting a response action.

Other Liability Defenses and Exemptions

CERCLA's cleanup statute include a variety of other exemptions and defenses to liability. The most common are:

- Acts of God

- Acts of War
- Acts or Omissions of a Third Party

Inheritance Exemption. A person who acquires property by inheritance or bequest is exempt from liability when the acquisition occurred after the release.

- Involuntary Acquisition/Eminent Domain. A part of the third party defense under CERCLA and a more straightforward exemption under some state laws, states and local governments that acquire ownership or control involuntarily (e.g., tax foreclosure), or through the exercise of eminent domain “by purchase or condemnation” are not liable.
- Exclusion for Permitted Releases. Federally permitted releases defined at 42 USC § 9601(10) are excluded under CERCLA pursuant to 42 USC § 9607(j). This exclusion does not affect liability under any other state or federal law or common law.
- Lender Exclusion. The definition of “owner or operator” now expressly excludes any individual “who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest.”

Fiduciary Exemption. Certain fiduciaries, e.g., trustees, who hold title to contaminated property in their fiduciary capacity may be exempted from liability unless their negligence causes the contamination.

[1] The Brownfields Amendments were scheduled to be signed into law by the President on September 11, 2001, but due to the events of that day, the signing was postponed until January 11, 2002.

[2] Commonly referred to as “arranger,” “transporter,” or “generator” liability.

[3] Memorandum from Barry Breen, Director, EPA Office of Site Remediation Enforcement, Revised Settlement Policy and Contribution Waiver Language Regarding Exempt De Micromis and Non-Exempt De Micromis Parties (Nov. 6, 2002).

[4] Memorandum from Susan E. Bromm, Director, EPA Office of Site Remediation, 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”) (March 6, 2003).

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

| Topic | Document Title | Summary |
|--|--|---|
| Brownfields Federal Statutory Overview | Brownfields Handbook: How to Manage Federal Environmental Liability Risks 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> |

| Topic | Document Title | Summary |
|---|--|--|
| Scope and application of certain liability exemptions of the 2002 CERCLA Amendments | 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) EPA, March 6, 2003 | 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. 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. |
| Windfall Liens | Interim Enforcement Discretion Policy Concerning “Windfall Liens” Under Section 107(r) of CERCLA EPA, July 16, 2003 | 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. |
| Liability | Liability and Other Guidance Quick Reference Fact Sheet, April 1997. EPA 500-F-97-104 . | 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 | 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) . | 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 | EPA Memorandum: Guidance on Settlements with Prospective Purchasers of Contaminated Property, May 1995. | 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. |
| Model Comfort Letter Clarifying National Priority List (NPL), Uncontaminated Parcel Identifications, and CERCLA Liability Involving Transfers of Federally Owned Property | 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. OSWER Guidance, Model Comfort Letter Clarifying NPL Listing, Uncontaminated Parcel Determinations, and CERCLA Liability Involving Transfers of | 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. |

| Topic | Document Title | Summary |
|--|--|---|
| | Federally Owned Property , January 1996. 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. | |
| Policy on the Issuance of Comfort/Status Letters | EPA Memorandum: Policy on the Issuance of Comfort/Status Letters , November 12, 1996. Policy on the Issuance of Comfort/Status Letters , November 12, 1996. | 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. |
| Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996 | HR3610: Sections 2501-2505 , September 30, 1996. | 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 | Federal Register (Volume 60, Number 237) , December 11, 1995. | 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 | Federal Register (Volume 60, Number 173, Page 46691-46715)[Rules and Regulations] , September 7, 1995. | 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 | 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. | 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. |

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

Exhibit: Environmental Law Information

| Organization | Topic |
|--------------------------|--|
| American Bar Association | Section of Environment, Energy, and Resources |
| Environmental Law Net | Resource for environmental law research and news |

| Organization | Topic |
|---------------------|---|
| EPA | Compliance and Enforcement Home |
| EPA | Environmental Law for Citizens |
| EPA | Environmental Law for Businesses |
| EPA | Environmental Law for Governments |
| EPA | Major Environmental Laws |
| EPA | Compliance Assistance |
| EPA | Enforcement |