EPA United States Environmental Protection Agency

5th National Training Conference on PRP Search Enhancement

St. Louis, Missouri

May 16-18, 2006

Agenda

FIFTH NATIONAL TRAINING CONFERENCE ON PRP SEARCH ENHANCEMENT
MAY 16-18, 2006
HYATT REGENCY ST. LOUIS
One St. Louis Union Station, St. Louis, MO

Tuesday, May 16

7:30 a.m. - 8:30 a.m.	**Registration** [Coffee and Pastries]	
8:30 - 8:45	***WELCOME AND OPENING REMARKS*** [Introduction of the Nat'l PRP Search Enhancement Team (Team)]	**Nancy Deck/HQ & Team** **Neilima Senjalia/HQ**
	USING SPECIALIZED EXPERTISE IN PRP SEARCHES: [Session Coordinator Leo Mullin Reg 3]	
8:45 - 9:45	***FINANCIAL ANALYSIS*** *[including performing ability to pay analyses, identifying concealed resources, and investigating possible fraudulent conveyances]*	**Leo Mullin/Reg.3**
9:45 - 10:00	**BREAK**	
10:00 - 11:00	***LIABILITY INSURANCE***	**Ron Gonzalez/Reg.1**
11:00 - 12:00	***THE NATIONAL ENFORCEMENT INVESTIGATIONS CENTER (NEIC) & PRP SEARCH EXPERTISE***	**Gene Lubieniecki/NEIC** **Dr. Doug Kendall/NEIC** **Jon Beihoffer/NEIC** **Don Smith/NEIC**
Noon - 1:00	**LUNCH BREAK**	
	DISCUSSIONS OF PRP SEARCH ISSUES AT THE FOLLOWING TYPES OF SITES: [Session Coordinator Cheryle Miemski Reg 7]	
1:00 - 1:30	***RECYCLING SITES***	**Carol Berns/Reg.2**
1:30 - 2:30	***MINING SITES***	**Joe Tieger/HQ** **Andrea Madigan/Reg.8**
2:30 - 2:45	**BREAK** - [Refreshments Provided]	
2:45 - 3:45	***AREA-WIDE GROUND WATER SITES***	**Lance Vicek/Reg.5** **Steve Arbaugh/Reg.9**
3:45 - 4:45	***SURPLUS GOVERNMENT PROPERTY/ FORMERLY USED DEFENSE SITE***	**Grechen Schmidt/Reg.10**
4:45 - 5:00	**ANNOUNCEMENTS AND ADJOURN**	**Nancy Deck/HQ**

Wednesday, May 17

[PLEASE NOTE: The 8.00 - 9:00 a.m. Session on PRP Search Benchmarking is for EPA folks ONLY However, coffee and pastries are available for ALL participants and a break-out Room will be available (TBD) for your use during the EPA Only Session See you at 9:00 a.m. to begin Wednesday for ALL]

Coffee and Pastries Available for All Starting at 7.45 a.m

8:00 - 9:00 EPA Only	***PRP SEARCH BENCHMARKING AND BEST PRACTICES***	**Bruce Pumphrey/HQ**
9:00 - 9:05	***GOOD MORNING AND ANNOUNCEMENTS***	**Nancy Deck/HQ**
	DEVELOPMENTS IN LIABILITY AND BANKRUPTCY LAW *[Session Coordinators Cheryle Micinski and Clarence Featherson HQ]*	
9:05 - 10:00	***CURRENT DEVELOPMENTS IN LIABILITY LAW*** *[including Aviall and its progeny; Rohm & Haas overruled, and General Electric's UAO lawsuit]*	**Clarence Featherson/HQ** **Mike Northridge/HQ**
10:00 - 10:30	***SUCCESSOR LIABILITY***	**Cheryle Micinski/Reg.7**
10:30 - 10:45	**BREAK**	
10:45 - 11:45	***CURRENT DEVELOPMENTS IN BANKRUPTCY LAW***	**Andrea Madigan/Reg.8**
11:45 - Noon	**BREAK** - PLEASE NOTE Lunch Provided	
Noon - 1:00	**CONFERENCE LUNCHEON** — Buffet Style KEYNOTE SPEAKER - Deputy Assistant Administrator Office of Enforcement and Compliance Assurance/HQ	CATHERINE R McCABE
1:00 - 1:15	**BREAK**	
1:15 - 2:45	***LIABILITY AND THE BROWNFIELDS AMENDMENTS*** *[including the new "all appropriate inquiries" standard]*	**Helen Keplinger/HQ** **Bill Keener/Reg.9**
2:45 - 3:00	**BREAK** - [Refreshments Provided]	
3:00 - 3:20	***PRP SEARCH ISSUES AT MERCURY RELEASE SITES***	**Wilda Cobb/Reg4**
3:20 - 4:50	***CORPORATE BUSINESS PRACTICES AND LIABILITY***	**Joe Tieger/HQ** **Leo Mullin/Reg.3**
4:50 - 5:00	**ANNOUNCEMENTS AND ADJOURN**	**Nancy Deck/HQ**

Thursday, May 18

8:00 - 8:15	***GOOD MORNING AND ANNOUNCEMENTS*** [Coffee and Pastries]	Nancy Deck/HQ
	PROPERTY LAW *[Session Coordinator - Stephen Hess/OGC-HQ]*	
8:15 - 9:00	***TITLE SEARCHES***	Steve Hess/HQ Lance Vlcek/Reg.5
9:00 - 10:15	***SUPERFUND LIENS AND WINDFALL LIENS***	Kathleen West/Reg.4 Bill Keener/Reg.9
10:15 - 10:30	**BREAK**	
10:30 - 11:30	***ENFORCEMENT OF ACCESS ORDERS AND THE PRP SEARCH***	Steve Hess/HQ
11:30 - 12:30	**LUNCH BREAK**	
12:30 - 1:30	***INSTITUTIONAL CONTROLS, THE MODEL ENVIRONMENTAL EASEMENT, AND THE NATIONAL IC STRATEGY***	Greg Sullivan/HQ Sheri Bianchin/Reg.5 Steve Hess/HQ
1:30 - 2:00	***ALTERNATIVE SITES*** *[including how alternative site status is determined, tracking activities and expenses at alternative sites, and cost recovery processes]*	Tom Marks/Reg.5
2:00 - 2:45	***DEVELOPING NATIONAL REPOSITORIES FOR THE SHARING OF CORPORATE INFORMATION***	Scott Nightingale/KN Steve Arbaugh/Reg.9
2:45 - 3:00	**BREAK**	
3:00 - 4:00	***KATRINA AND RITA: OUR ROLE IN RESPONDING TO NATURAL DISASTERS*** *SLIDE SHOW AND REPORTS FROM THOSE WHO HAVE BEEN THERE*	Herb Miller/Reg.4 Pam Travis/Reg.6 Norma Tharp/Reg.7 Greehen Schmidt/Reg10
4:00 - 4:30	***REPORT OUT [Session Coordinators] - ANY UNFINISHED BUSINESS - LAST WORDS***	Session Coordinators Nancy Deck/HQ
4:30	**ADJOURN - HAPPY TRAILS - UNTIL NEXT TIME!**	

TRAVEL SAFE

PRP Search Enhancement Team

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May 2006

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Ms. Senjalia is the Deputy Director of the Policy and Program Evaluation Division in the Office of Site Remediation Enforcement, a part of Office of Enforcement and Compliance Assurance at the Environmental Protection Agency. Since joining EPA in 1989, she has held various staff and management positions in EPA's hazardous waste enforcement programs. Her current responsibilities include establishing policies for compelling private parties to clean up hazardous waste sites under the Superfund and Resource Conservation and Recovery Act corrective action programs, developing annual and long term strategic plans, setting goals and measures, and reporting accomplishments. Prior to joining EPA, Neilima worked in the environmental programs for the Naval Research Lab in the Department of Navy, State of West Virginia, and the District of Columbia.

Roster of Conference Participants

Fifth National Training Conference on PRP Search Enhancement
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Fifth National Training Conference on PRP Search Enhancement
Roster of Conference Participants By Region
May 16-18, 2006
St. Louis, MO

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EPA	=	78	Other Federal Agencies	=	3
State	=	16	Contractor/Private Firms	=	2
Tribal	=	2	TOTAL	=	101

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Financial Analysis & Ability to Pay

LEO J. MULLIN

Mr. Mullin is a cost recovery expert for the United States Environmental Protection Agency, Region III. He joined EPA as a civil investigator in October 1989. Mr. Mullin's responsibilities include conducting and/or overseeing PRP searches; working with the Office of Regional Counsel and Department of Justice on Cost Recovery complaints; making determinations associated with corporate veil piercing, corporate successor liability; ability to pay and financial assurance. Mr. Mullin also assists in responding to questions concerning potential liability from the purchase of contaminated property. Mr. Mullin has testified as an expert witness on matters such as ability to pay, financial analysis and property valuation. He has also submitted testimony regarding issues such as corporate veil piercing, corporate successor liability, and the costs of site cleanups. From 1982 to 1989 Mr. Mullin was employed as a Revenue Officer by the Internal Revenue Service and prior to 1982, Mr. Mullin worked for an urban redevelopment consultant. Mr. Mullin received a B.A. in Politics from St. Joseph's University in 1982.

Ability to Pay
and
What to do if the Assets are Hidden

FIFTH NATIONAL CONFERENCE ON
PRP SEARCH ENHANCEMENT
MAY 16-18, 2006
St. Louis, Missouri

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Basic Outline

- Ability to Pay
  - The Incomplete Story
- Look for Hidden Assets
- Introduction to the Federal Debt Collection Act

Ground Rules

- DISCLAIMER: This training material is submitted for background purposes only. It does not represent a complete analysis of issues discussed. Portions of the material have been condensed and if taken out of context could be inaccurate. The information presented is from an ability to pay perspective and as such will not be in accordance with Generally Accepted Accounting Principles (GAAP). The concepts discussed are based on practical examples and do not represent legal conclusions. This document does not constitute Agency Guidance.

EPA Guidance Documents and Assistance

EPA's Superfund Guidance Documents can be found at
http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund/

EPA's Superfund Ability to Pay Guidance can be found at
http://www.epa.gov/compliance/resources/policies/cleanup/superfund/genpol-atp-rpt.pdf

Other EPA Ability to Pay Documents are referenced at
http://www.epa.gov/compliance/resources/policies/cleanup/superfund/payshortsht-mem.pdf

EPA's Office of Enforcement and Compliance Assistance (OECA) has some contractor resources. OECA is also able to refer you to people in other Regions who may help. To request this type of assistance please contact Tracy Gipson (202) 564-4236

ABC's of Accounting

- The Balance Sheet Equation.

Assets
- Liabilities
Equity

Assets = What you have

Liabilities = What you owe

Equity = The difference between Assets and Liabilities

Ability to Pay Equation

Holdings
- Need
ATP Target

ATP Target is the difference between Holdings and Need.

Holdings = What do you Have
+ What will you get

Need = What do you need
+What will you need

ABC's of Ability to Pay

- Assumes everything can be converted to dollars.
- Assumes the cost to convert to dollars is not significant.
- Assumes we all agree that the dollar value is reasonably accurate.

ATP Topics for Another Day

- How to verify the submission.
- How to project future income.
- How to project future needs.
- How to Present and Defend the Analysis.

What do we hear about Today???

- Identifying Hidden Assets
- Introduction to the Federal Debt Collection Procedures Act of 1990 (28 U.S.C. §§ 3001 *et seq.*)

Where are Hidden Assets???

Look to the Balance Sheet

Assets
- Liabilities
Equity

Assets = Current Assets
PP&E
Other Assets

Current Assets include Cash, Receivables, Inventory (anything likely to turn into cash this year)

PP&E includes Plant Property & Equipment
At the lesser of costs after depreciation or fair market value

Other Assets include many things even Hidden Assets

WHAT ARE OTHER ASSETS?

Intangibles
- Goodwill
- Patents

Investments
- in subsidiaries
- other securities

Everything Else

What includes Everything Else?

EVERYTHING ELSE

Antiques

Real Property

Office Art

What do you do once you find a Hidden Asset?

Don't lose focus Bring in Experts

Recognize the Costs for a Forced Sale

Don't Get Greedy!!!

Identifying Hidden Assets

Sources of Information

Databases: Lexis, Searchsystems.net, Auto Track, Library Staff

Submissions: Financial Statements, Tax Returns, Court Filings

Personal Observation: Pictures, Informants, Appraisers

WHAT HAPPENS IF IT IS NO LONGER THE PRP's?

General Structure of the Federal Debt Collection Procedures Act of 1990

1) Definitions and General Provisions (28 U.S C §§ 3001 *et seq*)

2) Prejudgment Remedies (28 U.S C §§ 3101 *et seq*)

3) Postjudgement Remedies (28 U S.C §§ 3201 *et seq*)

4) Fraudulent Transfers (28 U.S C §§ 3301 *et seq*)

Key Definitions & Provisions

§ 3001 Applicability

(a) In general.--Except as provided in subsection (b), the chapter provides the exclusive civil procedures for the United States--

(1) to recover a judgment on a debt, or

(2) to obtain, before judgment on a claim for a debt, a remedy in connection with such claim

§ 3002 Definitions (3) "Debt" means--

(A) [loans], or

(B) an amount that is owing to the United States on account of fine penalty, recovery of a cost incurred by the United States, or other source of indebtedness to the United States,

How Does this help?

section 3304(b) provides:

[A] transfer made or obligation incurred by a debtor is fraudulent as to a debt to the United States which arises before the transfer is made or the obligation is incurred if--

(1)(A) the debtor makes the transfer or incurs the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation, and

(B) the debtor is insolvent at that time or the debtor becomes insolvent as a result of the transfer or obligation, or

Fraudulent Transfers Part II

section 3304(b) continued:

The Transfer is also Fraudulent if

(2)(A) the transfer was made to an insider for an antecedent debt, the debtor was insolvent at the time; and

(B) the insider had reasonable cause to believe that the debtor was insolvent

What is an Insider?

(A) If the debtor is an individual— an Insider is
- (i) a relative of the debtor or of a general partner of the debtor;
- (ii) a partnership in which the debtor is a general partner;
- (iii) a general partner in a partnership described in clause (ii) or
- (iv) a corporation of which the debtor is a director, officer, or person in control;

B) If the debtor is a corporation— an Insider is
- (i) a director of the debtor;
- (ii) an officer of the debtor;
- (iii) a person in control of the debtor
- (iv) a partnership in which the debtor is a general partner;
- (v) a general partner in a partnership described in clause (iv), or
- (vi) a relative of a general partner, director, officer, or person in control of the debtor;

What is an Insider? (cont.)

(C) If the debtor is a partnership— an Insider is
- (i) a general partner in the debtor;
- (ii) a relative of a general partner in, a general partner of, or a person in control of the debtor;
- (iii) another partnership in which the debtor is a general partner;
- (iv) a general partner in a partnership described in clause (iii) or
- (v) a person in control of the debtor

(D) an affiliate, or an insider of an affiliate as if the affiliate were the debtor; and

(E) a managing agent of the debtor

What if a Fraudulent Transfer Happens???

In an action or proceeding under the FDCPA, the government may obtain:

(1) avoidance of the transfer or obligation to the extent necessary to satisfy the debt to the United States,

(2) a remedy against the asset transferred or other property of the transferee, or

(3) any other relief the circumstances may require

CONCLUSIONS

- Ability to Pay in its simplest form is identifying what is not needed
- Look for Hidden Assets but keep it in perspective
- When Appropriate Use the FDCPA

For questions call

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NOTES

Liability Insurance

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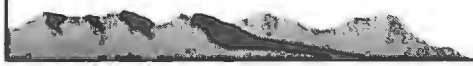
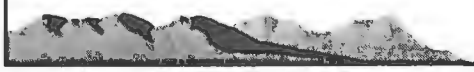
FIFTH NATIONAL PRP SEARCH ENHANCEMENT CONFERENCE
St. Louis, MO
Tuesday, May 16, 2006

Liability Insurance



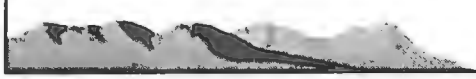
LIABILITY INSURANCE COVERAGE ANALYSIS

Ron González
EPA Region I



Presentation Overview

- Overview of Coverage Issues
- Triggering the Policy: "Occurrence" and the Timing of Property Damage
- Gathering and Evaluating Evidence Necessary to Support a Claim
- Evaluate the PRP's Potential Claim for Insurance Coverage at the Site



Presentation Overview (cont.)

- Obtaining and Reviewing Policies
- EPA Insurance Points of Contact

Overview of Coverage Issues

- General liability policies
  - Protects insured against claims by third parties
  - Not first-party (property) policies that pay for loss to the insured's own property (e.g. fire)
- Comprehensive General Liability (CGL)
- Commercial General Liability

Overview of Coverage Issues

- **Insuring Agreement:**
  - **all sums** which the insured shall become **legally obligated** to pay **as damages** because of

    A. bodily Injury or
    B. **property damage**

    . . . caused by an **occurrence**

Overview of Coverage Issues

- **Occurrence:**

  An accident, including injurious exposure to conditions, which results, **during the policy period**, in bodily injury or **property damage** that is neither **expected nor intended** from the standpoint of the insured.

Overview of Coverage Issues

- **Sudden & Accidental Pollution Exclusion**:
  - Exclusion (f) excludes bodily injury and property damage:

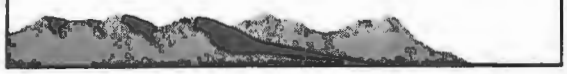
    arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is **sudden and accidental**.

Overview of Coverage Issues

- Sudden and accidental has two interpretations:
  - **Unexpected and unintended** – no temporal element
    - Minority position
    - Regulatory misrepresentation argument
  - **Sudden means abrupt** – temporal requirement
    - Majority position (more than twice as many)

Overview of Coverage Issues

- **Absolute Pollution Exclusion**
  - 1985-1986 timeframe
  - No coverage for traditional environmental cleanup costs

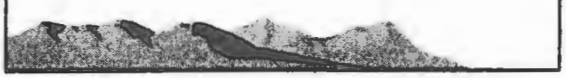


Overview of Coverage Issues

- **Owned Property Exclusion**
  - Owned Property
  - Rented Property
  - Formerly Owned and/or Rented Property
  - Care, Custody or Control

Overview of Coverage Issues

- Most eastern jurisdictions say groundwater is third-party property
- More uncertainty in the western states
- Questions as to whether source removal to protect groundwater is third-party property damage
- If no groundwater contamination, not many jurisdictions will say it's covered



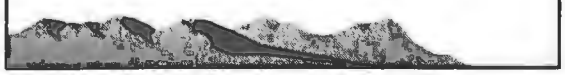
Overview of Coverage Issues

- **Allocation:**
  - Which policies of all the policies that are "triggered" will pay and/or in what order?
  - Generally two approaches
    - Joint and Several – "pick and choose"
    - Pro Rata – "fair share"
  - Complex issues
    - Second level of analysis?

Triggering the Policy: "Occurrence" and the Timing of Property Damage

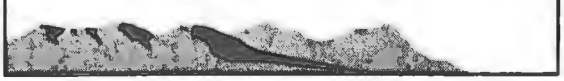
- **Occurrence:**

  An accident, including injurious exposure to conditions, which results, **during the policy period**, in bodily injury or **property damage** that is neither expected nor intended from the standpoint of the insured.



Triggering the Policy: "Occurrence" and the Timing of Property Damage

- First, some sort of event . . .
- And then the question is "When did the property damage occur?"



Trigger of Coverage Issue

- Four approaches:
  - Exposure
  - Manifestation
  - Injury in Fact
  - Continuous Trigger (triple trigger)

Trigger of Coverage Issue

- **Exposure:**
  - –First discharge to environment, e.g., when solvent first hits the ground
  - –The analysis may not focus as closely on when precisely the third-party property gets impacted

Trigger of Coverage Issue

- **Manifestation:**
  - –When damage becomes known or reasonably could have been known
  - –Usually is after 1985
  - –Minority of jurisdictions
  - –Policy in one year gets triggered

Trigger of Coverage Issue

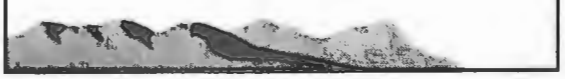
- **Injury in Fact:**
  - –When property is actually contaminated
  - –Need to establish, e.g., when hazardous substance leached into groundwater
  - –Perhaps most fact-intensive
  - –May need to obtain expert witness

Trigger of Coverage Issue

- **Continuous Trigger:**
  - –All policies from exposure to manifestation (triple trigger)
  - –Analogy to the asbestos cases
  - –Courts' desire to maximize available coverage
  - –Adopted by majority of the courts that have decided the issue

Trigger of Coverage Issue

- Trigger issue is still unresolved in a fair number of jurisdictions
- Factual development is very important
- Good discussion setting out the four approaches can be found in *Quaker State Minit-Lube, Inc. v. Fireman's Fund Ins. Co.*, 868 F. Supp. 1278 (D. Utah 1994)



State-by-State Survey of Law on Insurance Coverage Issues

- www.coverageanalysis.com/statebystate/index.html
- www.amre.com
- **Barry R. Ostrager and Thomas R. Newman, Handbook on Insurance Coverage Disputes (13th Ed., Aspen 2006)**

Insurance Coverage Analysis

- Often question is framed as:
  - "Does the policy cover pollution?"
- Better question may be:
  - "Are EPA's (or the State's) costs at this Site covered?"

Insurance Coverage Analysis

- You need to consider both:
  - The terms of the **policy** (contract) and
  - The **facts** at your Site

Gathering and Evaluating Evidence Necessary to Support a Claim

- Two Threshold Questions:
  - Absolute Pollution Exclusion?
  - Evidence of some third-party property damage, which may be groundwater (GW) contamination?

Gathering and Evaluating Evidence

- What is the nature of the site?
- Identify releases and disposals
- Has contamination impacted third-party property?
- When did the contamination impact third-party property?
- Evaluate facts in light of the insurance policies

Gathering and Evaluating Evidence

- **The Nature of the Site**
  - Former manufacturing facility?
  - Waste processing or transfer station?
  - Landfill?

Gathering and Evaluating Evidence

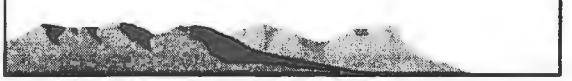
- **Identify Releases and Disposals**
  - Actual releases (threat of release probably not enough)
  - Sudden or gradual?
  - Intent?

Gathering and Evaluating Evidence

- **Identify Releases and Disposals (Continued)**
  - Operational history of the site
  - What is the nature of the site contamination?
  - To what extent is site contamination the result of PRP site operations?
  - Intent?

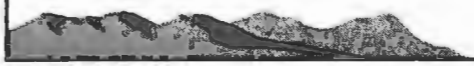
Gathering and Evaluating Evidence

- **When did releases/disposals happen?**
  - When was the first release/disposal?
  - What are the dates of releases of the contaminants of concern that are driving the cleanup?



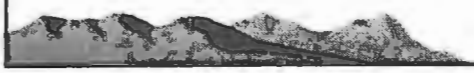
Gathering and Evaluating Evidence

- **Has contamination impacted third-party property?**
  - Not necessarily the same analysis as "Site"
  - Groundwater (GW) can be third-party property
  - Evidence you have and evidence you can develop
  - Can we allocate the costs associated with the third-party property?
  - If possible, start thinking about these issues early in the investigation



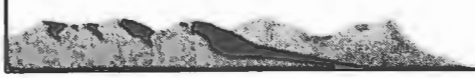
Gathering and Evaluating Evidence

- **When did contamination impact third-party property?**
  - Important points to identify include:
    - When GW beyond PRP's property boundary was first contaminated
    - When contamination became evident/observed in GW



Gathering and Evaluating Evidence

- **When did contamination impacting third-party property first become manifest?**
  - When did regulatory agencies (EPA, State, Tribe, etc.) become involved at the site?
  - What did regulators know about the nature and extent of contamination at the site?
  - What did the regulators convey to the insured PRP about contamination at the site (including GW, third-party property, etc.)?



Evaluate the PRP's Potential Claim for Insurance Coverage at the Site

- This is essentially a litigation risk analysis
  - Law of the jurisdiction
    - Value of the various exclusions
  - Existence/non-existence of policies
  - How many policies are triggered
  - Limits of the policies that are triggered
    - Exhaustion of limits
  - Other defenses
    - Late notice, payment of premium, voluntary payments, etc.

Obtaining and Reviewing Policies

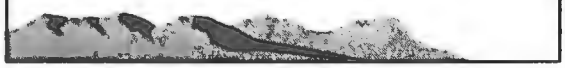
- Request to PRP or Trustee (if in bankruptcy)
- . . . **all insurance policies that may potentially provide the Respondent with insurance for bodily injury or property damage in connection with the Site and/or Respondent's business operations (including, but not limited to, Comprehensive General Liability). Include, without limitation, all primary, excess and umbrella policies.**

Obtaining and Reviewing Policies

- If you are aware of any such policies . . . but have no copies, identify each such policy to the best of your ability by identifying:
  - **insurer (name and address)**
  - **policy type and number**
  - **named insured**
  - **limits**
  - **effective dates**

Obtaining and Reviewing Policies

- Determine whether you have all the policies issued
- If unsure if policies exist or if the policies are lost . . .
  - Have PRP request polices from insurer
  - Have PRP review insurance, financial, legal, safety and other corporate records
  - Brokers, lawyers, accountants and bankers
  - Look for policies and also for evidence of policies

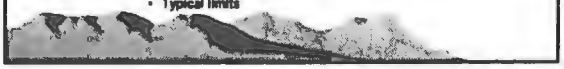


Obtaining and Reviewing Policies

- Evidence of policy includes:
  - Policy number on documents/correspondence
  - Renewal?
  - Schedule of underlying insurance in excess/umbrella policy
  - Certificate of insurance
  - Loss control reports
  - Documents showing premium payments
- Burden of proof is on the insured (PRP)
  - Will need to establish type of coverage (e.g., liability), policy period, policy limits
  - Expert testimony is sometimes used for this

Obtaining and Reviewing Policies

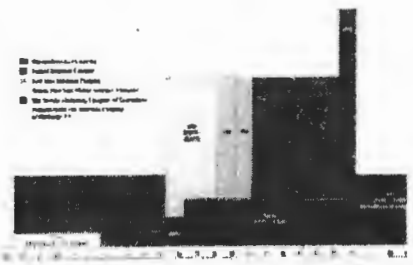
- Insurance Archeology
  - May or may not be cost effective to use services
  - Knowledge about what to look for
  - Knowledge about places to look
  - Knowledge concerning historical industry practices re:
    - Policy forms
    - Costs of various coverages (limits, exclusions)
    - Typical limits



Obtaining and Reviewing Policies

- Read all policies and the endorsements
- Investigate "exhaustion of limits" or the extent of the "erosion of limits"
  - Settlements?
  - Has PRP given site or full environmental release?
- Consider preparation of a coverage chart

Coverage Chart



EPA Insurance Points of Contact

EPA Region	Contact	Phone/Email Information
Region 1	Ronald Gonzalez	617 918-1786 - gonzalez.ronald@epa.gov
Region 2	Virginia Curry Muthu Sundram Frances Zizila	212 637-3134 - curry.virginia@epa.gov 212 637-3148 - sundram.muthu@epa.gov 212 637-3135 - zizila.frances@epa.gov
Region 3	Mary Rugala	215 814-2686 - rugala.mary@epa.gov

EPA Insurance Points of Contact

EPA Region	Contact	Phone/Email Information
Region 4	Karen Singer Susan Hansen Ray Strickland Cathy Winokur (RCRA)	404 562-9540 - singer.karen@epa.gov 404 562-9700 - hansen.karen@epa.gov 404 562-8890 - strickland.ray@epa.gov 404 562-9569 - winokur.cathy@epa.gov
Region 5	Susan Prout Luis Oviedo	312 353-1029 - prout.susan@epa.gov 312 353-9538 - oviedo.luis@epa.gov
Region 6	Barbara Nann	214 665-2157 - nann.barbara@epa.gov
Region 7	Audrey Asher	913 551-7255 - asher.audrey@epa.gov

EPA Insurance Points of Contact

EPA Region	Contact	Phone/Email Information
Region 8	Richard Sisk Andrea Madigan	303 312-6638 - sisk.richard@epa.gov 303 312-6904 - madigan.andrea@epa.gov
Region 9	Jim Collins	415 972-3894 - collins.jim@epa.gov
Region 10	Jennifer Byrne	206 553-0050 - byrne.jennifer@epa.gov
Headquarters	Erin Smith Anne Berube Tim Dicintio Deniz Ergener	202 564-2038 - smith.erin@epa.gov 202 564-6065 - berube.anne@epa.gov 202 564-4790 - dicintio.tim@epa.gov 202 564-4233 - ergener.deniz@epa.gov

NOTES

The National Enforcement Investigations Center & PRP Search Expertise

GENE LUBIENIECKI, JR.

As Civil Program Coordinator at the Environmental Protection Agency's National Enforcement Investigations Center (NEIC), Denver Colorado, Mr. Lubieniecki currently manages NEIC's national civil enforcement investigation activities across the United States. NEIC is an EPA expert investigation and technical support center for civil and criminal environmental enforcement support. Mr. Lubieniecki has been with EPA-NEIC since 1979. Prior to being the Civil Program Coordinator, he directed a group of engineers and scientists responsible for conducting large-scale compliance monitoring investigations and was also a senior project manager leading such investigations. His technical experience includes wastewater and hazardous waste management and legal case support at a wide variety of federal, municipal, and commercial industrial facilities. Prior to his work at the NEIC, Mr. Lubieniecki was a principal member of a research team at the US Army Construction Engineering Research Laboratory, Champaign, IL, investigating and providing solutions to a wide variety of water and wastewater related problems at military installations.

Mr. Lubieniecki holds a Masters Degree in Environmental Engineering and a Bachelors Degree in Biological Sciences, both from the University of Illinois.

DR. DOUGLAS KENDALL

Dr. Kendall is a chemist at NEIC, where he has provided technical support for EPA enforcement cases since 1981. Most of his work has been on RCRA and Superfund enforcement for both civil and criminal cases. Much of his work is in applied spectroscopy, particularly X-ray methods and infrared spectroscopy. In addition to performing laboratory analyses, Dr. Kendall serves as a project leader and as an expert witness for both EPA and DOJ. In 2005, Dr. Kendall received a level I Scientific and Technological Achievement Award from the Science Advisory Board of the EPA. The award was for a research paper that developed from an enforcement investigation. Dr. Kendall received his PhD. from Harvard University.

JON BEIHOFFER

Mr. Beihoffer is a senior chemist at EPA's National Enforcement Investigation Center (NEIC) in Denver, Colorado. From 1986 to date, Mr. Beihoffer has served as a chemist at NEIC's Laboratory. He works primarily on Superfund and criminal enforcement cases. His analytical instrumentation specializations include nuclear magnetic resonance spectroscopy (NMR); mass spectrometry (MS); and gas and liquid chromatography (GC and LC). Prior to joining EPA, Mr. Beihoffer worked at environmental laboratory for two years performing gas chromatography/mass spectrometry (GC/MS) analysis.

Mr. Beihoffer received his MS in Environmental Chemistry from the University of Montana in 1984 and BS in Chemistry from the University of Minnesota – Duluth in 1981.

DON SMITH

Mr. Smith has over twenty-seven years of experience in laboratory analyses and environmental consulting. Of the twenty-seven years, about eight years were spent in commercial analytical laboratories performing organic, inorganic, and radiochemical analyses and another six years as a consultant. Mr. Smith has been with the U.S. EPA's National Enforcement Investigations Center (NEIC) for thirteen years. During his employment with NEIC, he has performed inorganic and organic analysis and provided testimony in civil and criminal proceedings. Mr. Smith has a bachelor's degree in chemistry from Metropolitan State College in Denver. Currently, Mr. Smith is a Unit Leader in the NEIC Laboratory Branch.

National Enforcement Investigations Center (NEIC)

Science and Technology Support For PRP Identification

Gene Lubieniecki
Dr. Doug Kendall
Jon Belhoffer
Don Smith

What Is The NEIC?

- Division of the Office of Criminal Enforcement, Forensics, and Training (OCEFT) within the Office of Enforcement and Compliance Assurance (OECA)
- Responsible for providing science and technology support for all EPA enforcement programs
- About 90 FTE, mostly scientests and engineers, including analytical laboratory, located in Denver, CO, to support all enforcement programs

CERCLA Cases NEIC Has Supported

- Sauget
- WR Grace/Libby
- Stringfellow
- Coshocton City Landfill
- Summitville Mine
- Allied Signal
- Higgins Disposal Service
- Refuse Hideaway Landfill
- Roebling Steel
- Upsilon-Davis
- Kennecott
- Presidio Army Base
- Charles George Landfill
- American Cyanamid
- Bunker Hill
- Higgins Farm
- Diamond Alkali
- Bolin Oil
- Route 561 Dump
- Westgate/Exide
- Butterworth Landfill
- LCP Chemical
- Helen Kramer Landfill
- Tex Tin
- Operating Industries
- Spiesfield
- ASARCO Smelter
- Highway 218 Perchlorate

CERCLA Cases NEIC Has Supported (cont.)

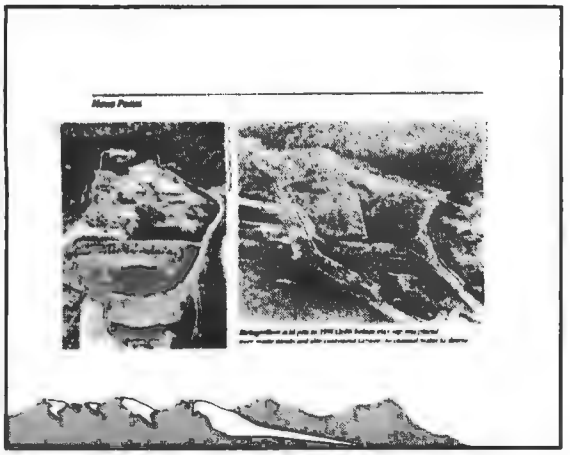
- Casmalia
- New Jersey Zinc/Horsehead Industries
- Kerr-Mcgee
- Butterworth Landfill
- LCP Chemicals Tar Lake
- Abex
- Center County Kepone (Nease Chem)
- Pollution Control Industries
- Beacon Heights/Laurel Park
- Krejci Landfill
- V-1 Oil
- Coeur D'Alene
- Chemical Warehouse
- Clean Care Corp
- INEEL
- Westbank Asbestos
- Industrial Excess Landfill
- Atlas Tack
- Tennessee Products
- Exxonmobile/Sharon Steel/Fairmont Coke
- Anniston Lead
- Beede Waste Oil
- Sikes
- Myers Dump

Dr. Doug Kendall
Better ID Through Chemistry

1. Compositional Analysis Identify all major and minor components
2. Non-toxic or non-target compounds may ID source of waste
3. Fingerprint
   Qualitative match
   Quantitative pattern of trace elements

Better ID Through Chemistry

1. Stringfellow Acid Pits
2. Paint cases
   source and receptor matching
   pigments and polymers
3. Instrumentation for Compositional Analysis

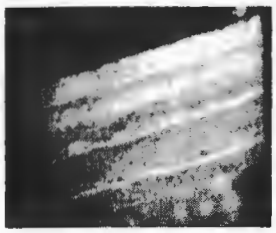


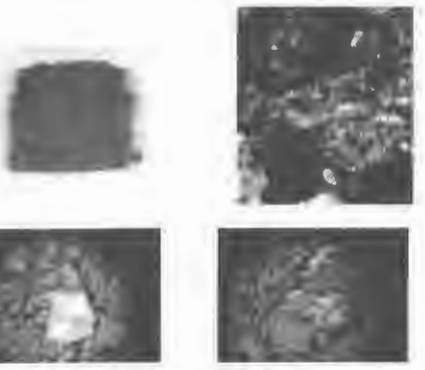
Stringfellow Acid Pits

- P-Chlorobenzene Sulfonic Acid
- Non-toxic waste from DDT production

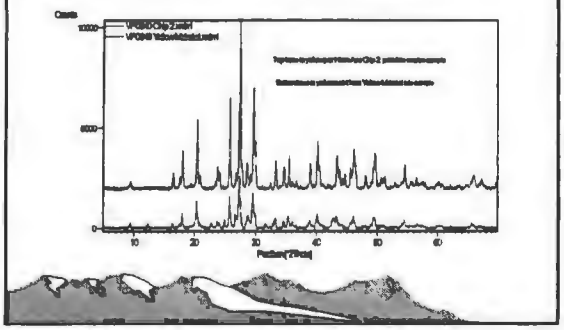
Source Identification Through Paint Analysis

- X-ray diffraction to fingerprint Pigments
- Infrared Spectroscopy to fingerprint Polymers / Resins
- Light or Electron Microscopy to Match particles

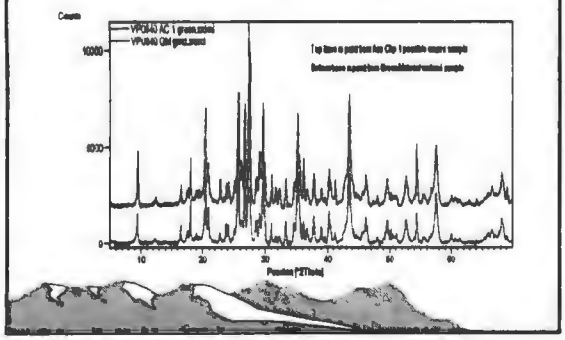




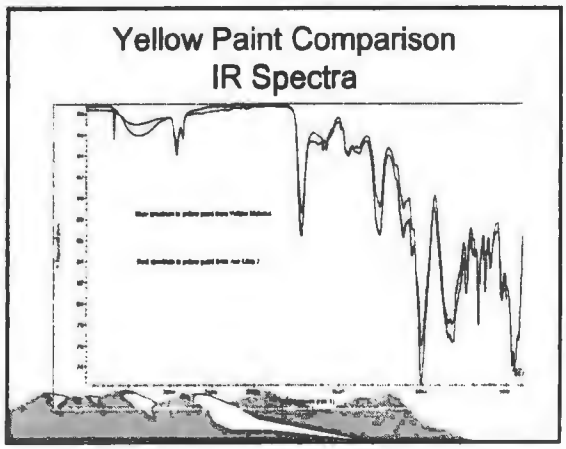
Yellow Paint Comparison
X-Ray Diffraction



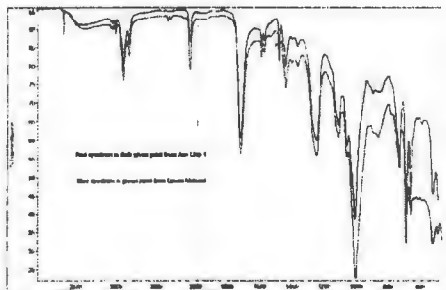
Green Paint Comparison
XRD



Yellow Paint Comparison
IR Spectra



Green Paint Comparison
IR note Cyanide



Compositional Analysis

- Screening Analyses to guide future work
- Identify all elements > 1%
- Speciate Compounds
- Use sample and site knowledge
- Bulk and particle analysis

Instrumentation

- Basic e.g. carbon/sulfur analyzer
- Complex e.g. NMR, SEM
- Non-environmental e.g. IR, XRD
- Complementary e.g. XRF, ICP & ICP/MS

Sauget Area 1 and 2 Historical Case Study

Jon Beihoffer

Sauget Area 1 and 2

Strength of Evidence Approach

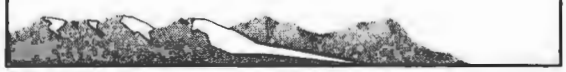
- Pathway
- Temporality
- Co-occurrence
- Gradients
- Plausible Mechanism
- Consistency of association
- Specificity

Chemicals of Concern

- Review of Company Documents
  - Standard Manufacturing Process
  - Standard Operating Instructions
  - Memos
  - Purchasing Records
  - Shipping Records
- Historical Research
  - Journals and Periodicals
  - Industry Directories

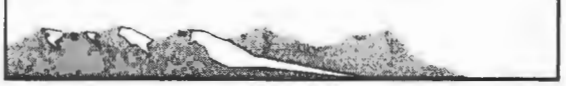
Samples

- Removal Action
- RI/FS
- Enforcement Action



Analytical Data

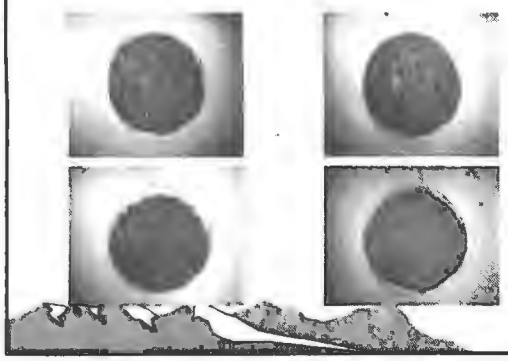
- Removal Action
- RI/FS
- Enforcement Action



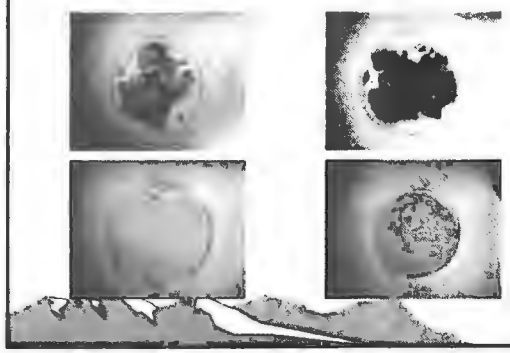
Process Materials

- Spent Catalyst
- Crude and Off-Spec Product
- Filter Cake
- Other Waste

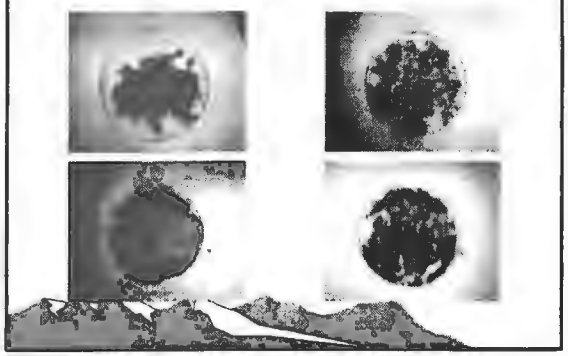
Spent Catalyst



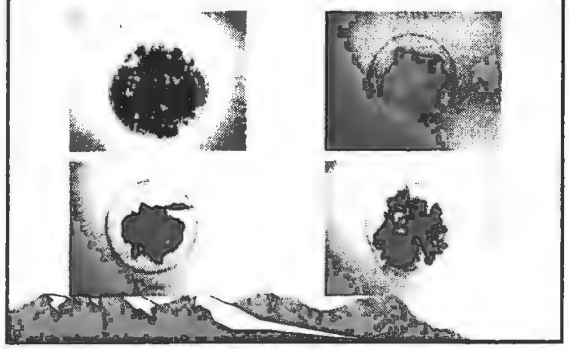
Crude and Off-Spec Product



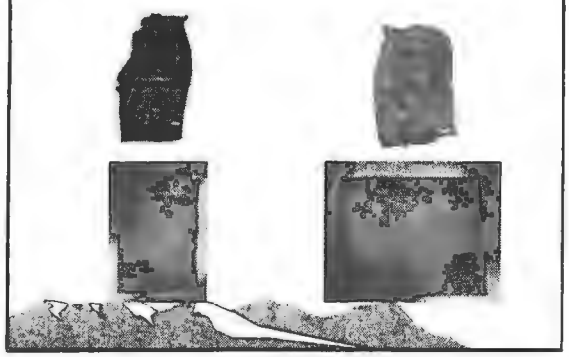
Filter Cake



Other Waste



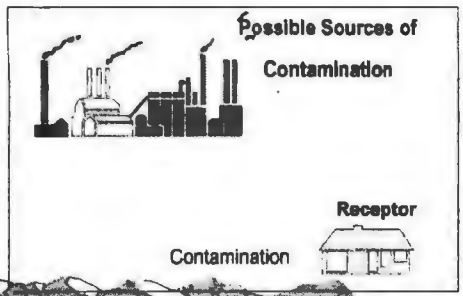
Artifacts



Conclusion

- Strength of Evidence Approach
- Chemicals of Concern
- Waste Types
- Archival of Samples and Artifacts
- Analytical Testing

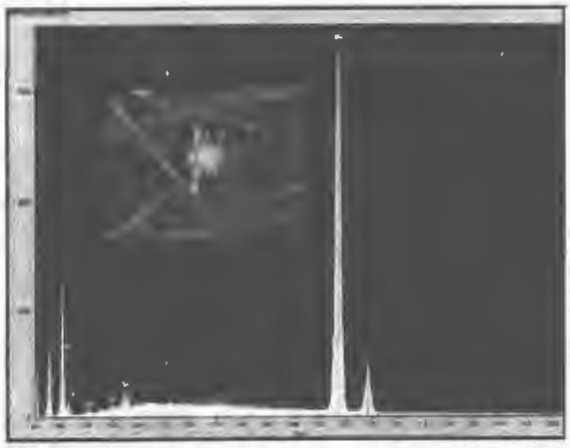
Source-Receptor Determinations
Don Smith, EPA-NEIC



Source-Receptor Measurement Techniques

- Identifying a specific source of waste from several possible sources
- Analytical methods
  - Trace metal composition
  - Mass Spectrometry (isotopic)
  - X-ray (fluorescence, diffraction)
  - Scanning electron microscopy (SEM)
  - Gas Chromatography/Mass Spectrometry (GCMS)

Matching *something* from the waste to a source.



Mass Spectrometric Techniques for Measuring Isotope Ratios

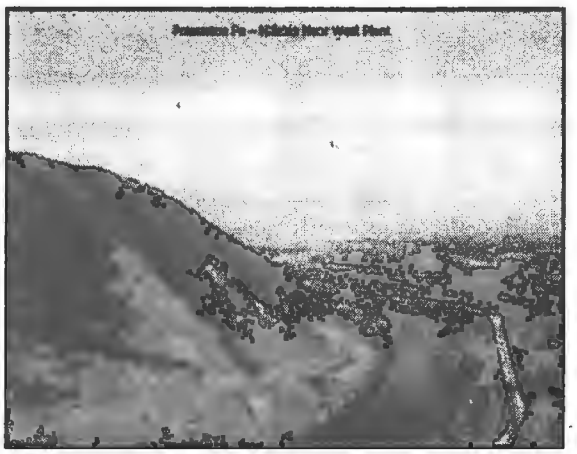
- Heavy elements (plutonium, lead, uranium)
- Light element methods (carbon, oxygen, sulfur, chlorine, etc.)

Mass Spectrometric Methods for Heavy Element Matching

- ICP-Mass Spectrometry
- ICP-Mass Spectrometry using multi-collector detection
- Thermal Ionization Mass Spectrometry using multi-collector detection

Source-Receptor Analyses Palmerton Pennsylvania

- Zinc Smelting –Secondary Zinc Recovery
- Lead contamination from gaseous and dust contaminants
- Contributions from multiple sources
- Objective was to distinguish between sources

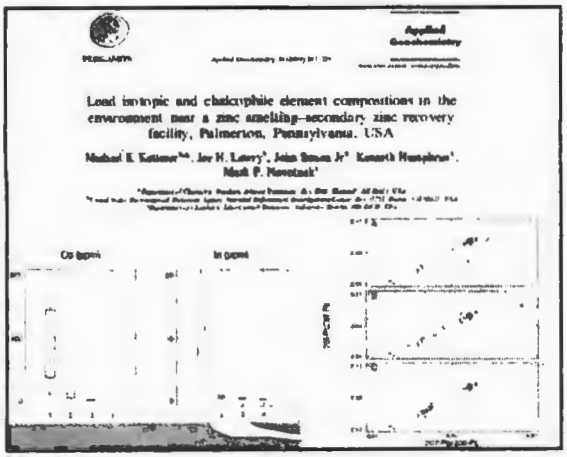


Previous Studies Identified the Extent
and types of Contamination

- Buchauer 1973, Strojan 1978 and Beyer et al in 1984 characterized Zn, Cd, Pb, and Cu in the environment in and around Palmerton
- Ketterer, Lowry, Simon et.al. attempted to identify the sources of heavy element contamination (Published in 2001)
- Examined lead isotope ratios and associated elements

Lead Isotope Ratio Analysis

- Well established technique
- Relies on variation in Pb isotopic composition arising from varying inputs of radiogenic ^{206}Pb, ^{207}Pb, and ^{208}Pb
- Isotopic composition of lead ores are characteristic of the mine source
- Older lead sources have accumulated less radiogenic ^{206}Pb, ^{207}Pb, and ^{208}Pb relative to non-radiogenic ^{204}Pb



Applied Geochemistry

Lead isotopic and chalcophile element compositions in the environment near a zinc smelting–secondary zinc recovery facility, Palmerton, Pennsylvania, USA

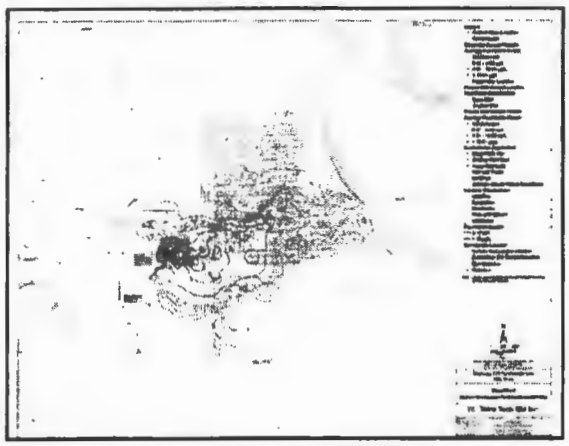
Michael E. Ketterer*, Jay H. Lawry, John Simon Jr, Kenneth Humphrey, Mark P. Novotnak

Conclusions of Palmerton Study

- The Zn smelting Pb is derived from mixing of Zn ores smelted of the 82 year history of the site.
- The EAF process Pb originates from mixing of scrap steel furnace feedstocks and reflects more recently mined, highly radiogenic Pb or from Missouri.
- Palmerton residential soil lead is mostly derived from EAF processing and Zn smelting

Hills Iowa
Site Discovery

- Former USDA grain bins study revealed perchlorate contamination
- Private potable water supply wells in the area
- Shallow approximately 30' feet deep in porous surficial aquifer
- Private water well sampling results included perchlorate



Hills Iowa Perchlorate Study

- Unknown source of Perchlorate Contamination
- Previous efforts to ID included:
  - Trace metal analysis
  - Isotope ratios (quadrupole instrument)
  - Total Perchlorate analysis
  - Anion analysis

Hills Iowa Perchlorate Contamination

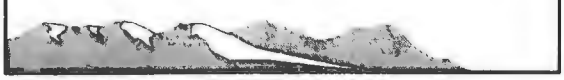
- Groundwater "source area" – 4 acres south of park and school in grain field
- Ranged from <4 ppb to 392 ppb –Average = 89 ppb
  Action level = 24.5 ppb (1/2006)
- Soil source area – same 4 acre GW source area
- High = < 4ppb to 260 ppb – Average = 30 ppb
- Average = 30 ppb

Investigated Sources of Contamination at the Hills Site

- Information request letters (CERCLA 104(e))
- Agri-wholesale facility
- City of Hills
- Fireworks suppliers
- Maytag
- NASA
- Property owners - west side
- Railroads
- University of Iowa

Other Possible Sources of Perchlorate

- Use in nuclear reactors and electronic tubes
- Automobile air bags
- Additives in lubricating oils
- Use in tanning and finishing leather
- A fixer for fabrics and dyes
- Electroplating



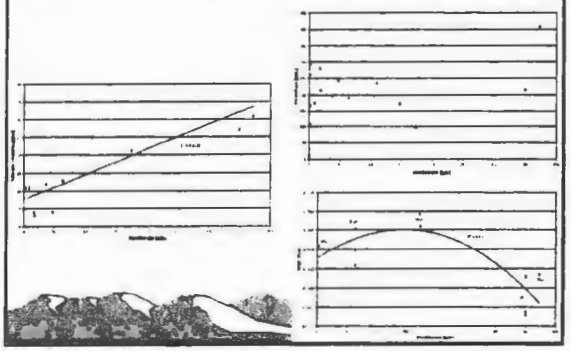
Other Possible Sources of Perchlorate (cont.)

- Aluminum refining
- Rubber manufacturing
- Paint and enamel manufacturing
- Methemphetamine laboratories
- Atmospheric generation

Suspected Sources and Investigations

- Suspected Sources
  - Fireworks – half duds, whole duds, perchlorate spill
  - Flares – RR Xing, cases/boxes on ground, light sabers
  - Dynamite – Highway 218 construction, rock blasting
- Investigations
  - Geophysical – ground penetrating radar, magnetometer, conductivity meter
  - Excavation of wire bundle, scrap treated lumber, 8 inch steel wrench
  - Fingerprint analysis – chemical constituents in source groundwater and contaminated wells versus fireworks, flares and dynamite

Results of Hills Iowa Source Identification Study



Proposed Light Element Stable Isotope Investigation

- Conduct concurrent elemental constituent analysis using a greater number of analytes
- Stable isotope analysis of chlorine and oxygen in source and groundwater samples

Why Isotopes?...

- Stable isotope ratios provide a unique "fingerprint" of a chemical compound
- Identify source of contaminant –whose is it?
- Indicate contaminant behavior
- Source variability must be characterized
- Microbial degradation has large isotope effect

How It Works

- Stable Isotope Fractionation
- Preferential partitioning of isotopes between phases or between reaction and product species
  - Function of difference in masses
- Examples:
  - Evaporation of water – lighter elements (^{2}H and ^{16}O partitioned to higher energy phases (vapor)
  - Chemical reactions – lighter elements partitioned to reactants (chlorine production)

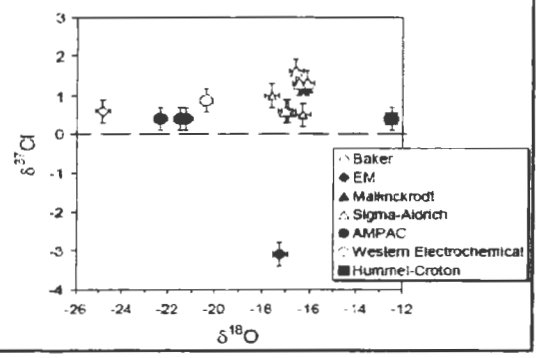
Light Element Stable Isotope Analysis

- Chlorine has two stable isotopes, ^{35}Cl and ^{37}Cl
- Delta notation δ(‰) = [Rsample/Rstandard–1] x 1000 where R = $^{18}O/^{16}O$, $^{37}Cl/^{35}Cl$ …
- Precision of δ measurements normally +/-0.1 to 0.3‰

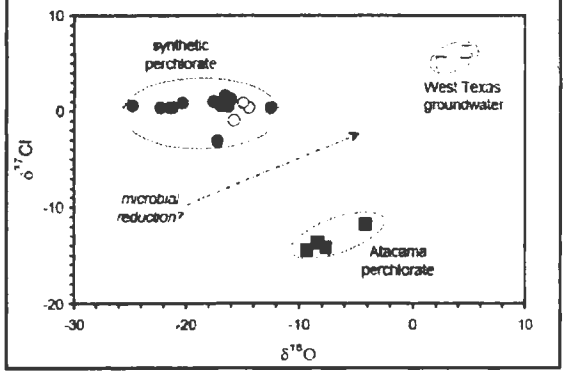
How are isotope ratios of perchlorate measured in groundwater samples?

- Extract and recover ClO_4 from water using ion-exchange resin developed by ORNL to obtain ~10 mg perchlorate for isotopic analyses
- Requires sampling 1,000 liters of 10-ppb water
- Convert ClO_4 to form that can be isotopically analyzed using gas-source isotope ratio mass for chlorine isotope analysis
- Compare groundwater isotopic ratios of $^{37}Cl/^{35}Cl$ and $^{18}O/^{16}O$ with potential source materials

Stable Isotope Analysis of Perchlorate Reagents (Sturchio, 2005)



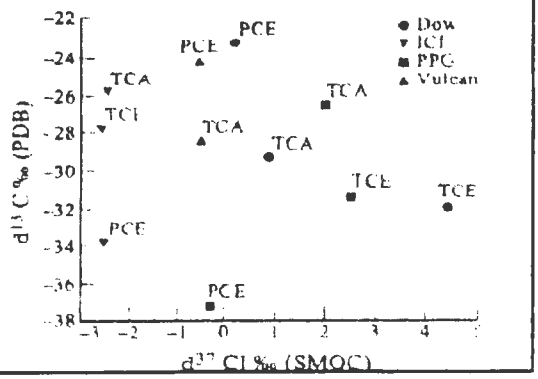
Comparison of Chlorine and Oxygen Isotopic Ratios in Groundwater



Other Applications of Isotope Ratio Mass Spectrometry

- Chlorinated solvent source ID
- Nitrate/Nitrite source ID
- Waste source ID

Identification of PCE, TCE, and TCA from 4 different sources using IRMS (from Philp, 2005)



Acknowledgements

- Dr. Mike Ketterer, University of Northern Arizona
- Dr. Neil Sturchio, University of Illinois at Chicago, Department of Earth and Environmental Sciences
- Craig Smith and Doug Ferguson, EPA Region 7
- Amy Bern, EPA-NEIC

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- Ketterer M.E., Lowry J.H., Simon J., Humphries K., Novotnak M.P., 2001. Lead isotope and chalcophile element compositions in the environment near a zinc smelting-secondary zinc recovery facility, Palmerton, Pennsylvania, USA. Applied Geochemistry 16 (2001) 207-229
- Philp P.R., June 2005. The use of Stable Isotopes as a Tool for Monitoring the Origin and Fate of Emerging Contaminants. ISEF Workshop, Virginia Beach, Virginia
- Sturchio N.C., Bohlke J.K., Beehus G., Horita J., Brown G.M., Baloso, A.D., Patterson L.J., Hatzinger P.B., Jackson A.J., Ballesta J., Perchlorate Environmental Occurrence, Interactions, and Treatment, Springer, 2006.

Questions?

Summary

- NEIC provides science and technology support for Agency enforcement cases, including CERCLA PRP searches
- Wide array of analytical capabilities to help fingerprint hazardous substances to ID responsible parties
- We do not have unlimited resources; we look for unique opportunities

How To Contact The NEIC

- Gene Lubieniecki, NEIC Civil Program Coordinator
- Lubieniecki.gene@epa.gov
- 303-462-9012

NOTES

PRP Search Issues at Recycling Sites

CAROL BERNS

Carol has been practicing law for over 25 years. The first ten years were spent as a staff attorney with the Army Corps of Engineers in both Kansas City and New York. In 1990, Carol began working for EPA Region 2 as a Superfund Enforcement Attorney. In addition to her caseload, which runs the gamut from small owner-operator sites to large generator sites involving thousands of parties, Carol is a member of the PRP Search Enhancement Workgroup and has participated in and spoken at several conferences.

Carol received her J.D. from the University of Kansas in 1980. She received her B.S.. from The George Washington University in 1974.

Recycling Sites

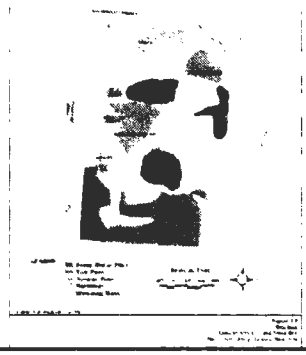
Issues that can arise during PRP searches

Consolidated Iron and Metal Co., Inc. Superfund Site

- Newburgh, New York
- Adjacent to Hudson River
- Junkyard
- Operated from 1950s through 1990s
- Primarily handled cars, car parts, white goods, transformers, IBM electronics

Con Iron Site Background

- Map of site



Con Iron Site Processing

- Burning
- Compacting/Bailing
- Shearing
- Smelting
- Flattening
- Battery cracking
- Tire piles

Con Iron Site Contaminants

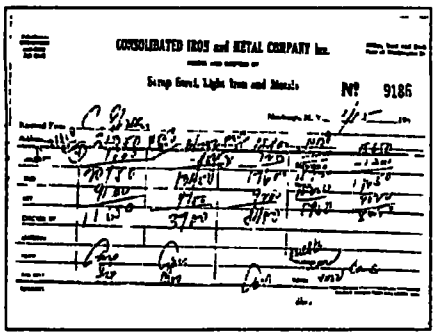
- Lead – pervasively throughout the Site
- Other metals
- PCBs
- BTEX compounds
- pesticides

Con Iron Site Contamination

Con Iron Site PRP Issues

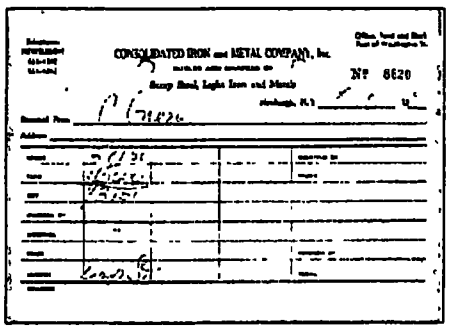
- Site documents – 200 + boxes weight slips representing over 11,000 parties
- Deciphering weight slips
- No addresses! -Identifying parties and getting addresses
- Same party identified differently
- Understanding what different types of scrap were present (specialized terms)

Con Iron Site Evidence


CONSOLIDATED IRON and METAL COMPANY Inc.

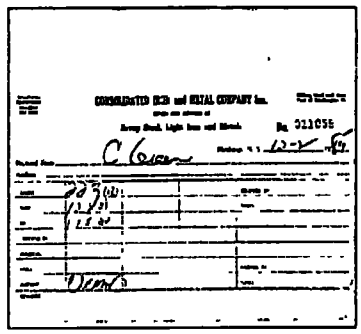
Nº 9186

Con Iron Site Evidence


CONSOLIDATED IRON and METAL COMPANY, Inc.

Nº 8620

Con Iron Site Evidence



Con Iron PRP Search Resources

- Resources employed:
  - Interview Site owner/operator – multiple times
  - Interview other executive in scrap business
  - Specialized information request letters sent out
  - Asked for help identifying PRPs from municipality PRP
  - Newspaper clippings
  - CI visited some PRP locations

Con Iron PRP Search Resources

- Resources employed cont'd
  - Documents from local and state enforcement cases
  - Documents from local environmental groups
  - Newspaper articles
  - Switchboard.com/other internet tools
  - New York Secretary of State's office
  - Phone calls

Con Iron Liability Issues

- SREA – determining what was in and out
- Setting up "tracked waste" categories
- Bankruptcies and dissolutions
- Successor liability
- "third prong" issues (Section 127(f))

Mercury Refining Superfund Site

- Towns of Guilderland and Colonie, New York
- Operated from late 1950s until 1998
- Mercury reclamation facility
- Retort ovens used to heat mercury bearing materials – mercury recovered and further refined

Mercury Refining Superfund Site

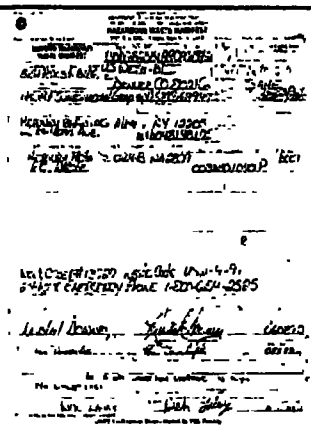
Mercury Refining Site

- Type of waste – mercury, PCBs
- Forms of mercury waste
  - Batteries
  - Thermometers
  - Fluorescent bulbs
  - Pressure regulators
  - Vapor lamps
  - In total, approx. 35 different waste types

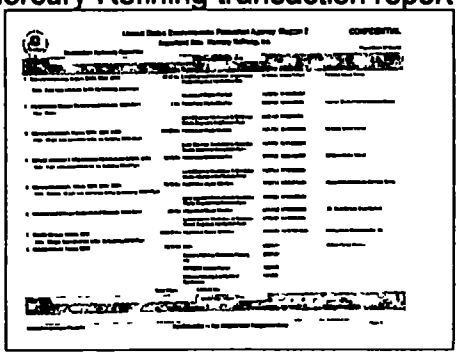
Mercury Refining PRP issues

- Evidence-
  - manifests, internal refining documents
  - No 104(e)s because enough records
- Data input issues
  - Common unit (lbs) – required some estimation
  - Used total weight in (i.a.w. Waste in Guidance)

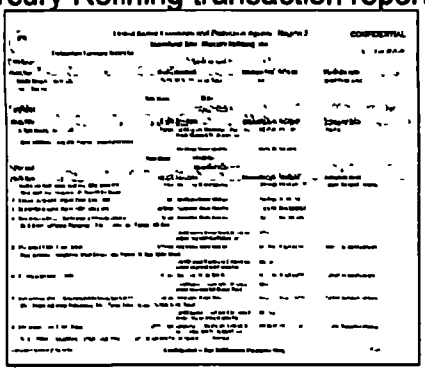
Mercury Refining



Mercury Refining transaction report



Mercury Refining transaction report



Mercury Refining Legal issues

- SREA issues
  - Scrap metal exemption
  - Mercury was liquid/powder
  - batteries

Mercury Refining legal issues

- Address checking
  - Team of people
  - CI databases
  - Google company databases
  - LEXIS
- Successor liability issues
- 104(e)s to majors w/ success. liab. issues

Mercury Refining settlements

- De Minimis settlement results
- 425 parties initially
- 65 offers returned as undeliverable
- 275 parties signed on so far (most under $10,000)

NOTES

PRP Search Issues at Mining Sites

JOSEPH TIEGER

Joseph Tieger is a senior environmental protection specialist and team leader in the Office of Site Remediation Enforcement, Regional Support Division, U.S. Environmental Protection Agency, Washington, D.C. He began his career with the federal government as a biologist with the San Francisco District, Army Corps of Engineers, Regulatory Program. He then worked for the U.S. Fish and Wildlife Service in California, Missouri and Washington, D.C. Joe has been with the EPA CERCLA program since 1989. He has focused on enforcement issues relating to the cleanup of hardrock mine sites and the associated processing and smelting facilities. Joe is considered to be the enforcement program's expert on mine sites, divided estates, and the application of CERCLA liability at public/private sites. Joe has a B.A. and M.A. in Biology, from San Francisco State University, an M.A. Public Administration, and a Juris Doctor, from George Washington University. He is a member of the Maryland Bar.

CERCLA Section 107(a) Liability

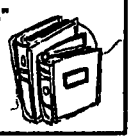
- Owners
- Operators
- Generators
- Arrangers

Things to Remember About Land

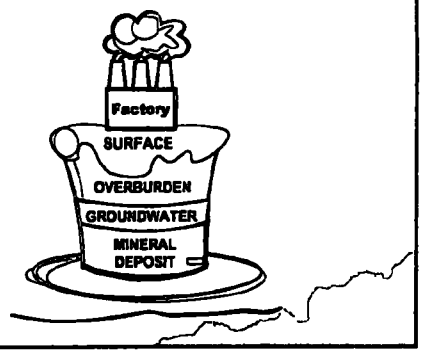
- Someone Always Owns the Land.
- Ownership Can Be Divided by Time (Sold, Leased, Rented).
- Interests Can Be Separated and "Taken" or Conveyed (Fee or Easements).
- Ownership Can Be Divided Horizontally (Subdivided).
- Ownership Can Be Divided Vertically.
  - And in some cases, the airspace above land and access to sunlight can be at issue
- Issues Are Decided by State Law

Owners

- CERCLA Section 101(20) Does Not Distinguish Owners and Does Not Provide a Definition.
- Black's Law Dictionary
  - Own: "to have or possess as property; to have legal title to."
  - Owner "One who has the right to possess, use, and convey something."
- Webster Adds: "to have power over; control."



The Layer Cake



Surface Owners

- Liable If They Have the Power to CONTROL the Activity.
  - Even if they do not know the party will release hazardous substances.

Subsurface Owners

- Under the common law of most states, subsurface owners have the RIGHT to enter onto the surface to the degree necessary to gain access to the subsurface and to take actions needed to conduct mining activities.
- In most states, they do NOT need to pay for damage to surface owners' property if they can show their work was reasonably necessary to reach the minerals
- The subsurface mineral owner has CONTROL over the activity
- State of Colorado v. Asarco Resurrection Mining Co., et al., 608 F Supp. 1484 (1985)

Leftovers

- The owner of the mineral estate retains title to the already mined, low-grade ore or the mining waste that is left on the land in the hope that either technology or the market will make processing profitable. These materials often become the source of releases.
- The owner of the mineral estate is potentially liable as owner and/or operator for releases of hazardous substances from these materials

Summary - Who is Liable?

- The owner who has control of the activity that causes or is the source of the release!
- The mineral owner may or may not also be liable as the operator.
- The owner of the material (ore, waste) that is the source of the release
- The owner and operator may be the same or different entities.

What About the Groundwater?

- Ownership, control, and use of groundwater vary by state.
- Sometimes groundwater is classified as a mineral and the ownership and use may belong to the surface owner.
- Sometimes groundwater is classified as a state resource and use can be controlled by the state.
- Groundwater is both "environment" and a "natural resource" under CERCLA Section 101

Mills and Smelters

- MILLS: Receive "ore" and produce "concentrate" and wastes (waste rock and process tailings).
- SMELTERS: May be but frequently are not co-located with mines or mills; receive and produce concentrate and produce refined metal, dross, slag, and air emissions.

What Is This Stuff?

- REFINED METAL Ingot
- DROSS MAY have commercial value, is NOT "recycled" material Often sold or otherwise sent to a specialized smelter for further processing, is not a "waste" unless "disposed of"
- SLAG The bottom of the pot, impurities, waste, often contains hazardous substances

What Is This Stuff? *(continued)*

- Who Is Liable Depends on "The Deal" or "Who Owns What and When Did They Own It?"
  - A "Tolling Agreement" – NOT an agreement to extend a time limit for litigation, settlement, or filing a claim.
  - In the mining sector, an agreement between a mine and a mill, a mill and a smelter, or among all of them, a contract that determines <u>when</u> payment for the metal is due. The form and timing of the transaction determine liability

ANDREA MADIGAN

Ms. Madigan is a senior enforcement attorney in EPA's Region 8's Legal Enforcement Program, Office of Enforcement, Compliance, and Environmental Justice. Ms. Madigan joined EPA in 1990 in the Atlanta regional office and transferred to the Denver office in 1998. She works primarily on large Superfund enforcement cases and chairs EPA's National Bankruptcy Work Group. Ms Madigan frequently serves an instructor on a variety of environmental topics, including Superfund enforcement, bankruptcy, and environmental management systems. Prior to joining EPA, Ms. Madigan was in private practice specializing in bankruptcy and commercial litigation.

Ms. Madigan received her J.D. from the University of Colorado in Boulder, Colorado in 1983.

The Basics of Mining Law

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US EPA Region 8
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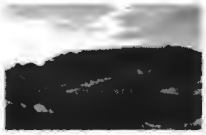
1872 Mining Law

- Anyone may enter public domain lands to search for, remove, and sell minerals located thereon.

What are public domain lands?



- Have remained in federal ownership since original acquisition
- Were retained upon admission of a state
- Remain unoccupied, unappropriated, and unreserved
- Have not been withdrawn
- Are open to disposition under the public land laws

Some examples of lands that are not public domain lands

- Navigable submerged lands
- Railroad grant lands
- State land grants
- Early homestead grants
- Desert land entries
- Indian allotments
- Acquired lands

Reserved Public Domain

- Lands removed from the public domain and immediately designated to some predetermined purpose
- Reservations include national parks, national forests, Indian reservations, and military reservations
- With some exception, reserved lands are <u>not</u> open to the operation of the public land laws, including the Mining Law

National Parks

- Yellowstone NP established 2 months before 1872 Mining Law to be preserved in its natural condition. 17 Stat. 32 & 33 (1872).
- Each NP is withdrawn by a specific act. Almost all are withdrawn from operation of Mining Law
- Existing mining claims in NPs are
  - subject to the usual maintenance requirements
  - managed under the Mining in the Parks Act and not subject to 3809 regulations

National Forest System Lands

- Forest Management Act
- Weeks Act
- General Exchange Act

- Forest Management Act of 1897—opens lands reserved as national forests to the operation of the Mining Law, unless withdrawn by a secondary withdrawal
- Weeks Act of 1911—authorized federal government to purchase lands for stream-flow protection and to maintain the acquired lands as national forests that are not open to the operation of the Mining Law
- General Exchange Act of 1922—authorized U.S. to acquire title to lands within national forests that are normally open to operation of the Mining Law

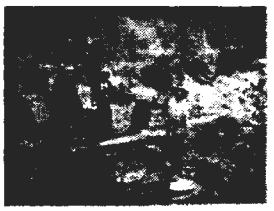
Withdrawn Lands

- Withdrawn lands are lands removed from the public domain for the purpose of maintaining the status quo
- Withdrawn lands not open to operation of Mining Law

Acquired Lands

- Federally owned lands that were acquired from nonfederal owners by purchase, condemnation, gift or exchange
- Although not part of the public domain, certain legislation opens some acquired lands to the Mining Law's operation

The General Mining Law: 1872 - 1955



Two Types of Mineral Deposits

- Two types of mineral deposits under the Mining Law
- A "lode" is a mineral deposit in solid rock made up of a vein of quartz or other rock bearing gold, silver, lead, copper, or other valuable deposits. A "lode" is typically a tabular-shaped deposit of valuable mineral between definite boundaries, and may include several veins spaced closely together to be mined as a unit.
- A "placer" includes forms of valuable mineral deposits other than "lodes" and is typically an alluvial or glacial deposit.

Overview of the 1872 Mining Law

- Prospectors (U.S. citizens or those declaring an intention to become U.S. citizens) may enter upon public domain lands to search for "valuable minerals" gold, silver, lead, and copper.
- Upon "discovery" of a lode or placer deposit the miner may "locate" it (obtaining a so-called unpatented mining claim).
- "Discovery," which is not defined by the statute, has been determined to mean that the deposit can be mined at a profit.

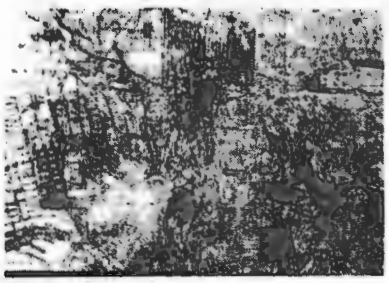
- Miners may also locate "mill sites" on non-mineral lands located near mineral deposits to place processing facilities, tailings, rock dumps, etc.
- Tunnels can be driven to discover or develop valuable mineral deposits.

Locating a Lode Claim

- 30 U.S.C. § 23 --
  - Prior to 5/10/1872: per local rules/customs
  - Post 5/10/1872: 1500' x 600' claims w/ parallel end lines and "framing" the vein or lode
- 30 U.S.C. § 28--
  - Boundaries to be distinctly marked on the ground
  - Name of the locator, date of location, and a description of the location recorded
  - Note: claims can be "co-owned" by tenants in common
  - Location notice recorded per the custom & practice of the local mining district or state law.
  - Notice to the federal government of the location NOT required.

Leadville Mining Claims: 1879

Leadville Mining Claims: 1901



Locating a Placer Claim

- 30 U.S.C. § 35
  - 20-acre claims
  - Located like lodes
  - For mineral deposits not properly located as a lode claim
- 30 U.S.C. § 36
  - Association placers
  - 160-acre max

Locating a Mill Site

- 30 U.S.C. § 42
  - Nonmineral, nonadjacent lands
  - Used and occupied for mining or milling purposes associated with a claim
  - 5 acre maximum size
  - Limited by what is reasonably necessary
  - Independent quartz mill or reduction works
  - 1960 amendment for mill sites associated with placer claims
  - $5/acre patent w/ lode
  - $2.50/acre patent w/ placer

Tunnels and Adits

- Miners may locate a tunnel site and run a tunnel to discover or develop a vein or lode and have a possessory right to the veins or lodes discovered within 3000 feet from the face of the tunnel. 30 U.S.C. § 27
- Tunnel sites are subsurface rights-of-way.
- Tunnel sites are not mining claims but merely means of exploration.
- Not subject to being patented.

Assessment Work

- 30 U.S.C. § 28
  - Requires $100 in labor each year per claim
  - Noncompliance opens lands to location by others ("re-location")
  - Co-owners may "publish out" a co-owner who fails to contribute
  - Assessment work year runs from noon September 1st to noon the following September 1st

Maintenance Fee

- 30 U.S.C.A. §§ 28f.-k.(West Supp. 2005)
- $30 location fee for new claims
- $125 annual maintenance fee
- Failure to pay timely, claim is null and void
- Small miner waiver—10 or fewer claims
- Small miner must do assessment work and make FLPMA filings
- Current authorization ends FY2008

Patenting Mining Claims

- A mineral patent is a title conveyance from the United States to a private party in fee simple absolute
- A claimant must:
  - (1) file an application showing compliance with Mining Law requirements;
  - (2) file a survey of the claim
  - (3) post an application notice on the claim
  - (4) file affidavits of two persons that notice was posted
  - (5) file a copy of notice in appropriate BLM office
  - (6) publish application notice in nearby newspaper for 60 days
  - (7) if no adverse claim exits, pay purchase monies
- Lode, placer and mill sites subject to mineral patent. Tunnel sites are not.

The General Mining Law Post 1955:
Regulating Free Access

- Surface Resources and Multiple Use Act of 1955
- Federal environmental statutes
- Federal Land Policy and Management Act of 1976 and BLM's 43 C.F.R. Part 3809 Regulations
- Organic Administration Act of 1987 and USDA/Forest Services' 36 CFR Part 228 Regulations
- State mine reclamation and other laws

Surface Resources and Multiple Use Act of 1955

- Addresses abuses of 1872 Mining Law
- Many mining claims not located in good faith for mineral exploration/development but for non-mining private uses such as residences, fishing and hunting camps, taverns, etc.
- Gives federal land managers authority to regulate surface use of mining claim to curb abuses

Federal Environmental Statues

- Surface Mining Control and Reclamation Act of 1977 - only applies to surface coal mining
- NEPA – not applicable to patented mining claims
- Clean Water Act
- Clean Air Act
- Endangered Species Act
- RCRA
- CERCLA

Federal Land Policy and Management Act of 1976

- Prior to FLPMA, recordation of mining claims and the notices of assessment work to maintain legal possession per state law (no information directly to BLM).
- Purpose: BLM to be get notice of location and number of unpatented mining claims, mill sites, and tunnel sites; annual filing requirement; presumption of abandonment if initial/annual filings not made.

- Prevention of unnecessary or undue degradation of public lands.
  - "Casual use" with "no or negligible" surface disturbance:
    1. notice of casual use not required
    2. reclamation required
    3. financial assurance not required
  - "Notice-level" operations – disturbance of 5 or fewer acres:
    1. notice of operations required but BLM does not approve/modify
    2. reclamation required
    3. financial assurance not required
  - "Plan-level" operations – disturbance of 5+ acres or in special status areas (wilderness areas/national monuments):
    1. "plan of operations" submitted for BLM approval
    2. reclamation required
    3. financial assurance required

Organic Administration Act of 1897

- Authorizes the Secretary of Agriculture to promulgate regulations for the administration of national forests
- Forest Service promulgated surface management regulations in 1974 now codified at 36 C.F.R. Part 228. Operations must minimize adverse environmental impacts on surface resources whenever feasible.

State Mine Reclamation and Other Laws

Most western states have a variety of laws requiring reclamation, protection of ground water resources, and other laws of general applicability to hard rock mining that are not pre-empted by the Mining Law.

Mixed Ownership Sites

- Located partially on public and partially on private land
- Patented claims
- Unpatented abandoned claims
- CERCLA Liability

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

JUN 24 2003

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Policy on Listing Mixed Ownership Mine or Mill Sites Created as a Result of the General Mining Law of 1872 on the Federal Agency Hazardous Waste Compliance Docket

FROM: David J. Kling, Director
Federal Facilities Enforcement Office (FFEO)

TO: Regional Docket Coordinators

This policy addresses the issue of when so-called "mixed ownership" mine or mill sites, created as a result of the General Mining Law of 1872 (GML), 30 U.S.C. § 22 et seq., should be included on the published list of federal facilities which have been reported to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Section 120(c) Federal Agency Hazardous Waste Compliance Docket (Docket).[1] For the reasons stated

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[1] Section 120(c) of CERCLA states that:

The Administrator shall establish a special Federal Agency Hazardous Waste Compliance Docket (hereinafter in this section referred to as the "docket") which shall contain each of the following:

(1) All information submitted under section 3016 of the Solid Waste Disposal Act [42 U.S.C.A. § 6937] and subsection (b) of this section regarding any Federal facility and notice of each subsequent action taken under this chapter with respect to the facility.
(2) Information submitted by each department, agency, or instrumentality of the United States under section 3005 or 3010 of such Act [42 U.S.C.A. § 6925 or 6930].
(3) Information submitted by the department, agency, or instrumentality under section 103 of CERCLA [42 U.S.C.A. § 9603].

The docket shall be available for public inspection at reasonable times. Six months after establishment of the docket and every 6 months thereafter, the Administrator shall publish in the Federal Register a list of the Federal facilities which have been included in the docket during the immediately preceding 6-month period. Such publication shall also indicate where in the appropriate regional office of the Environmental Protection Agency additional information may be obtained with respect to any facility on the docket. The Administrator shall establish a program to provide information to the public with respect to facilities which are included in the docket under this subsection. (emphasis added)

below, we believe that, as a matter of policy, mixed ownership mine or mill sites created as a result of the GML generally should not be included on the published list of federal facilities which have been reported to the Docket. This policy recognizes that individual mine or mill sites should be evaluated on a case-by-case basis, and does not in any way address the status of the federal government as a potentially responsible party (PRP). The policy does not address issues regarding "ownership" under CERCLA, nor does it address any federal cleanup obligations. This policy simply speaks to Congress' intent regarding the types of facilities that should be included on the published list of federal facilities which have been reported to the Docket.

Background

Mixed ownership mine or mill sites are those located partially on private land and partially on public land. Unlike Department of Defense or Department of Energy federal facilities, which are or were operated by the United States or its contractor and are entirely in Federal ownership, many mine and mill sites consist of both federal and private land ownership.

Generally, under the GML, a person may establish private rights to mine certain minerals on federally-owned land by staking a claim to the land. Once a claim is established and if it is maintained, the claimant gains rights to the beneficial use of the property incident to mining, but the fee simple title remains with the federal government. Prior to enactment of the Federal Land Policy and Management Act of 1976 (FLPMA), the claimant had a right to extract the minerals and control the surface. Since the enactment of FLPMA, the claimant has the right to extract the minerals and may use the surface to the extent necessary to develop the claim, subject to surface management regulations of the land managing agency. The claim is private property, is taxable, and can be sold, leased, bequeathed, etc. If the claim is abandoned or otherwise becomes invalid, all of the property rights revert to the federal government and the land is under the control of the Federal Land Managing Agencies (FLMA), usually the Forest Service (FS) within the United States Department of Agriculture or the Bureau of Land Management (BLM) within the United States Department of the Interior.

A claimant may, through a process called "patenting," buy the fee simple interest from the federal government and own the property in its entirety. If the owner of patented property abandons it, the property does not revert to the United States, but remains private land. The effect of the GML is that thousands of former mine or mill sites are now private properties (inholdings) within the boundaries of federal land managed as National Forests, National Parks, and BLM-managed lands.

Many FLMAs do not have a comprehensive inventory of all mine sites, and neither do the states or EPA. However, there are estimated to be tens of thousands of mines on federal lands, and approximately an equal number on private lands, including many with releases of hazardous substances. A mixed ownership mine "site," often a mining district, may have involved hundreds of private entities as owners or operators. A large-scale map of a National Forest or BLM-managed lands may indicate the overall boundary and imply that all of the land inside is federally-owned. A more detailed map will indicate that there are many private inholdings,

frequently including mine or mill sites,[2] which, as explained above, the FLMA has little or no control over but which may impact the interspersed federally-owned land.

A review of CERCLA Section 120(c) and its legislative history reveals that Congress did not directly address whether mixed ownership mining sites should be identified as federal facilities in the Docket. Therefore, we believe that the decision whether to include such sites on the published list of federal facilities which have been reported to the Docket should be guided by sound policy reasons.[3]

Policy

It is our policy that mixed ownership mine or mill sites generally should not be included on the published list of federal facilities which have been reported to the Docket. This policy recognizes that individual mine or mill sites should be evaluated on a case-by-case basis, and does not in any way address the status of the federal government as a PRP. The policy does not address issues regarding "ownership" under CERCLA, nor does it address any federal cleanup obligations. This policy simply speaks to Congress' intent regarding the types of facilities that should be included on the published list of federal facilities which have been reported to the Docket. Because these sites are typically encumbered by substantial private rights derived from the GML and the contamination at these sites is typically the result of private activities, we believe that treating these sites as private facilities will foster the most effective use of CERCLA response authorities.

At "mixed ownership" mine or mill sites, the efficient use of limited EPA and FLMA resources is greatly facilitated through a cooperative approach. As part of this cooperative effort, EPA and the FLMA need to evaluate issues such as whether EPA or the FLMA is pursuing PRPs at the site, and how the EPA and/or the FLMA is otherwise addressing the contamination at the site. EPA regions, in cooperation with the FLMA and the states in which the sites are located, may also find it helpful to develop a prescreening process which could reveal potentially significant problems at a site and feed into the cooperative effort to address these sites. At some "mixed ownership" mining sites, EPA will be the lead agency and will generally need to work with the FLMA to effectively address any release of hazardous substances on the federally owned areas of the site, while at other "mixed ownership" mining sites the FLMA may be the lead agency and will generally need EPA authority to effectively address the risks posed by the non-federal areas of the site. Several EPA regions have entered into site specific memoranda of agreement to define the respective roles of the agencies. Additional guidance or interagency

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[2] Federal land laws other than the GML (such as the railroad and homestead acts) have also created private property rights within these Federal lands. In addition, federal law has created state trust lands interspersed within federal land units

[3] Nothing in this Policy is intended to alter or modify a federal agency's obligation under CERCLA Section 120 to determine whether information must be reported to the Docket based on the criteria set forth in Section 120(c)(1)-(3). Also, the fact that information is reported to the Docket does not necessarily mean that the site will be included on the published list of facilities which have been reported to the Docket.

agreements may also need to be developed to support coordinated enforcement and response actions at mixed ownership mining sites. Mixed ownership sites with potential or confirmed hazardous releases that are not included on the published list of federal facilities which have been reported to the Docket should, however, be considered for inclusion in EPA's CERCLIS database.

Other Mine Sites

Unpatented abandoned mine or mill sites which were created under a GML claim, entirely on federal lands, and that have reverted to federal control, should be discussed with the FLMA having "jurisdiction, custody, or control" of the site and EPA HQ (FFEO and the Office of Site Remediation Enforcement (OSRE)) before including the site on the published list of federal facilities reported to the Docket. Additionally, mines, mill, or mine waste disposal areas on FLMA lands that were created under a federal permit or lease should be discussed with the FLMA having "jurisdiction, custody, or control" of the site and EPA HQ before including that site on the published list of federal facilities which have been reported to the Docket.

The discussion in this document is intended solely as guidance to EPA personnel. This document is not a regulation, nor does not it change or substitute for any regulation. Thus, it does not impose legally binding requirements on EPA, States, or the regulated community. This guidance does not confer legal rights or impose legal obligations upon any member of the public. In the event of a conflict between the discussion in this document and any statute or regulation, this document would not be controlling. The general description provided here may not apply to a particular situation based upon the circumstances. Interested parties are free to raise questions and objections about the substance of this guidance and the appropriateness of the application of this guidance to a particular situation. EPA and other decisionmakers retain the discretion to adopt approaches on a case-by-case basis that differ from those described in this guidance where appropriate and to amend this guidance without public notice.

Thank you for your time and attention to this Policy on listing "mixed ownership" mine or mill sites on the published list of federal facilities which have been reported to the Docket. For further discussion on mining and private party enforcement issues contact Joe Tieger of OSRE (202-564-4276), on CERCLA Section 120 issues, Andrew Cherry of FFEO (202-564-2589), and on Docket issues, Augusta Wills of FFEO (202-564-2468).

References:

General Mining Law of 1872, 30 U.S.C. §§ 21-54.
Comprehensive Environmental Response Compensation and Compensation Act, as amended, 42 U.S.C.A. §9601 et seq.
Executive Order No. 12580, January 23, 1987.

cc: HQ and Regional Site Assessment Staff
Regional Mining Coordinators
Regional Federal Facility Program Managers

NOTES

PRP Search Issues at Area-wide Ground Water Sites

LANCE VLCEK

Mr. Vlcek is a senior investigator in Region 5's Enforcement Investigations and Search Section, Superfund Division. Mr. Vlcek has ten years with the EPA. Prior to joining EPA, Mr. Vlcek worked as a Contract Auditor and Criminal and Civil Investigator. He has worked for the US Department of Energy, Defense Contract Audit Agency, Immigration and Naturalization Service, and the US Consumer Product Safety Commission. Mr. Vlcek also has some 30 years with the U.S. Army (Active and Reserve Duty) as a Criminal Investigator and Intelligence Officer. He has worked on numerous groundwater sites in Region V.

STEVEN ARBAUGH

Mr Steven Arbaugh is currently employed at the EPA Region 9 office in San Francisco, CA, as a civil investigator in the Superfund Division Mr Arbaugh has performed civil investigator duties with the remedial case development team since April, 2001. Starting in July, 1998, Mr. Arbaugh was employed as an enforcement officer with the EPA Region 9 Pesticide Program. Prior to working for the EPA at the Region 9 office, Mr. Arbaugh was employed by the Utah Department of Environmental Quality, Air Division He was employed as an air quality planner and air quality enforcement specialist for 9 years

NOTES

PRP Search Issues at a Surplus Government Property/ Formerly Used Defense Site

GRECHEN F. SCHMIDT

Grechen Schmidt is an investigator with Region 10. Grechen started with EPA in 1988 as Community Involvement Coordinator. She worked on the Bunker Hill Superfund site helping the community understand the various aspects of the complex investigation underway. Grechen has served as a liaison between the affected community and the regulatory agencies during the investigation and cleanup of the Exxon Valdez oil spill, Commencement Bay Superfund site and the 22 federal facilities Superfund sites within the region. She helped develop national community involvement guidance for Federal Facilities and has conducted training for EPA and the Department of Defense on effective community involvement.

Grechen designed and coordinated the implementation procedures for the Superfund Technical Assistance Grant program (TAG) in Region 10. She served as EPA's technical expert on the Superfund and TAG programs in a criminal trial, resulting in a fraud conviction, with the defendant serving a maximum jail sentence.

From 1995 to 1997, Grechen worked as a Compliance Officer in the Drinking Water program focusing on water systems in Washington state. In addition, she served as the regional contact with OECA and brought a 20-year old enforcement case close to resolution by combining resources of two neighboring (and failing) water systems.

Grechen took an IPA to Anchorage to work with the Alaska Department of Environmental Conservation's (ADEC) Contaminated Sites program as a community involvement coordinator from 1997 to 1999. ADEC was in the process of re-writing their regulations to include community involvement. Grechen developed guidance and trained ADEC staff to effectively work with the community.

Upon returning to EPA Region 10, after a short stay the in community involvement unit, she became an investigator in Office of Environmental Assessment in 2000. Grechen is the only investigator for Region providing investigative support the Superfund program along with all other EPA programs and sister agencies, including ATSDR, state Department of Labor and Industries, State Patrol, etc.

FORMER GOVERNMENT FACILITIES

NORTH RIDGE ESTATES
Case Study

Purpose

- Case Study
  - Small problem turns big–
  - Informants
- The Monster in the Closet
  - Sites waiting to be discovered

Klamath Falls Marine Recuperational Barracks

North Ridge Estates
SITE BACKGROUND

- 1944: Marine Recuperational Barracks began operation
- 1947: Property granted to State of Oregon for Oregon Technical Institute (OTI)
- 1964: OTI closed, property reverted back to GSA

North Ridge Estates
SITE BACKGROUND

- 1966: Engelberg group purchases property
  - Some buildings removed
  - GSA aware
- 1977: MBK Partnership purchases property
  - Many more buildings removed improperly

North Ridge Estates
SITE BACKGROUND

- 1979: EPA order to MBK
  - Cease and Desist Order
  - Required cleanup and Institutional Controls
- 1980's
  - Further demolition
  - Plans for housing development
- 1993:
  - MBK builds first house
  - Corps inspects site and does not ID ACM

North Ridge Estates
SITE BACKGROUND

- 1993-2001
  - MBK develops property
  - Constructs 22 homes
- 2001: DEQ cites MBK for Asbestos problems

North Ridge Estates
SITE BACKGROUND

- 2002: DEQ agreement with MBK for removal
- 2003
  - Homeowners sue MBK, MBK sues State and Federal Government
  - EPA AOC with MBK for removal, risk assessment
    - 7.5 tons ACM removed by hand
    - 81.5 tons ACM removed by mini-ex & excavator
- 2004
  - AOC/SOW for RI/FS being developed
  - MBK declares bankruptcy
  - EPA & State counter sue

North Ridge Estates
SITE BACKGROUND

2004:
- AOC/SOW for RI/FS being developed
- MBK declares Chapter 11 bankruptcy

- 2005
  - Homeowners relocated during summer removal
- 2006
  - January 20, MBK, their insurers settle for $12M
    - Homeowners can permanently move
    - EPA can complete investigation
    - But no money for cleanup!

PRP Search Issues

- The lawsuits
  - Dozens of Depositions
  - 16,000 Documents during initial discovery
  - Medical records/privacy issues
  - Financial issues for all parties
- Historical sources of information
  - National Archives
  - General Service Administration

Informants

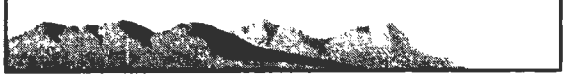
- We found some and some found us!
  - Depositions gave us leads
  - Newspaper coverage
  - Residents gathering information

A Potential Monster

How many former government sites do you have in your region that haven't been maintained ?

Gov't Property Transfers (aka Public Benefit Conveyances)

- WWII-era facilities have been:
  - Sold to private parties at gov't auction
  - Transferred to public use as hospitals, schools, prisons, and airports.
- If property transferred for public use, gov't retains responsibility to ensure properly maintained for 30 years after transfer.



Gov't Property Transfers con't.

- GSA, Dept of Education and Dept of Health and Human Services are three agencies responsible for monitoring condition of "public benefit" properties.
- If property is not used for public benefit before 30 years is up, goes back to gov't.

THE HIDDEN PROBLEMS

- These facilities were built using
  - Lead based paint
  - Electrical equipment containing PCBs
  - Asbestos containing materials
    - Floor tile
    - Siding
    - Pipe lag (insulation)

The continuing saga

- Former military facilities are still being used; upgraded and maintained
- Others aren't or problems are just being identified
- These may be the Superfund sites of the future!

- Questions????

NOTES

PRP Search Benchmarking & Best Practices

BRUCE PUMPHREY

Bruce Pumphrey has been with EPA for over 25 years, both at Headquarters and in Region 5. He started out with the Headquarters Water Quality Standards Program in 1981 and then transferred to Region 5's Water Division in 1984, working in Water Quality Standards, Wasteload Allocation and NPDES Compliance and Enforcement. In 1987 Bruce joined Region 5's Superfund program and conducted PRP searches, information management and strategic planning.

In 1991, Bruce returned to Headquarters to work in OSWER's Office of Waste Programs Enforcement which subsequently became the Office of Site Remediation Enforcement in OECA. With the exception of a stint in the Office of Wastewater Management to work on the CAFO Rule and another in OSWER to enhance their Program Evaluation capabilities, Bruce has worked for the last 19 years in the Superfund Enforcement Program. In his spare time he likes to hike, bike, sail, and whitewater kayak.

NOTES

Current Developments in Liability Law

CLARENCE E. FEATHERSON

Mr. Featherson is a senior attorney in EPA's Office of Site Remediation Enforcement (OSRE). Clarence works closely with EPA's Regional Offices, EPA's Office of General Counsel and the Department of Justice in the enforcement of cases involving CERCLA corporate liability issues, CERCLA pre-enforcement issues, and other legal issues affecting EPA's Superfund enforcement program. In his non-EPA life Clarence is a motivational/inspirational speaker and trainer. He received his A.B. Degree from Brown University and a J.D. Degree with honors from Howard University's School of Law.

MIKE NORTHRIDGE

Mike is a senior enforcement attorney in EPA Headquarters' Office of Site Remediation Enforcement. He joined EPA in 1984 (in HQ's RCRA program office) and transferred to waste enforcement in 1988. He leads the Agency's enforcement screening process for the national prioritization panel, seeking to ensure that Regions have exhausted alternatives prior to turning to Superfund monies as a last resort. He also works on other Enforcement First issues, including HQ's recent policies on Enforcement First for Institutional Controls (issued 3/06) and Enforcement First for RI/FS (issued 8/05), respectively. In addition, he is one of HQ's main contacts on issues relating to CERCLA 106 UAOs. This morning he's promised to give "a guide for non-lawyers" to the ongoing litigation over General Electric Company's challenge to the constitutionality of EPA's pattern and practice in issuing such UAOs.

Mike received his law degree from Georgetown University in 1984.

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

Frequently Asked Questions (FAQs) About *Aviall*

Q. What is "*Aviall*"?

A. Aviall Industries, Inc. is a party in a case that reached the U.S. Supreme Court. The case concerned Aviall's ability to get a share of its costs – known as "contribution"– for hazardous site cleanup from another company. The official name and citation of the case is *Cooper Industries, Inc. v. Aviall Services, Inc.*, 125 S.Ct. 577 (2004); the case is often referred to as "*Aviall.*" The U.S. Supreme Court issued its decision on December 13, 2004.

Q. What are the facts and procedural history of the case?

A. Cooper Industries, Inc. owned and operated four aircraft engine maintenance sites in Texas for a number of years before it sold the sites to Aviall. Aviall continued to operate at the sites and ultimately, discovered that both it and Cooper had contaminated the facilities. After undertaking a cleanup, Aviall sued Cooper for contribution toward the cleanup costs.

On summary judgment, the U.S. District Court for the Northern District of Texas held that Aviall could not obtain contribution from Cooper under § 113(f)(1) of CERCLA because Aviall had not been sued under CERCLA § 106 or § 107. A divided panel of the Court of Appeals for the Fifth Circuit affirmed, but on rehearing *en banc*, the entire Fifth Circuit, by a divided vote, reversed the panel. The case then reached the U.S. Supreme Court.

Q. What did the U.S. Supreme Court hold in *Aviall*?

A. The issue before the Supreme Court in *Aviall* was whether "a private party who has not been sued under § 106 or § 107 of CERCLA may nevertheless obtain contribution under § 113(f)(1) [of CERCLA] from other liable parties." CERCLA § 113(f)(1) provides, in part: "Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title."

The Supreme Court held that the plain language of CERCLA § 113(f)(1) allows a "potentially responsible party" (PRP) to seek contribution only "during or following" a "civil action" under CERCLA § 106 or § 107(a). In other words, because Aviall had not previously been sued for clean up of the site or for cost recovery under CERCLA, Aviall cannot sue for contribution under § 113(f)(1).

The Supreme Court declined to decide whether a PRP may recover costs under CERCLA § 107(a)(4)(B), which provides for recovery "of any other necessary costs of response incurred by any other person consistent with the national contingency plan." The Court remanded the case to the U.S. Court of Appeals for the Fifth Circuit.

Q. Did the *Aviall* decision address contribution rights under § 113(f)(3)(B)?

A. No. While the Court noted that CERCLA § 113(f) provides another avenue for contribution under § 113(f)(3)(b), the Court did not address that subsection because it was not at issue in the case. That section provides that a PRP "who has resolved its liability to the United States or a

State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement" may seek contribution from non-settling PRPs.

The United States acknowledged at oral argument before the Supreme Court that if a party enters into an administrative order on consent or a judicial settlement that resolves liability for response costs or response actions, that would entitle the party to seek contribution. Thus, for example, a remedial design/remedial action consent decree with the United States, or an administrative order on consent with EPA for remedial investigation/feasibility study, removal action, or reimbursement of response costs should give rise to a right of contribution pursuant to § 113(f)(3)(B).

Q. Is EPA named as a party in the Aviall litigation?

A. No, EPA is not named as a party in the Aviall litigation. However, on February 23, 2004, the United States filed an amicus brief on the merits of this case.

Q. What positions did the United States take in its amicus brief on Aviall?

A. Among other things, the United States took the position that, based on the plain language of CERCLA § 113(f)(1), a party that is itself liable or potentially liable may seek contribution under that section only during or following a civil action under § 106 or § 107, and conversely, that § 113(f)(1) does not authorize a contribution action in the absence of an ongoing or completed § 106 or § 107(a) civil action. The United States also stated that a liable party is limited to seeking contribution in the manner authorized by § 113(f), and that CERCLA § 107(a) does not provide an independent basis for a liable person to recover response costs from another liable person. The United States also stated that a "civil action" is "commonly understood to mean a judicial proceeding," and that "EPA's issuance of a § 106(a) administrative order does not generally entitle the recipient to seek contribution under § 113(f)(1)."

Q. What impact will *Aviall* have on EPA's enforcement and brownfields programs?

A. Currently, EPA is evaluating the potential impacts of the *Aviall* decision on enforcement and brownfields programs and considering whether any actions are necessary. EPA also anticipates working in close coordination with state governments and organizations and the U.S. Department of Justice on *Aviall*-related issues.

Q. Did the *Aviall* decision address whether a party that voluntarily incurs cleanup costs may recover those costs under state law?

A. No. The opinion addressed recovery under federal law, specifically, CERCLA § 113(f)(1).

Q. Did the *Aviall* decision address the right of non-liable parties to sue for costs?

A. No. The Supreme Court's opinion does not address the right of non-liable parties to sue for costs under § 107(a). Persons who cleanup Brownfields sites may qualify as non-liable parties through the bona fide prospective purchaser exemption under CERCLA § 107(r).

Q. Does EPA have a position on possible legislative changes in light of the Aviall decision?

A. EPA does not have a position on this issue.

Q. How can I find out more about EPA's Aviall-related work?

A. EPA has information about Aviall-related work on its Web site (www.epa.gov). You may also contact the Office of Site Remediation Enforcement at (202) 564-4200.

Issued May 2005

NOTES

Successor Liability

CHERYLE MICINSKI

Cheryle Micinski is a lawyer in the Office of Regional Counsel, Region 7 She has been practicing law for nearly 30 years. The first ten years were spent as a prosecutor with county and city. She began employment with the Environmental Protection Agency in 1981. She became a Branch Chief, Superfund Branch in 1987 and then a Deputy Regional Counsel in 1993. Cheryle teaches many Superfund related courses for EPA and has been a frequent speaker at seminars and programs relating to hazardous waste topics. She is an adjunct professor at Avila University in Kansas City, Missouri. Cheryle received her J.D. from the University of Missouri-Kansas City in 1973. She received her A.B. from Indiana University in 1968.

SUCCESSOR LIABILITY UNDER CERCLA

Cheryle Micinski
Deputy Regional Counsel
Region 7

General Rule

- Asset purchasers do not acquire the liabilities of the seller corporation.

When can successors be held liable under CERCLA?

- "Congress is unlikely to leave a loophole that would allow corporations to die a paper death, only to rise Phoenix-like from the ashes, transformed but free former liabilities." U.S. v. Mexico Feed and Seed, 980 F2d at 487

Exceptions to the General Rule

- Effort to fraudulently escape liability
- De facto merger or consolidation
- Express or implied assumption of liability
- Purchaser is a mere continuation of the seller

The "CERCLA" Exemption

- Substantial continuity or continuity of enterprise
  - Equitable test
  - Purpose is to identify transactions where the characteristics of the selling corporation survive the asset sale and purchaser is charged with seller's liabilities.

Fraud

- Transfer of assets and businesses of predecessor to successor is fraudulent as to creditors
- Conveyance is made with intent to defraud or with intent to hinder or delay creditors

Fraud-What to look for

- Badges or indicia of fraud.
- Look behind claim of "fair value", *i.e.*, inadequate or fictitious consideration.
- Check the solvency and debt of the transferring corporation.
- Was there litigation or the threat of litigation at the time of transfer?
- Was there an attempt to conceal the transfer?
- Was this transaction conducted in a manner different from the common business practice?

De Facto Merger or Consolidation

- Statutory merger where acquiring company survives: mandatory that successor assumes debts of predecessor.
- Seller liquidates and dissolves
- Look beyond the stated form of the transaction to determine if there is a *de facto* merger.

What to look for:

- Continuation of enterprise of the seller: continuity of management, physical location, assets, general business operations.
- Continuity of ownership of purchaser and seller: same shareholders.
- Seller ceases operation, liquidates, dissolves.
- Purchaser assumes obligations necessary for uninterrupted business operations.

Express or Implied Assumption

- Courts use general principles of contract law.
- Documents that may hold the key:
  - Assumption agreement, indemnity provisions, covenants.
  - Plan of Reorganization
  - Purchase agreement
  - Tax and SEC filings

Further examination for Implied Assumption

- Who drafted the documents?
- Who was in control during the transaction?
- How was the transaction characterized subsequently?
- Would an implied assumption benefit the purpose of CERCLA, the public?

Mere Continuation

- Asset purchaser is a mere reorganized version of the predecessor, rather than a distinct corporate entity; resembles *de facto* merger; one corporation emerges.
- "What emerged is what went in", *i.e.*, a gas company selling gas to the same metro area.
- Focus on continuation of the corporate entity.

What to look for:

- Key factors: Common ownership of purchaser and seller and common identity of officers and directors
- Other factors:
  - Inadequate consideration for assets
  - Similar control of hiring and function of officers, directors and stock
- Common sense test: no one factor is dispositive

Substantial Continuity

- Also referred to as continuity of enterprise
- Most expansive and controversial theory
- Focus on business (as opposed to corporation)
- Not all circuits accept this theory
- Issue regarding application of federal common law v. state law of successor liability

What to look for:

- Continuity of directors, officers, management, employees, , physical location.
- Continuity of assets and general business operations; same products
- Retention of name, business address, phone number and customers
- Adequacy of compensation; arms length transaction; attempt to shift liability to corporate shell
- Charactenzation of the transaction to the public, in the trade press
- Knowledge of environmental existing liabilites

Present Status of Substantial Continuity Theory

- In the courts
  - Impact of Bestfoods
  - Acceptance of federal common law or a uniform federal rule
- Within the government
  - The Exide case
  - Acceptance of federal common law or a uniform federal rule

Partial chronology relating to GE's litigation challenging constitutionality of EPA's CERCLA 106 UAO authority

11/20/00 - GE files its complaint (and amends it on 3/14/01).

(1/12/01 – GE submits FOIA request. 10/15/01: GE files FOIA complaint in district court. 6/7/02: GE and EPA file FOIA settlement with district court.)

3/27/01 – EPA moves to dismiss for lack of subject matter jurisdiction (or, in alternative, motion for summary judgment).
6/29/01 – GE brief opposing EPA's motion.

2/19/02 - oral argument in district court on MTD.
3/31/03 – district court grants EPA's motion to dismiss 257 F.Supp. 2d 8.

8/15/03 - GE's appellate brief.
9/22/03 - EPA's appellate reply brief.

11/20/03 - oral argument in D.C. Circuit.
3/2/04 – D.C. Circuit reverses and remands. 360 F3d 188.

5/6/04 – EPA brief (supporting motion for summary judgment).
12/17/04 – GE's brief (opposing MSJ) (including statement of material facts as to which there purportedly is a genuine issue).
1/10/05 – EPA's reply brief.

1/31/05 – oral argument in district court on MSJ.
3/30/05 – district court partially grants EPA's MSJ. 362 F.Supp. 2d. 327.

4/13/05 – EPA files answer to GE's amended complaint.

5/18/05 – court issues scheduling order (and subsequently revises it several times).
6/17/05 – discovery begins.

3/30/06 – GE files motion to compel production or *in camera* review of withheld documents.

4/20/06 – EPA's brief (opposing GE's motion to compel).

6/2/06 – district court hearing on GE's MTC.

NOTES

Current Developments in Bankruptcy Law

ANDREA MADIGAN

Ms. Madigan is a senior enforcement attorney in EPA's Region 8's Legal Enforcement Program, Office of Enforcement, Compliance, and Environmental Justice. Ms. Madigan joined EPA in 1990 in the Atlanta regional office and transferred to the Denver office in 1998. She works primarily on large Superfund enforcement cases and chairs EPA's National Bankruptcy Work Group. Ms Madigan frequently serves an instructor on a variety of environmental topics, including Superfund enforcement, bankruptcy, and environmental management systems. Prior to joining EPA, Ms. Madigan was in private practice specializing in bankruptcy and commercial litigation.

Ms. Madigan received her J.D. from the University of Colorado in Boulder, Colorado in 1983.

Current Developments in Bankruptcy Law

Presented by:
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May 2006

Bankruptcy v. Environmental Law: The Clash of the Titans

- Environmental Law
  - Compliance, Cleanup, Cost Recovery
  - Solutions are long term
  - Hold companies responsible for past acts
- Bankruptcy Law
  - Fresh Start for the Honest Debtor
  - Maintenance of Status Quo
  - Orderly Liquidation or Distribution to Creditors
  - Fair & Equitable Treatment of Similarly Situated Creditors
  - Expedited, consolidated process

Current Clashes

- EPA's authority to issue cleanup orders v. bankruptcy priority scheme - what creditors get paid in what order
- Debtor's obligation to manage property in accordance with environmental laws v. fresh start

Major Causes of Bankruptcy

- Individuals:
  - Job Loss
  - Medical Problems
  - Divorce
- Businesses:
  - Bad Economy
  - Bad Business Decisions
  - Business Planning

Types of Bankruptcy Cases

- Chapter 7
  - Liquidation
- Chapter 9
  - Municipalities
- Chapter 11
  - Reorganization
- Chapter 12
  - Family Farmer
- Chapter 13
  - Wage Earner

Key Statutory Bankruptcy Provisions

- Discharge:
  - §727(b)
  - §1141(d)(1)(A)
- What does this mean?
- Chapter 7
- Chapter 11
- Exceptions to Discharge

The Bankruptcy Estate - §541

- Created upon filing of bankruptcy case
- Includes all legal or equitable interests of the debtor in property as of the commencement of the case
- Exemptions for individuals

The Automatic Stay - §362(a)

- Prohibits:
  - Commencement or continuation of action that was or could have been brought pre-petition;
  - Enforcement of pre-petition judgment;
  - any act to obtain possession or exercise control over property of estate;
  - Any act to create, perfect, or enforce lien against property of estate;
  - Any act to create, enforce, or perfect lien securing pre-petition debt;
  - Any act to collect, access, or recover pre-petition claim;
  - Set-off of pre-petition debt.

Automatic Stay - Exceptions of Interest §362(b)

- Criminal actions
- Government exercise of police & regulatory authority

Priorities §507

- Not all claims are equal
- Priority claims must be paid in full before any claims of a lower priority are paid
- Claims of equal priority are paid pro rata

Examples of Priority Claims

- Administrative Expenses
  - Professional fees necessary to administration of the bankruptcy case
  - Response costs incurred post-petition to cleanup debtor owned property
  - Penalties for post-petitions violations
- Wages
- Certain Tax Claims

Bankruptcy Priority Scheme

- Secured claims
- Administrative Expenses
- Other priority claims
- General unsecured claims
- Subordinated claims
- Interest on general unsecured claims
- Debtor or equity interests

Secured Status §506

- A claim is secured only to the extent that there is sufficient value in the collateral securing such claim

Anatomy of a bankruptcy case

- Debtor files a petition in bankruptcy court
- Federal court action
- Filing creates the estate that includes all property of the debtor
- Estate is managed by a fiduciary who owes duty to all creditors
- Automatic stay arises

Initial Filing

- Upon commencement of case debtor files:
  - List of creditors
  - Schedules of Assets & Liabilities
  - Statement of Financial Affairs (SOFA)
- Notice of Commencement of Case given to parties in interest
- First Meeting of Creditors is held. (11 U.S.C. §341)

Chapter 7 Liquidation

- Debtor liquidates & goes out of business
- Trustee is appointed (11 U.S.C. §§701,702, 703)
- All marketable assets of debtor are sold
- Proceeds are paid to creditors in accordance with priority scheme set forth in the Bankruptcy Code (11 U.S.C. §726)
- No asset cases are common
- Individuals get discharged (11 U.S.C. §524)

Chapter 11
The Reorganization Chapter

- Debtor continues to operate its business as a "DIP" or debtor in possession (11 U.S.C. §1101)
- Trustee is appointed only for cause (11 U.S.C. §1104)
- Debtor or creditors offer a solution to debtor's insolvency thorough a plan to reorganization

Confirmation Requirements §1129

- Plan must be proposed in good faith
- Each creditor under plan must receive at least as much as it would under Chapter 7 (best interests test)
- All administrative claims paid
- Not likely to be followed by further reorganization (feasibility test)

What is a Claim? §101(12)

- Right to Payment or Equitable Remedy
  - need not be reduced to judgment
  - liquidated or unliquidated
  - fixed or contingent
  - mature or unmature
  - disputed or undisputed
  - legal or equitable
  - secured or unsecured

What this means for Superfund claims

- When does the claim arise?
- What is included in the claim
  - Past costs
  - Estimated future costs
- What gets discharged?
- What happens when the debtor owns contaminated property?

Injunctive Relief

- 28 U.S.C. §959(b) – debtor must comply with all other laws applicable to its operations
- Mandatory injunctions - Authority to issue cleanup orders is not a claim and therefore not subject to discharge

Is it a claim subject to discharge? Is it an injunctive obligation?

- Regulatory compliance orders
- CERCLA cleanup orders
- RCRA corrective action orders

Claims Process

- Need to file a Proof of Claim
  - What about the SOL?
- Impact of Bar Date
- Referral to DOJ
- Proving up the Claim
- Bankruptcy Timetable

Abandonment

- Allows trustee to abandon property that is burdensome or of inconsequential value
- Right is not absolute – property cannot be abandoned in contravention of laws reasonable designed to protect public health & safety from identifiable hazards

Summary of Information Sources

- In all cases:
  - Petition
  - Schedules
  - Statement of Affairs
  - Examination of Debtor
    - Section 341 Meeting
    - Rule 2004 Examination

Information Sources

- In a Chapter 7 Case:
  - Books and records of the debtor obtained through the trustee
  - Section 363 Motion
  - Abandonment Motion

Information Sources

- In a Chapter 11
  - Plan
  - Disclosure Statement
  - Post-Petition Financing Documents
  - Operating Reports
  - Fee Applications
  - Section 363 Motions
  - Settlement Notice

www.uscourts.gov

- Links to every federal court in the country
- PACER - Access to case dockets, and court papers
- Bankruptcy Basics
- Bankruptcy Official Forms

NOTES

Keynote Speaker:
Catherine R. McCabe

CATHERINE R. MCCABE

Catherine R. McCabe is the Deputy Assistant Administrator of EPA's Office of Enforcement and Compliance Assurance (OECA) in Washington, DC. OECA's mission is to improve the environment and protect public health by ensuring compliance with the nation's environmental laws, preventing pollution, and promoting environmental stewardship. As Deputy Assistant Administrator, Ms. McCabe serves as the senior career official for EPA's enforcement and compliance assurance office, responsible for managing the day to day operations of the nation's environmental enforcement program, with approximately 3,300 environmental professionals and an annual budget of more than $500 million.

Ms. McCabe has more than twenty years of experience in enforcing the nation's environmental laws. She served in the Department of Justice's (DOJ) Environment and Natural Resources Division beginning in 1983, and as Deputy Chief of the Environmental Enforcement Section from 2001 until 2005. Before joining DOJ, she served as Assistant Attorney General in the New York State Environmental Protection Bureau, and as an Associate with the Webster and Sheffield law firm in New York City.

Ms. McCabe earned her JD from Columbia Law School and her undergraduate degree from Barnard College

NOTES

Liability and the Brownfields Amendments

WILLIAM KEENER

William Keener is Assistant Regional Counsel for the U.S. Environmental Protection Agency's Region 9 office in San Francisco.

For the past 19 years, Mr. Keener has provided legal counsel to the EPA for federal environmental laws, particularly Superfund, the Resource Conservation & Recovery Act and the Oil Pollution Act. He has handled a wide variety of environmental enforcement cases, ranging from the emergency removal of hazardous materials to multi-party settlements at complex area-wide groundwater sites. His areas of expertise include brownfields and the liability of purchasers of contaminated real property.

Mr. Keener graduated with distinction from the University of California at Berkeley, and received his J.D. from Hastings College of the Law.

HELEN B. KEPLINGER

Ms. Keplinger is an attorney-advisor in U.S. EPA's Regional Support Division, Office of Site Remediation Enforcement, Office of Enforcement and Compliance Assurance. She has worked in EPA enforcement since 1979 and Superfund Enforcement since 1981.

Ms. Keplinger's present responsibilities at EPA include policy and model drafting projects concerning implementation of the Brownfields Amendments relating to *bona fide* prospective purchasers, windfall lien issues, innocent-landowners, *and bona fide* prospective purchasers who intend to do work at a Superfund site that they own. Other assignments include Prospective Purchaser Agreements, "RCRA-Prospective Purchaser Agreements," *de minimis* generator, *de minimis* landowner settlements, de micromis issues, and enforcement lead on the All Appropriate Inquiry Rule.

She received her J.D. from the Catholic University of America, Columbus School of Law, and her B.A. from West Virginia University She is a member of the Maryland Bar.

SUPERFUND LIABILITY

5th National Conference on PRP Search Enhancement

Helen Keplinger, OECA
Bill Keener, ORC Region 9

SENATE
S. 350
Brownfields

HOUSE
H.R. 1831
Small Business

H.R. 2869
Small Business Liability Relief & Brownfields Revitalization Act
January 11, 2002

SMALL BUSINESS LIABILITY RELIEF & BROWNFIELDS REVITALIZATION ACT

- Title I – Small Business Liability
- Title II – Brownfields

TITLE I
SMALL BUSINESS LIABILITY PROTECTION

- De Micromis Exemption
- Municipal Solid Waste Exemption
- De Minimis Settlements

De Micromis Exemption at NPL Sites

CERCLA 107(o)

- Generator / Transporter
  - < 110 gal. Liquid
  - < 200 lbs. Solid
- Disposed, Treated, Transported prior to April 1, 2001
- Guidance issued November 6, 2002

De Micromis Exemption

Exceptions:

- Materials contribute disproportionately to cost of cleanup
- Failure to cooperate
- Criminal conviction

De Micromis Exemption

CONTRIBUTION SUITS

Burden of Proof shifts to Non-governmental Plaintiff

Municipal Solid Waste Exemption at NPL Sites

CERCLA 107(p)

MSW generated by:

- Residential Owner / Lessee
- Small Business < 100 FTE
- Non-profit organization < 100 paid FTE

- Guidance issued August 20, 2003

What is MSW?

- Household waste
- Commercial, Industrial or Institutional Waste
  - Essentially the same as household waste
  - Collected and disposed with other MSW as part of normal Municipal Collection Service
  - Hazardous substances that are no greater in relative quantity than found in typical household waste

MSW - Burden of Proof

- Private Cost Recovery Burden of Proof Always on Plaintiff
- Government Cost Recovery
  - MSW disposed prior to April 1, 2001 burden is on government
  - MSW disposed after April 1, 2001 burden is on defendant

De Minimis Settlements
CERCLA 122(g)(7 - 12)

- Ability to Pay Settlements:
  - President shall consider ability of PRP to pay costs and "still maintain basic business operations... "
- PRP Settlor must cooperate, provide information and access
- PRP Settlor waives all CERCLA claims against other PRPs

De Minimis Settlements

- Must give PRP written reasons for denial of De Minimis Settlement
- Not subject to Judicial Review
- Guidance issued May 17, 2004

TITLE II
BROWNFIELDS
REVITALIZATION

A. Brownfields Program
B. Liability Clarifications
C. State Response Programs

B. Liability Clarifications

- Contiguous Property Owners
  CERCLA 107(q)
- BFPPs & Windfall Liens
  CERCLA 101(40) and 107(r)
- Innocent Landowners CERCLA 101(35)

Superfund Liability -- CERCLA 107

- Current Owners
- Owner/Operators at time of disposal
- Generators (arranged for disposal)
- Transporters

Landowner Liability

"Innocent Landowners" – CERCLA 101(35)

- Did Not Know or Have Reason to Know of Contamination
- Government Agency Acquiring by Involuntary Transfer or Eminent Domain
- Heirs

Innocent Landowners
CERCLA 101(35)

Did Not Know or Have Reason to Know:

- Did not cause, contribute or consent to release
- Full cooperation
- All Appropriate Inquiries: did not know or have reason to know of contamination
- Take Reasonable Steps: stop / prevent release and exposure

Innocent Landowner -- 101(35)

All Appropriate Inquiries

- Purchases before May 31, 1997 apply 5 statutory factors:
  - specialized knowledge or experience
  - relationship of purchase price to property value
  - reasonably ascertainable information
  - obviousness of contamination
  - ability of defendant to detect the contamination by appropriate inspection
- Purchases between May 31, 1997 and AAI Rule, apply ASTM Phase I

Innocent Landowner -- 101(35)

All Appropriate Inquiries

- AAI Rule effective Nov 1, 2006
- See detailed handout of the new Rule

Appropriate Care

Take Reasonable Steps:

- Stop any continuing release
- Prevent any threatened future release
- Prevent or limit any human, environmental or natural resource exposure
- EPA Guidance issued March 6, 2003
  - These steps are less than those required of PRPs (see "Common Elements" guidance)

Contiguous Property Owners

CERCLA 107(q)

- Property that is or "may be" contaminated
- Contamination comes from property contiguous to or "similarly situated with respect to"
- Owner not a PRP or affiliated with the PRP
- Full cooperation
- AI Appropriate Inquiries: did not know or have reason to know of contamination
- Take Reasonable Steps: stop / prevent release and exposure

Contiguous Property Owners

- CPOs not liable
- For migration of contaminated groundwater, no remediation is necessary
- EPA may issue:
  - No action assurance letter
  - Contribution protection

Contiguous Property Owners

- CPO Guidance issued Jan 2004
- Region 9 signed EPA's first CPO No Action Assurance letter in favor of the Fowler Ranch
  - Ranch adjacent to Firestone NPL site
  - Ranch owners bought Ag land in 1930s
  - Firestone's 1960s manufacturing operations contaminated groundwater that migrated under the ranch

Bona Fide Prospective Purchasers -- 101(40), 107(r)

- Acquire ownership after Jan 11, 2002
- Not a PRP or affiliated with the PRP
- Disposal occurred before purchase
- Provide all legally required notices
- Appropriate inquiries (and have knowledge of contamination)
- Take reasonable steps: Stop / prevent release and exposure

Bona Fide Prospective Purchasers

- Not liable under CERCLA 107 (r)
- Windfall Lien
  - See presentation on windfall liens May 18 by Bill Keener & Kat West

Bona Fide Prospective Purchasers

- BFPP Guidance issued May 2002
  - "In most cases," PPAs unnecessary, except
  - Windfall lien settlements, or
  - Substantial public benefits, or
  - Threat of litigation
- "Common Elements" Guidance March 6, 2003
  - Regions may provide comfort letters that address 'reasonable steps'

Bona Fide Prospective Purchasers

Uncharted Waters:

- BFPPs Who Want to Do Work
  - Authority; Document – AOC
- Landlord – Tenant Issues

Bona Fide Prospective Purchasers

- Tenants of BFPPS are BFPPs
  - What if landlord loses BFPP status?
- Tenants of PRPs are not BFPPs
  - Are ground lessees (w/ 99 year lease) equivalent to BFPPs who "acquire ownership"?

C. State Response Programs

- Assistance to States (Grants) CERCLA 128
- Enforcement Bar CERCLA 128
- Eligible Response Site CERCLA 101(41)
- NPL Deferral CERCLA 105(h)

Enforcement Bar CERCLA 128

President may not take action under CERCLA 106 or 107 (a) whenever party is conducting a cleanup in compliance with the State program at an Eligible Response Site

Eligible Response Site CERCLA 101(41)

- Definition <u>includes:</u>
  - Brownfields sites
  - LUST facilities
  - Other sites where EPA determines bar should apply
- Definition <u>excludes:</u>
  - Sites scoring above 28.5 after consulting with State
  - Sites identified by Regs (e.g., sole-source aquifer)

Brownfields Definition

Exclusions:

- Removal Action -- ongoing or planned
- NPL -- listed or proposed
- Subject to Enforcement Action

Enforcement Bar

- Exceptions:
  - State requests EPA for cleanup help
  - Contamination across State line or onto federal facility
  - EPA determines I&SE where additional cleanup is necessary
  - New information unknown to State
- EPA can recover costs incurred prior to Jan 11, 2002
- Other federal authority (RCRA) not barred
- Public record of cleanups at all State or Tribal sites

EPA Notifications to State

- EPA must notify State if it plans to conduct response action where may be barred
  - State has 48 hours to respond
- EPA need not wait for State response if there are exceptions to eligible response site
- EPA must report all such actions to Congress within 90 days

New EPA Liability Guidances

- BFPPs – May 31, 2002
- De Micromis Waste – Nov 6, 2002
- 'Common Elements' – March 6, 2003
- Windfall Liens – July 16, 2003
- MSW – August 20, 2003
- Contiguous Owners – January 14, 2004
- De Minimis/ATP – May 17, 2004
- AAI – Nov 6, 2005 [Nov 6, 2006]

For the Latest CERCLA Liability Information

- OBCR Homepage
  www.epa.gov/brownfields
- OECA Webpage
  www.epa.gov/compliance/cleanup/redevelop/index.html

ALL APPROPRIATE INQUIRIES RULE

5th National Conference on
PRP Search Enhancement

Bill Keener, ORC Region 9
Helen Keplinger, OECA

Bona Fide Prospective Purchasers

Threshold Criterion:

- **All Appropriate Inquiries (due diligence) and have knowledge of contamination**

Continuing Obligation:

- **Appropriate Care (take reasonable steps with respect to contamination)**

All Appropriate Inquiries

- **AAI, or Environmental Due Diligence, is the process of evaluating property for potential environmental contamination**
- **The goal is to identify conditions that indicate a release or threatened release of hazardous substances**

All Appropriate Inquiries

- The 2002 Brownfields Amendments required EPA to develop regulations for conducting AAI
- Statute listed 10 criteria EPA must include in the regulations
- Statute established interim standards

AAI Rule

- AAI Rule drafted through Regulatory Negotiation (26 stakeholder entities developed a consensus document)
- Rule issued Nov 1, 2005 with delayed effective date of 1 year
- After Nov 1, 2006, parties must follow the provisions of the final rule or use the ASTM E1527-05 standard

AAI Rule

- 40 CFR Part 312
- AAI Rule available at:
  - www.epa.gov/brownfields/regneg.htm
- Preamble is extensive
- For purchases made until new AAI Rule is effective: do ASTM Phase 1 (ASTM E1527 – 1997 or 2000 or 2005)

AAI Rule

- Final Rule is very similar to proposed rule
- Public commenters generally supported proposed rule
- Majority of 400 comments were on the proposed definition of environmental professional

Applicability of the Rule

The AAI Rule is applicable to:

- Parties who may potentially claim protection from CERCLA liability as:
  - bona fide prospective purchaser
  - contiguous property owner
  - innocent landowner
- Parties who receive grants under the EPA's Brownfields Grant program to characterize properties

Residential Property

- AAI Rule does not apply
- Appropriate inquiries mean:
  - inspection
  - Title search
  - Results reveal no basis for further investigation

Why Comply with AAI?

- Required if seeking protection from CERCLA liability, or conducting assessments with Brownfields grants funding
- To understand potential environmental risks associated with a property prior to purchase
- Gain information that will help property owners comply with "continuing obligations" to take appropriate care reasonable steps after purchase

AAI Rule Provisions

- Defines 'Environmental Professional'
- No requirement to do Phase II sampling
- Shelf Life: update after 180 days
- Interviews: Owners v. Neighbors
- On-site Visual Inspection
- Compare Price vs. Value of Property
- Specialized Knowledge of Buyer
- Review Government Records

AAI Rule Provisions

Environmental Professional

- P.E., P.G. and other state-certified or licensed EP with 3 years full-time experience; OR
- Baccalaureate degree in science or engineering plus 5 years of relevant full-time experience; OR
- 10 yrs full-time relevant experience [draft Rule required a college degree]

AAI Rule Provisions

Sampling & Analysis

- No requirement to conduct sampling & analysis
- But, AAI means documenting data gaps
- Sampling may be used to fill data gaps
- Sampling may be needed to ensure new owner can "take reasonable steps" after purchase

AAI Rule Provisions

Shelf Life - Timing

- AAI must be conducted within 1 year prior to purchase
- Some aspects must be updated if older than 180 days:
  - visual site inspection
  - interviews
  - records search

AAI Rule Provisions

Interviews

- Must interview current owner/occupant
- Additional interview of past owner/occupant may be necessary to meet objectives and performance factors
- Interview neighboring owner/occupants if the property is abandoned

AAI Rule Provisions

On-site Visual Inspection

- Must conduct on-site visual inspection
- Rule does not require the EP to inspect, may be done by subordinate, but EPA *recommends* that EP does it
- Limited exemption if no access to property after good faith efforts:
  - inspect from nearest vantage point

AAI Rule Provisions

Purchase Price vs. Value

- Does sale price reflect Fair Market Value?
- No requirement for formal appraisal, but may be useful
- If priced below FMV, then consider whether this is due to contamination

AAI Rule Provisions

Specialized Knowledge

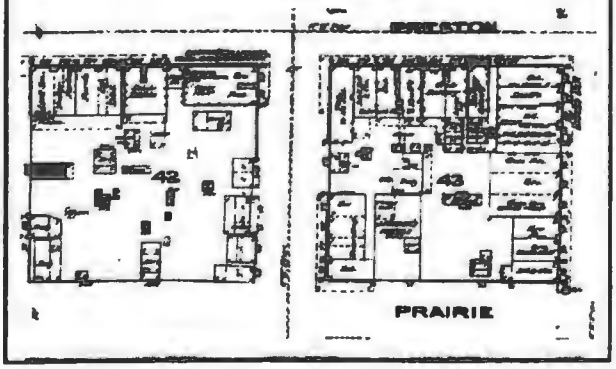
- Purchaser's knowledge of the property is relevant to the inquiry
- Courts have held that professional or personal experience of purchasers may be taken into account in determining whether they made "all appropriate inquiries"

AAI Rule Provisions

- Review records covering a period of time back to the property's obvious first developed use
- Records may include, but are not limited to:
  - Aerial photos
  - Fire insurance maps (Sanborn)
  - Building department records
  - Chain of title
  - Land use records

Common Historical Sources

Sanborn Map

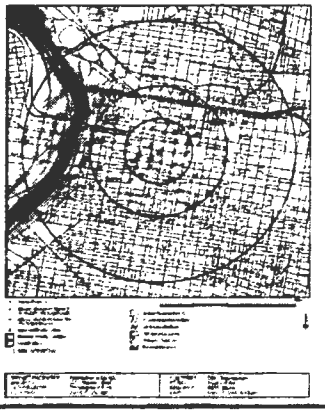


AAI Rule Provisions

- Must review Federal, State, and Local government records (or data bases containing government records) for subject and nearby properties
- Review Tribal records if property is located on or near tribal-owned lands

Standard Environmental Record Sources (where available)	Approximate Minimum Search Distance miles (kilometers)
Federal NPL site list	1.0 (1.6)
Federal Delisted NPL site list	0.5 (0.8)
Federal CERCLIS list	0.5 (0.8)
Federal CERCLIS NFRAP site list	0.5 (0.8)
Federal RCRA CORRACTS facilities list	1.0 (1.6)
Federal RCRA non-CORRACTS TSD facilities list	0.5 (0.8)
Federal RCRA generators list	property and adjoining properties
Federal institutional control/engineering control registries	property only
Federal ERNS list	property only
State and tribal lists of hazardous waste sites identified for investigation or remediation:	
State- and tribal-equivalent NPL	1.0 (1.6)
State- and tribal-equivalent CERCLIS	0.5 (0.8)
State and tribal landfill and/or solid waste disposal site lists	0.5 (0.8)
State and tribal leaking storage tank lists	0.5 (0.8)
State and tribal registered storage tank lists	property and adjoining properties
State and tribal institutional control/ engineering control registries	property only
State and tribal voluntary cleanup sites	0.5 (0.8)
State and tribal Brownfield sites	0.5 (0.8)

Environmental Database Report



AAI Rule Provisions

Gather information required to meet standards that is:

- Publicly available
- Obtainable within reasonable time and cost constraints, and
- Can be practically reviewed
- Review and evaluate thoroughness and reliability of information gathered

AAI Rule Provisions

Data Gaps

- Environmental Professional must identify data gaps affecting ability to identify conditions indicative of releases or threatened releases of hazardous substances
  - Comment on significance of data gaps
- Sampling and analysis may be prudent to address data gaps – not required

Appropriate Care

Take Reasonable Steps:

- Stop any continuing release or prevent any threatened future release
- Prevent or limit any human, environmental or natural resource exposure
- May need information gathered during AAI

Would You Buy This Property?

AAI Rule

- Decision to use the AAI Rule depends on need to have federal Superfund liability exemption (as a BFPP), or if a Brownfields grantee
- BFPP status may not provide RCRA or State liability exemptions

ASTM Phase 1's

- ASTM develops industry-wide standards
- Since 1997 ASTM Phase 1's have been the standard for environmental assessment of commercial real estate
- EPA has worked closely with ASTM to ensure that new E1527-2005 Phase 1 is compliant with AAI Rule

ASTM Phase 1's

- Increase in price of Phase 1s predicted
- Phase 1 data gaps, and requirement for appropriate care after purchase, may mean more Phase 2 sampling will be done
- Purchasers may do more 'due diligence' in selecting an EP
- Will ASTM 1527-05 become the new industry standard; will banks require it?

ASTM Phase 1's

- EPA does not review Phase 1's or other All Appropriate Inquiries documents
- For All Appropriate Care, EPA may issue a 'comfort letter' listing the 'reasonable steps' to be taken, if property is a federal Superfund site

Information

- More EPA Brownfields Information available at www.epa.gov/brownfields
- ASTM Phase 1 available at www.astm.org ($80)

U.S. Environmental Protection Agency

"WINDFALL LIEN" GUIDANCE

Frequently Asked Questions

Where can I obtain a copy of EPA's Windfall Lien Guidance?

EPA's July 16, 2003 guidance entitled, *"Interim Enforcement Discretion Policy Concerning "Windfall Liens" Under Section 107(r) of CERCLA,"* is available at: http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-windfall-lien.pdf

What is a CERCLA § 107(r) "windfall lien?"

A CERCLA statutory lien on a property for the *increase in the fair market value* of that property attributable to EPA's cleanup efforts. Unlike a CERCLA § 107(l) lien, it is not a lien for all of EPA's unrecovered response costs. The windfall lien is limited to the lesser of EPA's unrecovered response costs or the increase in fair market value attributable to EPA's cleanup.

To what properties does the windfall lien apply?

Properties that are or may be acquired by a "bona fide prospective purchaser" as defined at CERCLA § 101(40).

Does EPA have a windfall lien on all contaminated properties?

No. A windfall lien can only arise on properties where the United States spends money cleaning up the property. Thus, at the vast majority of Brownfield sites, there is no windfall lien.

If EPA has spent money cleaning up a property, what are some of the factors it will consider in deciding whether to perfect a windfall lien?

Important factors include:

- substantial unreimbursed cleanup costs unlikely to be recovered from liable parties;
- whether a bona fide prospective purchaser will reap a significant windfall directly as a result of EPA's expenditure of Superfund money at a Site (e.g., EPA conducts a cleanup at a site during a bona fide prospective purchaser's ownership);
- a real estate transaction, or transactions, structured so as to either create bona fide prospective purchaser windfall at taxpayer expense, or allow a liable owner to avoid CERCLA liability.

Are there situations where EPA will generally not perfect a windfall lien, even when the Agency has unreimbursed response costs?

Yes, absent special circumstances, EPA will generally not perfect a windfall lien in the following situations:

- a bona fide prospective purchaser acquires the property at fair market value after cleanup;
- EPA has previously resolved the potential windfall through a settlement with the liable owner;
- EPA's only site expenditures are Brownfield grants or loans;
- EPA's only site response costs are preliminary site assessment or site investigation costs;
- a homeowner sells a residential property to another homeowner;
- the bona fide prospective purchaser is going to use the property for the creation of a public park or other similar public purpose;
- there is a substantial likelihood of full cost recovery from CERCLA liable parties;
- an existing EPA landowner enforcement discretion policy (e.g., the Contaminated Aquifers Policy) applies to the bona fide prospective purchaser.

When EPA does file a windfall lien on a property, how will EPA value the windfall lien?

Absent special circumstances, EPA will generally seek only the increase in fair market value attributable to a response action that occurs after a bona fide prospective purchaser acquires the property at fair market value.

How will EPA determine the increase in fair market value after a bona fide prospective purchaser acquires the property?

Generally, EPA will calculate the increase in fair market value attributable to EPA's cleanup by considering the fair market value of the property as if cleanup were complete versus the fair market value of the property when acquired, presumably the bona fide prospective purchaser's purchase price.

What happens if a bona fide prospective purchaser wishes to acquire a property with a CERCLA § 107(l) lien on the property?

Where a bona fide prospective purchaser acquires a property with a perfected CERCLA § 107(l) lien, EPA expects that, in most instances, the CERCLA § 107(l) lien will be paid off as part of the transaction between the liable owner and the bona fide prospective purchaser. If not, EPA may subsequently seek enforcement of the CERCLA § 107(l) lien against the property during the bona fide prospective purchaser's ownership.

How is EPA addressing windfall lien concerns of bona fide prospective purchasers where EPA will generally not perfect a windfall lien?

EPA believes today's enforcement discretion policy addresses many windfall lien concerns and limits the need for EPA involvement in private real estate transactions. However, in situations where it may be appropriate for EPA to provide more site-specific information to interested parties, an additional tool may be available. Consistent with EPA's existing "Comfort/Status Letter" policy, EPA Regions may provide a comfort/status letter for circumstances where EPA will generally not pursue a windfall lien. A sample letter is attached to the policy.

How can windfall liens be released or settled?

Where EPA is likely to pursue a windfall lien and a bona fide prospective purchaser wants to resolve any existing or potential windfall lien, EPA has developed a model windfall lien resolution document. The model is attached to the policy.

MORE QUESTIONS

Questions regarding this reference sheet or EPA's Windfall Lien Guidance should be directed to Greg Madden in OSRE's Policy & Program Evaluation Division (202-564-4229, Madden.Gregory@EPA.gov) or to the Landowner Liability Protection Subgroup Regional contacts listed below. Questions regarding windfall lien resolution agreements should be directed to Helen Keplinger in OSRE's Regional Support Division (202-564-4221), Keplinger.Helen@EPA.gov or to the Landowner Liability Protection Subgroup Regional contacts listed below.

Regional Contacts

Region 1:	Joanna Jerison	617-918-1781
Region 2:	Michael Mintzer	212-637-3168
	Paul Simon	212-637-3152
Region 3:	Joe Donovan	215-814-2483
	Leo Mullin	215-814-3172
	Heather Gray Torres	215-814-2696
Region 4:	Kathleen West	404-562-9574
Region 5:	Thomas Krueger	312-886-0562
	Larry Kyte	312-886-0562
	Peter Felitti	312 886-5114
Region 6:	Mark Peycke	214-665-2135
Region 7:	Denise Roberts	913-551-7559

Region 8:	Matthew Cohn	303-312-6853
	Suzanne Bohan	303-312-6853
	Nancy Mangone	303-312-6903
Region 9:	Bill Keener	415-972-3940
Region 10:	Cyndy Mackey	206-553-2569

This document is intended for employees of EPA and the Department of Justice and it creates no substantive rights for any persons. It is not a regulation and does not impose legal obligations. This document is not intended as a substitute for reading the statute or EPA's July 16, 2003 Guidance entitled "Interim Enforcement Discretion Policy Concerning "Windfall Liens" Under Section 107(r) of CERCLA." Readers are strongly encouraged to review the guidance for more specific information on EPA's policy.

JUL 16 2003

U.S ENVIRONMENTAL PROTECTION AGENCY

U.S. DEPARTMENT OF JUSTICE

SUBJECT: Interim Enforcement Discretion Policy Concerning "Windfall Liens" Under Section 107(r) of CERCLA

FROM: Susan E. Bromm, Director
Office of Site Remediation Enforcement
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency

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

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

Table of Contents

I. INTRODUCTION

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. However, because each situation will be fact-specific, EPA does not intend to restrict Regional discretion to make case-specific determinations at variance with EPA's general approach described herein.

This interim policy memorandum does three things:

- First, it articulates factors that may lead EPA and DOJ to assert a windfall lien and provides examples of situations where EPA will generally not pursue a windfall lien.

- Second, this memorandum describes EPA's and DOJ's approach to settling windfall liens. EPA will generally seek only the increase in fair market value attributable to EPA's response action that occurs after a bona fide prospective purchaser acquires a property. In addition, this memorandum discusses how the Agency will generally address situations where a bona fide prospective purchaser acquires a property with an existing CERCLA § 107(*l*) lien.

- Third, this memorandum discusses comfort/status letters and agreements that EPA may, in its discretion, provide to a bona fide prospective purchaser in order to address the bona fide prospective purchaser's windfall lien concerns. Samples of these documents are provided as Attachments A and B.

EPA and DOJ are issuing this memorandum as an interim policy and, as they gain additional experience in implementing the windfall lien provision, they may revise or amend this policy. EPA and DOJ welcome comments on the policy and its implementation. Comments may be submitted to the contacts identified at the end of this document.

II. BACKGROUND

In enacting the Brownfields Amendments, Congress intended to promote the redevelopment and beneficial reuse of Brownfield sites and other contaminated or potentially contaminated properties.[1] As part of that effort, Congress provided liability protection under

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[1] A "brownfield site" is defined 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." CERCLA § 101(39)(A). The brownfield site definition also provides certain exclusions and inclusions identified in CERCLA § 101(39)(B)-(D).

CERCLA for bona fide prospective purchasers to encourage the purchase and reuse of contaminated properties. New CERCLA § 107(r) provides that bona fide prospective purchasers are not liable as owner/operators for CERCLA response costs, but the property they acquire may be subject to a windfall lien where an EPA response action has increased the fair market value of the property. In order to qualify as a bona fide prospective purchaser, an entity must meet the specified criteria found at CERCLA § 101(40)(A)-(H).[2]

EPA has previously issued guidance explaining EPA's view that, in most cases, the Brownfields Amendments make Prospective Purchaser Agreements ("PPAs") from the federal government, which provide a CERCLA covenant not to sue, unnecessary for bona fide prospective purchasers. See, "Bona Fide Prospective Purchasers and the New Amendments to CERCLA," Memorandum from Barry Breen, Director, Office of Site Remediation Enforcement, U.S. EPA, May 31, 2002 (hereinafter "May 2002 Bona Fide Prospective Purchaser Memorandum"). However, that guidance recognized that EPA may enter into a windfall lien resolution agreement with a purchaser if there is likely to be a significant windfall lien needing resolution.

Windfall liens will only arise where there is federal involvement at a site. Congress recognized that while there may be as many as 450,000 Brownfield sites nationwide, at the vast majority of them, there will be no federal involvement. See, e.g., S. Rep. No. 107-2, 107th Cong., 1st Sess., at 3. Bona fide prospective purchasers may acquire most of the hundreds of thousands of Brownfield sites without concerns about being pursued by the United States under CERCLA for unrecovered response costs. For those sites where there has been, or will be, federal involvement that results in EPA incurring response costs, a windfall lien may arise.[3] The United States has a windfall lien on the property in an amount, capped by the amount of unrecovered response costs, not to exceed the increase in fair market value attributable to the United States' response action. CERCLA § 107(r)(4). The windfall lien provision reflects Congress' intent that bona fide prospective purchasers should not be unjustly enriched and reap a windfall where taxpayer dollars are spent cleaning up the property and those taxpayer dollars lead to an increase in the fair market value of the property. See S. Rep. No. 107-2, 107th Cong., 1st Sess., at 13

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[2] This guidance addresses only those situations where an entity satisfies bona fide prospective purchaser criteria; if an entity does not satisfy the bona fide prospective purchaser criteria, the entity may be subject to full CERCLA liability and the property may be subject to a CERCLA § 107(*l*) lien for all unrecovered response costs. EPA has issued other guidances discussing the bona fide prospective purchaser criteria. See "Bona Fide Prospective Purchasers and the New Amendments to CERCLA," Memorandum from Barry Breen, Director, Office of Site Remediation Enforcement, U.S. EPA, May 31, 2002; "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")," Memorandum from Susan E. Bromm, Director, Office of Site Remediation Enforcement, U.S. EPA, March 6, 2003. Today's guidance does not affect EPA's intent to recover response costs from CERCLA liable parties.

[3] As noted below in Section III.A.1.b(3), where the only federal involvement is the expenditure of Brownfield grant or loan monies, EPA will generally not seek to perfect a windfall lien.

(windfall lien provision "prevents [bona fide prospective purchasers] from reaping a windfall due to the increase in property's value as a result of the Federal Government's cleanup efforts.")

III. DISCUSSION

A. EPA's Windfall Lien Enforcement Discretion Policy

EPA's implementation of the new CERCLA § 107(r) windfall lien provision raises two important questions. First, under what circumstances will EPA perfect a windfall lien against a property? Second, how does EPA intend to value that lien? This memorandum explains below how the Agency generally intends to exercise its enforcement discretion in answering each of these questions.[4] In addition, EPA explains how the Agency generally intends to address situations where a bona fide prospective purchaser acquires a property that is subject to a preexisting CERCLA § 107*(l)* lien. Exercising enforcement discretion involves evaluating a number of factors, including the status of a particular matter, allocation of Agency resources, potential litigation risk, potential cost recovery, and equitable considerations.

1. To Perfect, or Not to Perfect

This memorandum provides factors that may lead EPA to perfect a windfall lien, and examples of situations where EPA will generally not seek to perfect a windfall lien.

a. *Factors That May Lead EPA to Perfect a Windfall Lien*

Factors that may lead EPA to perfect a windfall lien include:

- EPA has substantial unreimbursed cleanup costs which EPA is unlikely to recover from liable parties;

- There is a likelihood that a bona fide prospective purchaser will reap a significant windfall as a direct result of EPA's expenditure of response costs at a site (e.g., EPA conducts a cleanup at a site during a bona fide prospective purchaser's ownership);

- A real estate transaction, or series of transactions, structured so as to permit:

  (a) a bona fide prospective purchaser to retain an increase in fair market value resulting from EPA's cleanup action (e.g., a liable owner sells property to bona fide prospective purchaser at below fair market value); or (b) a liable owner to sell property to avoid the consequences of CERCLA liability (e.g., sales that avoid EPA perfection of CERCLA § 107(l) lien against the property or during the process of EPA perfection of a CERCLA

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[4] This memorandum provides EPA's enforcement discretion policy and may not represent the United States' approach in cases where EPA is not involved, but a federal agency other than EPA (e.g., Department of Interior, Department of Defense) has unreimbursed response costs.

lien).[5]

Depending on an evaluation of these and other relevant factors, EPA may perfect a windfall lien. EPA does not intend the factors above to be comprehensive or applicable in each instance. There may be additional relevant factors in particular situations and Regional personnel should evaluate all relevant factors in making individual decisions regarding windfall liens.

As explained below the Agency will generally not perfect a CERCLA § 107(r) lien on a property if all of the increase in fair market value attributable to EPA's response action occurs before a bona fide prospective purchaser acquired the property at fair market value. However, even under that scenario, EPA may file a windfall lien on the property where there are substantial unreimbursed costs, EPA's response action results in a significant increase in the property's fair market value, there are no viable, liable parties from whom EPA could recover its costs, and a response action occurs while the property is owned by a person who is exempt (other than a bona fide prospective purchaser) from CERCLA liability. In these instances, EPA's cleanup can result in a windfall, at taxpayer expense, for the CERCLA-exempt party while EPA still has substantial unreimbursed cleanup costs. Whether EPA will perfect a CERCLA § 107(r) lien and prevent a potential windfall in such instances will be determined by site-specific circumstances and the equities of the particular situation. For example, if a secured creditor forecloses on a property, is exempt from CERCLA liability under CERCLA § 101(20)(E), and holds the property while EPA conducts a cleanup that substantially increases the property's fair market value, EPA may file a CERCLA § 107(r) lien on the property and seek the increase in fair market value attributable to EPA's cleanup. This would be particularly appropriate where the amount the secured creditor would receive upon sale of the property would exceed its security interest.

b. *Situations Where EPA Will Generally Not Seek to Perfect a Windfall Lien*

As noted above, EPA has not been and will not be involved at the vast majority of Brownfield sites. If EPA does not incur any response costs at a site, EPA will not have a windfall lien on the property. However, even at sites where EPA has been or is involved and has incurred response costs, the Agency may decide not to perfect a windfall lien. This section provides examples of situations where, in an exercise of its enforcement discretion, the Agency will generally not perfect a windfall lien, notwithstanding the incurrence of some response costs. An EPA decision to not perfect a windfall lien does not affect EPA's intent to recover costs from CERCLA liable parties.

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[5] If a property transfer is fraudulent or designed to avoid CERCLA liability, the United States reserves, and this policy does not limit, the United States' legal remedies provided under CERCLA or other federal statutes, including remedies provided under the Federal Debt Collection Procedures Act, 28 U.S.C. 3301 *et. seq.*, against the seller or purchaser. Notably, a person may not be "affiliated with" any potentially responsible party at the site and maintain bona fide prospective purchaser status. See, CERCLA § 101(40)(H).

(1) Post-Cleanup Acquisitions

EPA will generally not perfect a windfall lien where a bona fide prospective purchaser acquires the property at fair market value after cleanup.[6] Under the Brownfields Amendments, the windfall lien is measured by the increase in fair market value attributable to EPA's cleanup. Where a bona fide prospective purchaser acquires a property at fair market value post-cleanup, and no EPA response action occurs during the bona fide prospective purchaser's ownership, there is no potential windfall to the bona fide prospective purchaser. EPA would generally consider a post-cleanup acquisition to be an acquisition after completion of all EPA response activities, including operation and maintenance. There may be situations where some EPA site response activities remain to be completed after the acquisition, but those remaining site activities are expected to have zero or minimal impact on the fair market value of the property. Such situations would also be considered post-cleanup acquisitions solely for purposes of this policy.[7]

(2) Previous Full Resolution of Potential Windfall

EPA will not typically perfect a windfall lien if EPA has resolved the liability of an owner, who is liable under CERCLA § 107(a)(1), pursuant to a settlement or successful recovery of response costs that took into account the full value of the property as if cleanup were complete, including any potential windfall from EPA's cleanup activity. Under these circumstances, EPA will generally not perfect a windfall lien that might arise by virtue of a bona fide prospective purchaser's subsequent acquisition of that property.

(3) Specific Types of Expenditures

EPA will generally not perfect a windfall lien where EPA only spends money on the following two types of activities at a site. First, where EPA's only expenditures at a site are Brownfield grants or loans (i.e., assessment, cleanup, revolving loan fund, and job training monies), EPA will generally not perfect a windfall lien on the property.

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[6] As noted in Section III.A.1.a above, one exception to this approach may arise where a response action occurs while the property is held by a CERCLA-exempt party, there are no viable PRPs, EPA has substantial unreimbursed response costs, and EPA's cleanup results in a significant increase in the property's fair market value resulting in the potential for a significant windfall to the CERCLA-exempt party at taxpayers' expense.

[7] If EPA has filed a CERCLA § 107*(l)* or 107(r) lien on the property prior to a post-cleanup acquisition by a bona fide prospective purchaser, EPA expects that the CERCLA lien would normally be resolved at or around the time of the real estate transaction between the seller and the purchaser. If not, the value of the CERCLA lien will presumably be reflected in a reduced acquisition price, and EPA may separately pursue recovery pursuant to that lien after the post-cleanup acquisition. EPA's general approach in these situations is described below in Section III.A.2.

Second, where EPA's only costs are preliminary site assessment or site investigation ("PA" or "SI") costs, and EPA does not anticipate undertaking removal or remedial actions at the site, EPA will generally not perfect a windfall lien on the property.[8] EPA recognizes that EPA's performance of some limited investigation activities at a site could lead to concerns about a windfall lien and could have a chilling effect on a property sale. EPA hopes to ameliorate any such chilling effect by articulating its policy of generally not seeking imposition of a windfall lien at a site where the Agency's only costs are PA or SI costs.

(4) Specific Property Uses

When a bona fide prospective purchaser acquires a property that will be put to one of the following uses, EPA will generally not perfect a windfall lien on the property. First, where a bona fide prospective purchaser acquires property and uses it for residential purposes, and both the seller and purchaser are nongovernmental and noncommercial entities (i.e., a homeowner-to-homeowner sale), EPA will not, as a general matter, file a windfall lien on the property. This policy is consistent with Congress's objectives and EPA's previous policies regarding residential owners.[9]

Second, where a bona fide prospective purchaser acquires a property for the creation or preservation of a public park or similar public purpose, EPA will generally not perfect a windfall lien. Congress has encouraged the use of Brownfield grants and loans at sites that involve "the creation of, preservation of, or addition to a park, a greenway, undeveloped property, recreational property, or other property used for nonprofit purposes." CERCLA § 104(k)(5)(c)(v). Moreover, if a bona fide prospective purchaser uses the property in this manner, it will not likely reap a significant windfall. Thus, where a bona fide prospective purchaser is acquiring the property for the creation or preservation of public greenspace or for public recreational purposes, EPA will generally not perfect a windfall lien at that property.[10] In

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[8] Where EPA performs, or anticipates performing, a removal or remedial action after the PA or SI, perfecting a windfall lien may be appropriate.

[9] Both EPA and Congress have sought to give special consideration to residential property owners that are confronted with potential CERCLA liability. EPA previously announced its policy of generally not pursuing enforcement actions against residential owners of contaminated property, who did not cause the contamination. See "Policy Towards Owners of Residential Property at Superfund Sites," Memorandum from Don Clay, Assistant Administrator, Office of Solid Waste and Emergency Response (OSWER), and Raymond Ludwiszewski, Acting Assistant Administrator, Office of Enforcement, July 3, 1991 ("Residential Property Owner Policy"). The Brownfields Amendments provide relief for bona fide prospective purchasers of residential property by providing a less stringent "all appropriate inquiry" standard for nongovernmental, noncommercial bona fide prospective purchasers of residential property. CERCLA § 101(35)(B)(v).

[10] As noted above, EPA will generally not perfect a windfall lien where EPA's only response costs at the site are Brownfield grant or loan expenditures.

appropriate cases, Regions may seek evidence of deed restrictions or other written assurances that ensure such future uses. If the use for public greenspace or public recreation is temporary, and the property is later converted to a different use, EPA may consider perfecting a windfall lien on the property.

(5) Full Cost Recovery From Potentially Responsible Parties (PRPs)

In appropriate circumstances, where there is a substantial likelihood that EPA will recover all of its cleanup costs from liable parties, the Agency will generally not perfect a windfall lien on the property. For example, where EPA has entered a consent decree or settlement agreement with PRPs that provides for full recovery of response costs and implementation of the remedy (e.g., an RD/RA consent decree), EPA will generally not perfect a windfall lien on the property.

(6) Applicability of Enforcement Discretion Policies

EPA has previously identified circumstances where the Agency will exercise its enforcement discretion and generally not pursue current landowners for CERCLA cleanup or cost recovery (e.g., Residential Property Owner Policy; "Policy Towards Owners of Property Containing Contaminated Aquifers," Memorandum from Bruce M. Diamond, Director, Office of Site Remediation Enforcement, May 24, 1995 ("Contaminated Aquifers Policy")). Where one of these enforcement discretion policies would apply to a bona fide prospective purchaser, the Agency will generally not perfect a windfall lien against the property. For example, if a party meeting the bona fide prospective purchaser criteria acquires property that falls within EPA's "Contaminated Aquifers Policy," the Agency would generally not perfect a windfall lien against the property. Similarly, if the seller of the property had previously received a "No Current Superfund Interest" comfort/status letter explaining that EPA does not anticipate taking further response action at the site, then EPA would generally not seek to perfect a lien on the property.[11] Generally, acquisition of the property by a bona fide prospective purchaser, standing alone, should not change EPA's enforcement approach with respect to the property.

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[11] EPA enforcement discretion policies and EPA comfort/status letters are typically conditional in that they are based on the information available at the time, and if such conditions change, then the Agency's expectations may change as well. For example, if EPA spends significant amounts cleaning up a site during a bona fide prospective purchaser's ownership - an occurrence not anticipated at the time a comfort/status letter was issued to the former owner - then EPA may pursue a windfall lien against the bona fide prospective purchaser.

2. Settling With Bona Fide Prospective Purchasers

This section discusses EPA's and DOJ's general approach to settling CERCLA § 107(r) windfall liens in those situations where EPA has filed or will file a windfall lien on a property. Unlike the CERCLA § 107*(l)* lien, the CERCLA § 107(r) windfall lien is not for the entirety of EPA's unrecovered response costs. Instead, the windfall lien is for "an amount not to exceed the increase in fair market value of the property attributable to the response action at the time of a sale or other disposition of the property." CERCLA § 107(r)(4)(A). A windfall lien arises "at the time at which costs are first incurred by the United States with respect to a response action at the facility." CERCLA § 107(r)(4)(B). The Agency's general conceptual approach to valuing the windfall lien and general approach to calculating the increase in fair market value attributable to EPA's cleanup are discussed below. EPA also discusses how the Agency will generally address situations where a bona fide prospective purchaser acquires a property subject to an existing CERCLA § 107(*l*) lien.

a. *EPA's Windfall Lien Valuation Approach*

As an exercise of its enforcement discretion in settlement of CERCLA § 107(r) liens and consistent with the principles outlined in the prior section, EPA will generally seek only the increase in fair market value attributable to a response action that occurs after a bona fide prospective purchaser acquires the property at fair market value.[12] As noted above, in enacting the windfall lien provision, Congress sought to avoid windfalls at taxpayers' expense. By providing bona fide prospective purchasers with protection from CERCLA liability, Congress also sought to encourage beneficial reuse of contaminated properties. EPA believes an enforcement discretion settlement policy of generally seeking only the increase in fair market value that occurs after a bona fide prospective purchaser assumes ownership strikes the appropriate balance between these objectives. If there is not a CERCLA § 107*(l)* or 107(r) lien already filed on the property, bona fide prospective purchasers should be able to acquire property with the understanding that EPA will usually seek only the increase in value that results from EPA's expenditure of Superfund response costs on the property after a purchaser acquires the property. This approach should provide a level of certainty to bona fide prospective purchaser property transactions, and should also prevent bona fide prospective purchasers from reaping a windfall due to EPA's cleanup efforts. The following examples help illustrate this settlement approach.

> EXAMPLE: EPA spends $2,000,000 cleaning up a property, increasing its value from $1,000,000 to $2,000,000. A bona fide prospective purchaser then purchases the property, at fair market value, for $2,000,000. After the bona fide prospective purchaser's purchase, EPA spends an additional $1,000,000 cleaning up the site that results in a $500,000 increase in the fair market value of the property.

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[12] EPA's policy of seeking only the increase in fair market value after a bona fide prospective purchaser acquires the property will not necessarily apply if EPA is required to litigate to enforce the CERCLA § 107(r) lien against the property.

EPA will, through the section 107(r) lien, generally seek only the $500,000 increase attributable to EPA's response action that occurred after the bona fide prospective purchaser acquired the property.

If a bona fide prospective purchaser acquires property where a CERCLA § 107(r) lien has already been filed on the property, EPA expects that, in most instances, the CERCLA § 107(r) lien will be resolved directly with EPA as part of the transaction between the bona fide prospective purchaser and the seller. If the bona fide prospective purchaser does not resolve the existing lien when acquiring the property, EPA will generally seek the value of the unresolved lien from the bona fide prospective purchaser. For example, where the purchase price of the property is reduced to reflect an existing CERCLA § 107(r) lien on the property, a bona fide prospective purchaser could reap a windfall based on EPA's past cleanup activities at the site.

EXAMPLE: Prior to any EPA cleanup, bona fide prospective purchaser A buys a contaminated property for its fair market value of $750,000. EPA subsequently spends $500,000 on a cleanup that increases the fair market value of the property to $1,000,000 and files a CERCLA § 107(r) lien on the property. Bona fide prospective purchaser A sells the property to bona fide prospective purchaser B at a reduced value of $750,000, reflecting EPA's lien encumbrance.

Bona fide prospective purchaser B purchased at the reduced purchase price reflecting EPA's existing CERCLA § 107(r) lien. EPA would generally seek the $250,000 reflecting the value of the pre-existing CERCLA § 107(r) lien on the property.

Consistent with preventing bona fide prospective purchaser windfalls at taxpayer expense, if a bona fide prospective purchaser acquires a property at <u>below</u> fair market value, then EPA may seek any windfall due to EPA's cleanup action at the site. Again, EPA's intent is to ensure that its policy does not unnecessarily restrict property transfers, but also avoids creating incentives for transactions that will result in windfalls at taxpayer expense.

EXAMPLE: EPA spends $3,000,000 on a property, increasing its value from $1,000,000 to $2,000,000. A bona fide prospective purchaser then purchases the $2,000,000 property for $500,000. After the bona fide prospective purchaser assumes ownership, EPA spends an additional $1,000,000 cleaning up the site that results in an additional $500,000 increase in the fair market value of the property, bringing the property's fair market value up to $2,500,000.

Because the bona fide prospective purchaser is reaping a windfall due to EPA's cleanup work that occurred both pre- and post-purchase, EPA may seek the $1,500,000 increase in property value resulting from EPA's pre-purchase work (which produced a $1,000,000 fair market value increase) and post-purchase work (which produced a $500,000 fair market value increase).

As a general matter, the Agency will scrutinize property transactions that appear to be at

significantly less than fair market value or otherwise appear to not be arms length transactions. In particular, EPA will generally examine a transaction or series of transactions that appear to provide a windfall for the bona fide prospective purchaser, or appear structured to limit EPA's recourse against a liable seller (e.g., a transaction that limits the amount EPA can recover from a seller by disposing of one of the seller's most valuable assets: the property; or a transaction to evade CERCLA §107(*l*) or 107(r) lien perfection.)

EPA will generally exercise enforcement discretion in settling a CERCLA § 107(r) lien and not seek the increase in fair market value that occurs prior to acquisition by a bona fide prospective purchaser if that acquisition is at fair market value. However, as noted above at section III.A.1.a, EPA may file a CERCLA § 107(r) lien on a property where EPA has substantial unreimbursed response costs, there is no viable liable party from whom EPA could recover its costs, a response action occurs during ownership by a CERCLA-exempt party, and EPA's cleanup results in a significant increase in the property's fair market value. In this instance, EPA may, depending on the specific site circumstances and equities, seek the increase in fair market value that occurred prior to ownership by the bona fide prospective purchaser to avoid a potential windfall at taxpayer expense.

b. *Determining the Increase in Fair Market Value After A Bona Fide Prospective Purchaser Acquires the Property*

Where an EPA cleanup continues or occurs after the property is acquired by a bona fide prospective purchaser, EPA intends to calculate the increase in fair market value attributable to an EPA response action after that acquisition by comparing the fair market value of the property as if cleanup were complete to the fair market value of the property when acquired, presumably the bona fide prospective purchaser's acquisition price. EPA's general approach would consider the difference between those two values as representing the fair market value increase fairly attributable to future EPA response actions at the site. EPA recommends that bona fide prospective purchasers who believe there is a potential for a significant windfall obtain a reliable estimate of what the property's fair market value would be if the cleanup were complete. In most cases, this estimate should be based on a real estate appraisal by a trained professional.[13]

EPA understands that some bona fide prospective purchasers may want to resolve any potential windfall lien on the property at or around the time they acquire the property. As noted in the May 2002 Bona Fide Prospective Purchaser Memorandum, where there is the potential for a significant windfall lien and resolution of the lien is necessary for the transaction to go forward, EPA recognizes that a windfall lien resolution agreement with a bona fide prospective purchaser might be appropriate. Where this is the case, EPA strongly encourages resolving the windfall lien concerns associated with the property at or around the time the bona fide

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[13] In some circumstances, other credible mechanisms of the property's value as if clean might be appropriate (e.g., tax appraisal or information from neutral professional real estate brokers).

prospective purchaser acquires the property.[14] Resolving the potential windfall lien at this point should remove the cloud on the property's title and allow for free alienability in the future. To assist in resolving the amount of the windfall lien, a bona fide prospective purchaser should be prepared to provide EPA with a real estate appraisal prepared by a licensed appraiser, or similarly reliable estimate, of the fair market value of the property as if cleanup were complete.[15]

c. *Existing CERCLA § 107(l) Liens*

EPA generally seeks to limit the CERCLA § 107(r) lien exposure to the windfall a bona fide prospective purchaser might receive from EPA's cleanup. At the same time, EPA wants to avoid creating incentives for liable parties to structure transactions in such a way as to avoid their CERCLA liability. One mechanism to avoid creating such incentives is EPA's use of the CERCLA § 107*(l)* lien authority. Consistent with EPA's longstanding policies on the use of CERCLA § 107*(l)* liens, where EPA is concerned that a liable party may try to transfer its property to a bona fide prospective purchaser in an effort to avoid CERCLA liability, EPA should consider perfecting a CERCLA § 107*(l)* lien on the property.[16] Perfecting the CERCLA § 107*(l)* lien reduces the ability of a liable party to avoid its CERCLA liability for site response costs and helps protect bona fide prospective purchasers from acquiring property with substantial liabilities attached to it.[17]

Where a bona fide prospective purchaser acquires a property that is subject to an existing, perfected CERCLA § 107*(l)* lien, EPA expects that, in most instances, the CERCLA §107*(l)* lien would be resolved directly with EPA as part of the transaction between the liable owner and the bona fide prospective purchaser. That is, EPA would be paid the value of the CERCLA § 107*(l)*

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[14] In order to qualify as a bona fide prospective purchaser, a person must conduct "all appropriate inquiry" under CERCLA § 101(35)(B) and should know of any prior EPA involvement at the site and the possibility of a windfall lien.

[15] As noted in an earlier EPA guidance, a valuation of the property as if cleanup were complete should take into account: costs to maintain the remedy, health and safety requirement compliance costs, limitations on future use during and after cleanup, and superior liens. See "Support of Regional Efforts to Negotiate Prospective Purchaser Agreements (PPAs) at Superfund Sites and Clarification of PPA Guidance," Memorandum from Barry Breen, Director, Office of Site Remediation Enforcement, U.S. EPA and Bruce Gelber, Chief, Environmental Enforcement Section, Environment and Natural Resources Division, U.S. Department of Justice, January 10, 2001.

[16] For CERCLA § 107*(l)* lien guidance, see "Guidance on Federal Superfund Liens," Memorandum from Thomas L. Adams, Jr., Assistant Administrator, Office of Enforcement and Compliance Monitoring, September 22, 1987; "Supplemental Guidance on Federal Superfund Liens," Memorandum from William A. White, Enforcement Counsel, Office of Enforcement/Superfund, and Bruce M. Diamond, Director, Office of Waste Programs Enforcement, July 29, 1993.

[17] While EPA could still maintain a CERCLA § 107 action against the seller, EPA's ability to collect from that party may be diminished if the seller's only and/or most valuable asset is the property.

lien when the bona fide prospective purchaser acquires the property from the seller. If the CERCLA § 107*(l)* lien is not resolved as part of the property sale, and if EPA has unreimbursed cleanup costs, EPA may subsequently seek enforcement of the CERCLA § 107*(l)* lien against the property during the bona fide prospective purchaser's ownership. Assuming the price of the property is reduced in recognition of EPA's existing lien on the property, absent enforcement of the CERCLA 107(*l*) lien, the bona fide prospective purchaser could reap a windfall based on EPA's past cleanup activities at the site. The following example illustrates EPA's approach where there is an existing CERCLA § 107*(l)* lien.

> EXAMPLE: EPA spends $1,000,000 cleaning up a property and increases the value of the property from $2,000,000 to $2,500,000. EPA perfects a CERCLA § 107*(l)* lien on the property. A current liable owner/operator then sells the property to a bona fide prospective purchaser at a reduced value of $1,500,000, reflecting EPA's lien encumbrance.
>
> Because the bona fide prospective purchaser bought at the reduced purchase price that reflects EPA's existing CERCLA § 107*(l)* lien, to avoid a windfall to the bona fide prospective purchaser, EPA could seek from the bona fide prospective purchaser the $1,000,000 reflecting the value of the pre-existing CERCLA § 107*(l)* lien on the property through: (1) an *in rem* action against the property; or (2) settlement with the bona fide prospective purchaser.

B. Vehicles for Addressing Windfall Lien Liability Concerns

1. Comfort/Status Letters for Situations Where EPA Will Generally Not Pursue a Windfall Lien

EPA intends this policy to limit the need for EPA involvement in private real estate transactions by setting forth the Agency's enforcement discretion approach to implementation of the windfall lien provision, CERCLA § 107(r). However, there may be situations where it will be appropriate for EPA to provide more site-specific information to interested parties. EPA's "Policy on Issuance of Comfort/Status Letters" identifies the circumstances where it is appropriate to provide a "comfort/status" letter to facilitate Brownfields redevelopment.[18] The Comfort/Status Letter policy recognizes that there are instances where concerns over Superfund liability can impede Brownfields redevelopment and that providing an interested party with such a letter can be appropriate if "it may facilitate the cleanup and redevelopment of brownfields, where there is the realistic perception or probability of incurring Superfund liability, **and** where there is no other mechanism available to adequately address the party's concerns." 62 Fed. Reg. at 4,624. EPA developed four sample comfort/status letters for addressing some common

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[18] "Policy on the Issuance of Comfort/Status Letters," Memorandum from Steven A. Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance, November 8, 1996; reprinted at 62 Fed. Reg. 4,624 (Jan. 30, 1997) (hereinafter "Comfort/Status Letter policy").

inquiries regarding contaminated properties. Comfort/status letters have generally provided a quick and inexpensive method for facilitating property reuse.[19]

As noted above, EPA intends this policy, by identifying situations where EPA will generally not pursue a windfall lien, to greatly mitigate the need for site specific responses in most instances. However, there may be site-specific circumstances where it may be appropriate for Regions to provide a comfort/status letter consistent with EPA's Comfort/Status Letter policy. Of course, where there has been no federal response action at a site, there will be no windfall lien, and no need for a comfort/status letter or other document from EPA regarding the windfall lien provision in order to facilitate the sale of the property.[20]

For properties "that have been archived and removed from the CERCLIS inventory of Superfund sites," a "No Current Superfund Interest Letter" may be appropriate. 62 Fed. Reg. 4,625. This letter lets a party know that EPA does not anticipate taking any further response action, including enforcement action, and why.[21]

A "Federal Superfund Interest Letter" may be appropriate where EPA has incurred some response costs, but will most likely not seek to perfect a windfall lien (see Section III.A.1.b.(1)-(6), above). The Federal Superfund Interest Letter can be used to provide an interested party with EPA's view regarding the application of an EPA Superfund policy to "a party's particular set of circumstances." Id. at 4,626. [22] This type of comfort/status letter can be used for sites that are in CERCLIS, sites undergoing a federal removal or remedial action, and/or sites where EPA has or will incur response costs. To the extent a party falls under the circumstances identified in

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[19] See "U.S. EPA's Prospective Purchaser Agreements and Comfort/Status Letters: How Effective Are They? Findings, Benefits, and Suggested Improvements, Final Report," U.S. EPA, Office of Site Remediation Enforcement, Publication # 330R00002, September 29, 2000, at pp. 14, 17.

[20] EPA's Comfort/Status Letter policy does, however, identify a type of comfort/status letter for use in such situations (i.e., a "No Previous Federal Superfund Interest Letter"). Moreover, where a State has been or will be the lead for day-to-day activities and oversight of a response action, Regions should handle responses consistent with the Comfort/Status Letter policy (e.g., use of a "State Action" comfort/status letter).

[21] EPA archives a site if: " a) no contamination was found at the site; b) the site, while contaminated, neither met the criteria for inclusion on the NPL nor required any EPA response action; or c) contamination was removed quickly without the need to place the site on the NPL; **and** d) EPA has completed its cost recovery action for the site." 62 Fed. Reg. at 4,625.

[22] This memorandum does not supercede the Comfort/Status Letter policy, but merely identifies those circumstances where application of that policy may be appropriate in the windfall lien context. In issuing a comfort/status letter, EPA will continue to apply the guidelines provided in the Comfort/Status Letter policy and recommends review of that policy in instances where Regions are considering a comfort/status letter to address a party's windfall lien concerns.

this memorandum where EPA will generally not seek to perfect a windfall lien, a Federal Superfund Interest Letter could be provided, if appropriate, with a reference to this policy and language indicating EPA does not intend to file a windfall lien. Use of such letters should, however, be limited to:

> situations where the requesting party provides information that 1) a project found to be in the public interest (e.g., an economic redevelopment project) is hindered or the value of a property is affected by the potential for Superfund liability, and 2) there is no other mechanism available to adequately address the party's concerns other than a letter from EPA with a statement regarding the applicability of a specific Superfund policy, statutory provision or regulation.

Id. EPA is providing a sample Federal Superfund Interest Letter for CERCLA § 107(r) Windfall Liens as Attachment A. Where a State has been or will be involved at a site, EPA should coordinate with the State prior to issuing such a Comfort/Status letter.

2. Windfall Lien Resolution Documents for Situations Where EPA is Likely to Pursue a Windfall Lien

The Agency anticipates that in those situations where EPA has or will have unrecovered cleanup costs, a bona fide prospective purchaser will reap a windfall, and EPA is likely to pursue a windfall lien, a bona fide prospective purchaser may want to satisfy any existing and potential future windfall lien prior to or relatively coincident with their acquisition. Congress specifically provided EPA with the authority to resolve windfall lien exposure. CERCLA § 107(r)(2) states that the United States "shall have a lien on the facility, or *may by agreement with the owner, obtain from the owner a lien on any other property or other assurance of payment satisfactory to the Administrator, for the unrecovered response costs.*" Thus, Congress explicitly recognized that EPA can address the potential windfall through an agreement with the bona fide prospective purchaser at or around the time of the transaction.[23] EPA and DOJ have developed a model document to facilitate resolution of windfall liens that is attached hereto as Attachment B.

IV. CONCLUSION

In identifying how EPA generally intends to exercise its enforcement discretion in deciding when and when not to perfect a windfall lien, as well as describing the Agency's approach to valuing a windfall lien when perfected, it is EPA's intent to achieve national

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[23] The Brownfield Amendments allow EPA to address the windfall after a purchase takes place, without the bona fide prospective purchaser becoming liable as an owner under CERCLA § 107(a)(1). Prior to the Brownfield Amendments, EPA addressed CERCLA liability concerns of purchasers through Prospective Purchaser Agreements (PPAs), which were not available after the purchase of the property. Thus, the Brownfield Amendments help alleviate the timing issues surrounding coordination of the real estate transaction with the signing of a PPA. See May 2002 Bona Fide Prospective Purchaser Memorandum.

consistency and provide an understanding of EPA's implementation approach. Consistent with past EPA policies and practices, EPA is also identifying mechanisms that can be used to resolve CERCLA liability concerns.

As noted at the outset, EPA and DOJ are issuing this memorandum as an interim policy and will use the experience gained in implementation to decide whether to revise or amend this policy in the future. Anyone interested in providing comments on this policy, or its implementation, is invited to do so by submitting comments to EPA or DOJ.

If you have any questions or comments regarding this policy, please contact, at EPA, Greg Madden at (202) 564-4229 or at madden.gregory@epa.gov; if you have site-specific implementation questions, please contact Helen Keplinger at (202) 564-4221 or at keplinger.helen@epa.gov. You can also contact, at DOJ, Henry Friedman at (202) 515-5268 or at henry.friedman@usdoj.gov or Alan Tenenbaum at (202) 514-5409 or at alan.tenenbaum@usdoj.gov.

V. DISCLAIMER

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

Attachments

cc: Brownfields Amendments Implementation Steering Committee
Paul Connor (OSRE)
Sandra Connors (OSRE)
Thomas Dunne (OSWER)
Benjamin Fisherow (DOJ)
Linda Garczynski (OSWER)
Steve Luftig (OSWER)
Earl Salo (OGC)
EPA Brownfields Landowner Liability Protection Subgroup

Attachment A

Sample Federal Superfund Interest Letter for CERCLA § 107(r) Windfall Lien

[Insert Addressee]

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

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

I am writing in response to your correspondence of **[insert date]** concerning the property referenced above. My response is based upon the facts presently known to the United States Environmental Protection Agency ("EPA").

As you may know, the above-referenced property is located within or near the **[insert name of CERCLIS site.]** EPA is currently taking **[insert description of any action that EPA is taking or plans to take and any contamination problem.]**

[For situations when a party provides information showing that 1) a project found to be in the public interest is hindered or the value of a property is affected by the potential for a CERCLA § 107(r) windfall lien, 2) there is no other mechanism available to adequately address the party's concerns, and 3) it falls within one of the circumstances identified in the Windfall Lien Policy where EPA would generally not perfect a windfall lien, insert the following]

The [date] "EPA Interim Enforcement Discretion Policy Concerning "Windfall Liens" Under Section 107(r) of CERCLA" ("Windfall Lien Policy"), provides that EPA, in an exercise of its enforcement discretion, will generally not perfect a CERCLA § 107(r) windfall lien when the conditions and criteria described in the Windfall Lien Policy are met. Based upon the information currently available to EPA, EPA believes that the Windfall Lien Policy applies to **[you/your situation]**. Specifically, EPA believes that, consistent with the Windfall Lien Policy, your situation falls under the **[insert reason set forth in the guidance]** section of the guidance and EPA does not intend to file a windfall lien on the property **[optional - depending on which reason for not filing windfall lien may want to include the following: unless new information not previously known to EPA is discovered]**. I am enclosing a copy of the Windfall Lien Policy for your review.

EPA hopes that the above information is useful to you. **[Optional--In addition, we have included a copy of our latest fact sheet for the (insert name of site.)]** Further, we direct your attention to the **[insert location of site local records repository]** at which EPA has placed a copy of the Administrative Record for this site. This letter is provided solely for informational

purposes and does not provide a release from CERCLA liability. If you have any questions, or wish to discuss this letter, please feel free to contact **[insert EPA contact and address]**.

Sincerely,

Regional Contact

Enclosure

Attachment B

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION ___

IN THE MATTER OF: [name of Superfund Site]	)	
	)	[Docket Number]
	)	Agreement for Release and Waiver
	)	of Lien, CERCLA § 107(r)
UNDER THE AUTHORITY OF THE COMPREHENSIVE RESPONSE, COMPENSATION, AND LIABILITY ACT, 42 U.S.C. §§ 9601, *et seq.*	)	[Insert Settling Purchaser's Name]

I. INTRODUCTION

[The purpose of this model is to provide a sample document which may be used to release and waive any windfall lien, arising under Section 107(r) of CERCLA with respect to a bona fide prospective purchaser, through the payment of cash or other appropriate consideration. This model assumes that in most cases a Section 107(r) lien has not been perfected. Where the Section 107(r) lien has been perfected, it will be necessary to execute an additional document to file in the recorder's office where the lien was perfected. There may be a situation where it will also be appropriate to address a perfected Section 107(l) lien through this model, and additional language must be included for that purpose. The authority to enter Agreements for Release and Waiver of Lien, CERCLA § 107(r), has been delegated to the Regional Administrators. Exercise of this authority requires consultation with OECA/OSRE.] This Release and Waiver of Lien Agreement ("Agreement") is made and entered into by and between the Environmental Protection Agency ("EPA") and _____

[insert name of the Settling Purchaser] ("Name") (collectively, the "Parties").

This Agreement is entered into pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601, *et seq.*

[Provide introductory information, consistent with the Definitions and Statement of Facts, about the property to which the release and waiver of lien will be applicable ("Property") including, name, address, location, and description of Property, and also provide information about the Settling Purchaser, including name, address and corporate status, if applicable. If Property is part of a larger, or smaller, Site ("Site") explain the relationship of Property to Site and include size and description of each.]

The Parties agree to undertake all actions required by the terms and conditions of this Agreement. The purpose of this Agreement is to settle and resolve, subject to Section VIII, Reservation of Rights, the lien against the Property under Section 107(r) of CERCLA, 42 U.S.C. § 9607(r).

The release and waiver of this lien, in exchange for provision by the Settling Purchaser to EPA of consideration satisfactory to the Administrator, is in the public interest.

II. DEFINITIONS

1. "Bona Fide Prospective Purchaser" or "BFPP" shall mean a person as described in CERCLA § 101(40).

2. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

3. "Parties" shall mean EPA and _____.

4. "Property" shall mean the parcel, encompassing approximately __ acres, located at

[address] in City, _____, State or Commonwealth of _____, which is described in Exhibit 1, and shown on the map included as Exhibit___ to this Agreement.

5. "Settling Purchaser" shall mean _____.

6. "Site" shall mean the _____ Superfund Site.

7. "United States" shall mean the United States of America, including its departments, agencies, and instrumentalities.

III. STATEMENT OF FACTS

7. **[Include only those facts relating to the Property that are relevant to the lien being released and waived, including how response costs incurred or to be incurred gave rise to a lien. Avoid adding information that relates only to actions or parties that are outside of this Agreement.]**

IV. PAYMENT

8. In consideration of and in exchange for EPA's release and waiver of any lien it has or may have under Section 107(r) of CERCLA with respect to the Property, Settling Purchaser agrees, within ____ days of the effective date of this Agreement **[if EPA is resolving a perfected lien, payment may instead need to be made at the closing date]**, to pay to EPA the sum of $_____. Settling Purchaser shall make all payments required by this Agreement in the form of a certified check or checks made payable to "EPA Hazardous Substance Superfund," referencing the EPA Region, EPA Docket number, and Site/Spill ID#_____, [DOJ case number_____, **if applicable**] and name and address of Settling Purchaser. Payment shall be sent to [insert Regional Superfund Lockbox address where payment should be sent]. Notice of

payment shall be sent to the EPA Region ___ Financial Management Officer [insert address][1].

9. Amounts due and owing pursuant to the terms of this Agreement, but not paid in accordance with the terms of this Agreement, shall accrue interest at the rate established pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), compounded on an annual basis.

V. RELEASE AND WAIVER OF SECTION 107(r) LIEN

10. Subject to the Reservation of Rights in Section VIII of this Agreement, upon payment of the amount specified in Section IV, Payment, EPA agrees to release and waive any lien it may have on the Property now and in the future under Section 107(r) of CERCLA, 42 U.S.C.§ 9607(r), for costs incurred or to be incurred by EPA in responding to the release or threat of release of hazardous substances that were disposed of at the Site before Settling Purchaser acquired ownership of the Property.

VI. ACCESS/NOTICE /INSTITUTIONAL CONTROLS

11. [Whether or not to add this Section VI, Access/Notice/Institutional Controls, is within the Region's discretion based upon site-specific considerations. Adding this Section gives the Region the option to go into more detail than is obtained by relying upon the statute alone. Once the cleanup is complete, the provisions requiring the Settling Purchaser to

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[1] **This model is written for payment of cash only, but there may be a situation where performing work or providing other assurance of payment satisfactory to the Administrator would be appropriate. If work or other assurance of payment is accepted as consideration, other sections of this model would also need to be revised as appropriate. Where the Section 107(r) lien is resolved prior to completion of site work, there may be situations where a Special Account should be established to help fund future work. Whether to establish a Special Account should be worked out in advance of receipt of any money. The following language may be added to the Section IV, Payment:** [The total amount paid by [Settling Purchaser name] pursuant to this Agreement shall be deposited into [Site name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or transferred by EPA to the EPA Hazardous Substance Superfund.]

"ensure" access may no longer be necessary and may be allowed to expire in appropriate situations.] Settling Purchaser agrees to provide EPA, its authorized officers, employees, representatives, and all other persons performing response actions under EPA oversight, an irrevocable right of access at all reasonable times to the Property and to any other property to which access is required for the implementation of response actions at the Property, to the extent access to such other property is controlled by Settling Purchaser, for the purposes of performing and overseeing response actions at the Property under federal law. EPA agrees to provide reasonable notice to Settling Purchaser of the timing of response actions to be undertaken at the Property. Notwithstanding any provision of this Agreement, EPA retains all of its access authorities and rights, including enforcement authorities related thereto, under CERCLA, and the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 U.S.C. § 6901("RCRA"), *et seq.*

12. Settling Purchaser shall submit to EPA for review and approval a notice to be filed with the Recorder's Office **[or Registry of Deeds or other appropriate office]**, _____ County, State or Commonwealth of _____, which shall provide notice to all successors-in-title that the Property is part of the Site, [that EPA filed a lien under Section 107(r) of CERCLA, Instrument Number _____, on Date_____] [that EPA selected a remedy for the Site on _____, and that potentially responsible parties have entered a Consent Decree requiring implementation of the remedy] [that EPA is performing/ performed a response action at the Site], and that EPA has released and waived its Section 107(r) lien on the Property in this Agreement. [Such notice(s) shall identify the United States District Court in which the Consent Decree was filed, the name and civil action number of the case, and the

date the Consent Decree was entered by the Court.] The Settling Purchaser shall record the notice(s) within _____days of EPA's approval of the notice(s). The Settling Purchaser shall provide EPA with a certified copy of the recorded notice(s) within _____ days of recording such notice(s).[2]

13. Settling Purchaser shall implement and comply with any land use restrictions and institutional controls on the Property in connection with a response action.[3]

14. For so long as the Settling Purchaser is an owner or operator of the Site, Settling Purchaser shall ensure that assignees, successors in interest, and any lessees, sublessees and other parties with rights to use the Property shall provide access and cooperation to EPA, its authorized officers, employees, representatives, and all other persons performing response actions under EPA oversight. Settling Purchaser shall ensure that assignees, successors in interest, and any lessees, sublessees, and other parties with rights to use the Property implement and comply with any land use restrictions and institutional controls on the Property in connection with a response action.

15. **[Any requirement concerning institutional controls must survive property transfer, unless the particular institutional control is for a specifically limited period of time.]** Upon sale or other conveyance of the Property or any part thereof, Settling Purchaser shall require that each grantee, transferee or other holder of an interest in the Property or any part thereof shall provide access and cooperation to EPA, its authorized officers, employees, representatives, and all

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[2] **Regions negotiating Lien Release and Waiver Agreements for Sites that may be owned by one person but controlled by another should discuss appropriate language for this Paragraph with Headquarters.**

[3] **Where appropriate, Regions should consider defining institutional controls, in particular at properties where institutional controls have been specifically set forth in, for example, a Record of Decision (ROD).**

other persons performing response actions under EPA oversight. Settling Purchaser shall ensure that each grantee, transferee or other holder of an interest in the Property or any part thereof shall implement and comply with any land use restrictions and institutional controls on the Property in connection with a response action.

16. The Settling Purchaser shall provide a copy of this Agreement to any current lessee, sublessee, and other party with rights to use the Property as of the effective date of this Agreement.

VII. BFPP STATUS

17. Settling Purchaser shall take and maintain all steps necessary to achieve and maintain status as a "Bona Fide Prospective Purchaser" as that term is defined in Section 101(40) of CERCLA 42 U.S.C. § 9601(40), for the Property which is the subject of this Agreement, by complying with all of the requirements for a Bona Fide Prospective Purchaser as set forth in Section 101(40), including, without limitation, the exercise of "appropriate care" by taking "reasonable steps" as set forth in Section 101(40)(D), 42 U.S.C. § 9601(40)(D), and the implementation of and compliance with any land use restrictions and institutional controls as set forth in Section 101(40)(F), 42 U.S.C. § 9601(40)(F) for so long as Settling Purchaser retains any ownership interest in the Property.

VIII. RESERVATION OF RIGHTS

18. This Agreement does not release and waive or compromise any right of EPA or the United States other than the release and waiver by EPA of its right to assert or perfect a windfall lien pursuant to Section 107(r) of CERCLA, 42 U.S.C. § 9607(r), for costs incurred or to be incurred by EPA in responding to the release or threat of release of hazardous substances that were disposed of at the Site before Settling Purchaser acquired ownership of the Property, subject to

receipt of the payment [work] from Settling Purchaser as provided in Section IV. EPA and the United States reserve, and this Agreement is without prejudice to, all rights against Settling Purchaser with respect to all other matters, including but not limited to, the following:

(a) claims based on a failure by Settling Purchaser, assignees, successors in interest or any lessees, sublessees or other parties with rights to use the Property to meet a requirement of this Agreement, including but not limited to Section IV, Payment, and Section VI, Access/Notice/Institutional Controls;

(b) liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessment incurred by federal agencies other than EPA;

(c) liability under CERCLA, including Sections 106 and 107, 42 U.S.C. §§ 9606 and 9607, which arises due to failure of Settling Purchaser or assignees, successors in interest or any lessees, sublessees, or other parties with rights to use the Property to comply with Section 101(40), 42 U.S.C. § 9601(40); and

(d) liability under CERCLA resulting from the release or threat of release of hazardous substances that were disposed of at the Site after the Settling Purchaser acquired ownership of the Property.

19. Nothing in this Agreement is intended as a release and waiver for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, other than the release and waiver of the Section 107(r) lien in Section V, which the United States may have against any person, firm, corporation or other entity not a party to this Agreement. The United States reserves the right to compel potentially responsible parties to perform or pay for response actions at the Site.

20. Nothing in this Agreement shall in any way restrict or limit the nature or scope of response actions which may be taken or be required by EPA in exercising its authority under federal law. Settling Purchaser acknowledges that it is purchasing Property where response actions may be required.

IX. PARTIES BOUND

21. This Agreement shall apply to and be binding upon EPA, and shall apply to and be binding upon the Settling Purchaser and Settling Purchaser's [heirs] successors and assigns. Each signatory of a Party to this Agreement represents that he or she is fully authorized to enter into the terms and conditions of this Agreement and to legally bind such Party. Any change in ownership or corporate status involving the Property addressed shall in no way alter the release and waiver of the lien under this Agreement.

X. WAIVER OF CLAIM FOR REIMBURSEMENT

22. Settling Purchaser waives and shall not assert any claim for reimbursement from the United States with respect to the payment required by Section IV, Payment, of this Agreement, including but not limited to any direct or indirect claim for reimbursement of such payment from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 107, 111, 112, 113, or any other provision of law, or from any department, agency or instrumentality of the United States under CERCLA Sections 107 or 113. Nothing in this Agreement shall be deemed to constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

XI. PAYMENT OF COSTS

23. If the Settling Purchaser fails to comply with the terms of this Agreement, including,

but not limited to, the provisions of Section IV, Payment, it shall be liable for all litigation and other enforcement costs incurred by the United States to enforce this Agreement or otherwise obtain compliance.

XII. DISCLAIMER

24. This Agreement in no way constitutes a finding by EPA as to the risks to human health and the environment which may be posed by contamination at the Property nor constitutes any representation by EPA that the Property is fit for any particular purpose.

XIII. EFFECTIVE DATE

25. The effective date of this Agreement shall be the date upon which EPA issues written notice to the Settling Purchaser that EPA has fully executed the Agreement.

XIV. ATTORNEY GENERAL APPROVAL

26. **[Where the United States' total site costs are under $500,000, Regions need not seek pre-approval from the AG]** The Attorney General of the United States or his designee has issued prior written approval of the settlement embodied in this Agreement.

IT IS SO AGREED:

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BY:

_____

Regional Administrator Date

Region __

IT IS SO AGREED:

BY:

_____

Name Date

All Appropriate Inquiries Final Rule

What is "All Appropriate Inquiries"?

"All appropriate inquiries" is the process of evaluating a property's environmental conditions and assessing potential liability for any contamination.

Why is EPA Establishing Standards for Conducting All Appropriate Inquiries?

The 2002 Brownfields Amendments to CERCLA require EPA to promulgate regulations establishing standards and practices for conducting all appropriate inquiries.

Stakeholder Collaboration

A Negotiated Rulemaking Committee consisting of 25 diverse stakeholders developed the proposed rule. Following publication of the proposed rule, EPA provided for a three month public comment period. EPA received over 400 comments from interested parties. Based upon a review and analysis of issues raised by commenters, EPA developed the final rule.

When is the Rule Effective?

The final rule is effective on November 1, 2006—one year after being published in the Federal Register. Until November 1, 2006, both the standards and practices included in the final regulation and the current interim standards established by Congress for all appropriate inquiries (ASTM E1527-00) will satisfy the statutory requirements for the conduct of all appropriate inquiries.

Who is Affected?

The final All Appropriate Inquiries requirements are applicable to any party who may potentially claim protection from CERCLA liability as an innocent landowner, a bona fide prospective purchaser, or a contiguous property owner. Parties who receive grants under the EPA's Brownfields Grant program to assess and characterize properties must comply with the All Appropriate Inquiries standards.

When Must All Appropriate Inquiries be Conducted?

All appropriate inquiries must be conducted or updated within one year of the date of acquisition of a property. If all appropriate inquiries are conducted more than 180 days prior to the acquisition date, certain aspects of the inquiries must be updated.

What Specific Activities Does the Rule Require?

Many of the inquiry's activities must be conducted by, or under the supervision or responsible charge of, an individual who qualifies as an environmental professional as defined in the final rule.

The inquiry of the environmental professional must include:

- interviews with past and present owners, operators and occupants;
- reviews of historical sources of information;
- reviews of federal, state, tribal and local government records;
- visual inspections of the facility and adjoining properties;
- commonly known or reasonably ascertainable information; and
- degree of obviousness of the presence or likely presence of contamination at the property and the ability to detect the contamination.

Additional inquiries that must be conducted by or for the prospective landowner or grantee include:

- searches for environmental cleanup liens;
- assessments of any specialized knowledge or experience of the prospective landowner (or grantee);
- an assessment of the relationship of the purchase price to the fair market value of the property, if the property was not contaminated; and
- commonly known or reasonably ascertainable information.

How Does the Final AAI Rule Differ From the Interim Standard?

The final All Appropriate Inquiries rule does not differ significantly from the ASTM E1527-00 standard. The rule includes all the main activities that previously were performed as part of environmental due diligence such as site reconnaissance, records review, interviews, and documentation of recognized environmental conditions. The final rule, however, enhances the inquiries by extending the scope of a few of the environmental due diligence activities. In addition, the final rule requires that significant data gaps or uncertainties be documented.

Under the final All Appropriate Inquiries rule, interviewing the subject property's current owner or occupants is mandatory. The ASTM E1527-00 standard only required that the environmental professional make a reasonable attempt to conduct such interviews. In addition, the final rule includes provisions for interviewing past owners and occupants of the subject property, if necessary to meet the objectives and performance factors. Under the ASTM E1527-00 standard, the environmental professional had to inquire about past uses of the subject property when interviewing the current property owner.

The final rule also requires an interview with an owner of a neighboring property if the subject property is abandoned. The ASTM E1527-00 standard included such interviews at the environmental professional's discretion.

The final rule does not specify who is responsible for performing record searches, including searches for use limitations and environmental cleanup liens. The ASTM E1527-00 standard specified that these record searches are the responsibility of the user and required that the results be reported to the environmental professional.

Unlike the ASTM E1527-00 standard, the final rule requires the examination of tribal and local government records and more extensive documentation of data gaps.

The final rule includes specific documentation requirements if the subject property cannot be visually inspected. The ASTM E1527-00 standard did not include such requirements.

Who Qualifies as an Environmental Professional?

To ensure the quality of all appropriate inquiries, the final rule includes specific educational and experience requirements for an environmental professional.

The final rule defines an environmental professional as someone who possesses sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding conditions indicative of releases or threatened releases on, at, in, or to a property, sufficient to meet the objectives and performance factors of the rule, and has: (1) a state or tribal issued certification or license and three years of relevant full-time work experience; **or** (2) a Baccalaureate degree or higher in science or engineering and five years of relevant full-time work experience; **or** (3) ten years of relevant full-time work experience.

For more information on the environmental professional definition, please see EPA's Fact Sheet on the Definition of an Environmental Professional.

Will There Be an Updated ASTM Phase I Site Assessment Standard?

Yes. ASTM International updated its E1527-00 standard, "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process." EPA establishes that the revised ASTM E1527-05 standard is consistent with the requirements of the final rule for all appropriate inquiries and may be used to comply with the provisions of the rule.

Contact Information

Patricia Overmeyer

U.S. EPA's Office of Brownfields Cleanup and Redevelopment

(202) 566-2774

Overmeyer.Patricia@epa.gov

Also, please see the U.S. EPA's web site at www.epa.gov/brownfields for additional information.

Federal Register

Tuesday,
November 1, 2005

Part III

Environmental Protection Agency

40 CFR Part 312
Standards and Practices for All Appropriate Inquiries; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 312

[SFUND–2004–0001; FRL–7989–7]

RIN 2050–AF04

Standards and Practices for All Appropriate Inquiries

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) today is establishing federal standards and practices for conducting all appropriate inquiries as required under sections 101(35)(B)(ii) and (iii) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Today's final rule establishes specific regulatory requirements and standards for conducting all appropriate inquiries into the previous ownership and uses of a property for the purposes of meeting the all appropriate inquiries provisions necessary to qualify for certain landowner liability protections under CERCLA. The standards and practices also will be applicable to persons conducting site characterization and assessments with the use of grants awarded under CERCLA section 104(k)(2)(B).

DATES: This final rule is effective November 1, 2006.

ADDRESSES: EPA established a docket for this action under Docket ID No. SFUND–2004–0001. All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket.* Although listed in the index, some information is not publicly available, i.e., information labeled Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the EPA Docket Center, EPA West Building, Room B102, 1301 Constitution Ave., NW., Washington, DC. This docket facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OSWER Docket is (202) 566–0276.

FOR FURTHER INFORMATION CONTACT: For further information on specific aspects of today's rule, contact Patricia Overmeyer of EPA's Office of Brownfields Cleanup and Redevelopment at (202) 566–2774 or at *overmeyer.patricia@epa.gov.* Mail inquiries may be directed to the Office of Brownfields Cleanup and Redevelopment (5105T), 1200 Pennsylvania Ave. NW., Washington, DC 20460.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Who Potentially May be Affected by Today's Rule?

This regulation may affect most directly those persons and businesses purchasing commercial property or any property that will be used for commercial or public purposes and who may, after purchasing the property, seek to claim protection from CERCLA liability for releases or threatened releases of hazardous substances. Under section101(35)(B) of CERCLA, as amended by the Small Business Liability Relief and Brownfields Revitalization Act (Pub. L. 107–118, 115 stat. 2356, "the Brownfields Amendments") such persons and businesses are required to conduct all appropriate inquiries prior to or on the date on which the property is acquired. Prospective landowners who do not conduct all appropriate inquiries prior to or on the date of obtaining ownership of the property may lose their ability to claim protection from CERCLA liability as an innocent landowner, bona fide prospective purchaser, or contiguous property owner.

In addition, today's rule will affect any party who receives a brownfields grant awarded under CERCLA section 104(k)(2)(B) and uses the grant money to conduct site characterization or assessment activities. This includes state, local and tribal governments that receive brownfields site assessment grants for the purpose of conducting site characterization and assessment activities. Such parties are required under CERCLA section 104(k)(2)(B)(ii) to conduct such activities in compliance with the standards and practices established by EPA for the conduct of all appropriate inquiries. EPA notes that today's rule also may affect other parties who apply for brownfields grants under the provisions of CERCLA section 104(k), since such parties may have to qualify as a bona fide prospective purchaser to ensure compliance with the statutory prohibitions on the use of grant funds under Section 104(k)(4)(B)(I). Any party seeking liability protection as a bona fide prospective purchaser, including eligible brownfields grantees, must conduct all appropriate inquiries prior to or on the date of acquiring a property.

The background document, "Economic Impacts Analysis for the Proposed All Appropriate Inquiries Final Regulation" and the Addendum to this document provide a comprehensive analysis of all potentially impacted entities. These documents are available in the docket established for today's rule. A summary of potentially affected businesses is provided in the table below.

Our aim in the table below is to provide a guide for readers regarding entities likely to be directly regulated or indirectly affected by today's action. This action, however, may affect other entities not listed in the table. To determine whether you or your business is regulated or affected by this action, you should examine the regulatory language amending CERCLA. This language is found at the end of this **Federal Register** notice. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding section entitled **FOR FURTHER INFORMATION CONTACT.**

Industry category	NAICS code
Manufacturing	31–33
Wholesale Trade	42
Retail Trade	44–45
Finance and Insurance	52
Real Estate	531
Professional, Scientific and Technical Services	541
Accommodation and Food Services	72
Repair and Maintenance	811
Personal and Laundry Services	812
State, Local and Tribal Government	N/A

B. How Can I Get Copies of This Document and Other Related Information?

1. *Docket.* EPA established an official public docket for this action under Docket ID No. SFUND–2004–0001. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to today's action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Documents in the official public docket are listed in the index list in EPA's electronic public docket and comment system, EDOCKET. Documents may be available either electronically or in hard copy. Electronic documents may be viewed through EDOCKET. Hard copy

documents may be viewed at the EPA Docket Center, EPA West, Room B102, 1301 Constitution Avenue, NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OSWER Docket is (202) 566–0276.

2. *Electronic Access.* You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at *http://www.epa.gov/fedrgstr.*

An electronic version of the public docket also is available through EPA's electronic public docket and comment system, EDOCKET. You may use EDOCKET at *http://www epa.gov/edocket/* to view public comments, access the index listing of the contents of the public docket, and access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the appropriate docket identification number.

Certain types of information will not be placed in EDOCKET. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. Docket materials that are not available electronically may be viewed at the docket facility identified above.

Contents of Today's Rule

I. Statutory Authority

These regulations are promulgated under the authority of Section 101(35)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601), as amended, most importantly by the Small Business Liability Relief and Brownfields Revitalization Act.

II. Background

A. What is the Intent of Today's Rule?

On August 26, 2004, EPA published a notice of proposed rulemaking outlining proposed standards and practices for the conduct of "all appropriate inquiries." This regulatory action was initiated in response to legislative amendments to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). On January 11, 2002, President Bush signed the Small Business Liability Relief and Brownfields Revitalization Act (Pub. L. 107–118, 115 Stat. 2356, "the Brownfields Amendments"). The Brownfields Amendments amend CERCLA by providing funds to assess and clean up brownfields sites, clarifying CERCLA liability provisions for certain landowners, and providing funding to enhance state and tribal cleanup programs. The intent of today's rule is to finalize regulations setting federal standards and practices for the conduct of all appropriate inquiries, a key provision of the Brownfields Amendments. Subtitle B of Title II of the Brownfields Amendments revises CERCLA section 101(35), clarifying the requirements necessary to establish the innocent landowner defense. In addition, the Brownfields Amendments add protections from CERCLA liability for bona fide prospective purchasers and contiguous property owners who meet certain statutory requirements.

Each of the CERCLA liability provisions for innocent landowners, bona fide prospective purchasers, and contiguous property owners, requires that, among other requirements, persons claiming the liability protections conduct all appropriate inquiries into prior ownership and use of a property prior to or on the date a person acquires a property. The law requires EPA to develop regulations establishing standards and practices for how to conduct all appropriate inquiries. Congress included in the Brownfields Amendments a list of criteria that the Agency must address in the regulations establishing standards and practices for conducting all appropriate inquiries

section 101(35)(2)(B)(ii) and (iii). The Brownfields Amendments also require that parties receiving a federal brownfields grant awarded under CERCLA section 104(k)(2)(B) to conduct site characterizations and assessments must conduct these activities in accordance with the standards and practices for all appropriate inquiries.

The regulations established today only address the all appropriate inquiries provisions of CERCLA sections 101(35)(B)(i)(I) and 101(35)(B)(ii) and (iii). Today's rule does not address the requirements of CERCLA section 101(35)(B)(i)(II) for what constitutes "reasonable steps."

B. What is "All Appropriate Inquiries?"

An essential step in real property transactions may be evaluating a property for potential environmental contamination and assessing potential liability for contamination present at the property. The process for assessing properties for the presence or potential presence of environmental contamination often is referred to as "environmental due diligence," or "environmental site assessment." The Comprehensive Environmental Response Compensation and Liability Act (CERCLA) or Superfund, provides for a similar, but legally distinct, process referred to as "all appropriate inquiries."

Under CERCLA, persons may be held strictly liable for cleaning up hazardous substances at properties that they either currently own or operate or owned or operated at the time of disposal. Strict liability in the context of CERCLA means that a potentially responsible party may be liable for environmental contamination based solely on property ownership and without regard to fault or negligence.

In 1986, the Superfund Amendments and Reauthorization Act (Pub. L. No. 99–499, 100 stat. 1613, "SARA") amended CERCLA by creating an "innocent landowner" defense to CERCLA liability. The new section 101(35)(B) of CERCLA provided a defense to CERCLA liability, for those persons who could demonstrate, among other requirements, that they "did not know and had no reason to know" prior to purchasing a property that any hazardous substance that is the subject of a release or threatened release was disposed of on, in, or at the property. Such persons, to demonstrate that they had "no reason to know" must have undertaken, prior to, or on the date of acquisition of the property, "all appropriate inquiries" into the previous ownership and uses of the property consistent with good commercial or customary standards and practices. The 2002 Brownfields Amendments added potential liability protections for "contiguous property owners" and "bona fide prospective purchasers" who also must demonstrate they conducted all appropriate inquiries, among other requirements, to benefit from the liability protection.

C. What Were the Previous Standards for All Appropriate Inquiries?

As part of the Brownfields Amendments to CERCLA, Congress established interim standards for the conduct of all appropriate inquiries. The federal interim standards established by Congress became effective on January 11, 2002. In the case of properties purchased after May 31, 1997, the interim standards include the procedures of the ASTM Standard E1527–97 (entitled "Standard Practice for Environmental Site Assessments: Phase 1 Environmental Site Assessment Process"). In the case of persons who purchased property prior to May 31, 1997 and who are seeking to establish an innocent landowner defense or qualify as a contiguous property owner, CERCLA provides that such persons must establish, among other statutory requirements, that at the time they acquired the property, they did not know and had no reason to know of releases or threatened releases to the property. To establish they did not know and had no reason to know of releases or threatened releases, persons who purchased property prior to May 31, 1997 must demonstrate that they carried out all appropriate inquiries into the previous ownership and uses of the property in accordance with generally accepted good commercial and customary standards and practices.

In the case of property acquired by a non-governmental entity or non-commercial entity for residential or other similar uses, the current interim standards for all appropriate inquiries may not be applicable. For those cases, the Brownfields Amendments to CERCLA establish that a "facility inspection and title search that reveal no basis for further investigation shall be considered to satisfy the requirements' for all appropriate inquiries. In addition, such properties are not within the scope of today's rule.

The interim standards remain in effect only until the effective date of today's rule which promulgates federal regulations establishing standards and practices for conducting all appropriate inquiries.

On May 9, 2003, EPA published a final rule (68 FR 24888) clarifying that for the purposes of achieving the all appropriate inquiries standards of CERCLA section 101(35)(B), and until the effective date of today's regulation, persons who purchase property on or after May 31, 1997 could use either the procedures provided in ASTM E1527–2000, entitled "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process," or the earlier standard cited by Congress in the Brownfields Amendments, ASTM E1527–97.

Today's notice is a final rule and as such replaces the current interim standards for all appropriate inquiries established by Congress in the Brownfields Amendments and clarified by EPA in the May 9, 2003 final rule. Since the Agency is promulgating a final rule establishing federal regulations containing the standards and practices for conducting all appropriate inquiries, the interim standard will no longer be the operative standard for conducting all appropriate inquiries upon November 1, 2006, the effective date of today's rule. Until November 1, 2006, both the standards and practices included in today's final regulation and the current interim standards established by Congress for all appropriate inquiries will be recognized by EPA as satisfying the statutory requirements for the conduct of all appropriate inquiries under section 101(35)(B) of CERCLA.

D. What are the Liability Protections Established Under the Brownfields Amendments?

The Brownfields Amendments provide important liability protections for landowners who qualify as contiguous property owners, bona fide prospective purchasers, or innocent landowners. To meet the statutory requirements for any of these landowner liability protections, a landowner must meet certain threshold requirements and satisfy certain continuing obligations. To qualify as a bona fide prospective purchaser, contiguous property owner, or innocent landowner, a person must perform "all appropriate inquiries" on or before the date on which the person acquired the property. Bona fide prospective purchasers and contiguous property owners also must demonstrate that they are not potentially liable or affiliated with any other person that is potentially liable for response costs at the property. In the case of contiguous property owners, the landowner claiming to be a contiguous property owner also must demonstrate that he did not cause, contribute, or consent to any release or threatened release of hazardous substances. To meet the statutory requirements for a bona fide

prospective purchaser, a property owner must have acquired a property subsequent to any disposal activities involving hazardous substances at the property.

Continuing obligations required under the statute include complying with land use restrictions and not impeding the effectiveness or integrity of institutional controls; taking "reasonable steps" with respect to hazardous substances affecting a landowner's property to prevent releases; providing cooperation, assistance and access to EPA, a state, or other party conducting response actions or natural resource restoration at the property; complying with CERCLA information requests and administrative subpoenas; and providing legally required notices. For a more detailed discussion of these threshold and continuing requirements please see EPA, 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, 2003). A copy of this document is available in the docket for today's rule.

EPA notes that, as explained below, persons conducting all appropriate inquiries in compliance with today's final rule are not entitled to the CERCLA liability protections provided for innocent landowners, bona fide prospective purchasers, and contiguous property owners, unless they also comply with all of the continuing obligations established under the statute. As explained below, compliance with today's final rule is only one requirement necessary for CERCLA liability protection. We also note that the requirements of today's rule apply to prospective property owners who are seeking protection from liability under the federal Superfund Law (CERCLA). Prospective property owners wishing to establish protection from, or a defense to, liability under state superfund or other related laws must comply with the all criteria established under state laws, including any criteria for conducting site assessments or all appropriate inquiries established under applicable state statutes or regulations.

1. Bona Fide Prospective Purchaser

The Brownfields Amendments added a new bona fide prospective purchaser provision at CERCLA section 107(r). The provision provides protection from CERCLA liability, and limits EPA's recourse for unrecovered response costs to a lien on property for the lesser of the unrecovered response costs or increase in fair market value attributable to EPA's response action. To meet the statutory requirements for a bona fide prospective purchaser, a person must meet the requirements set forth in CERCLA sections 101(40) and 107(r). A bona fide prospective purchaser must have bought property after January 11, 2002 (the date of enactment of the Brownfields Amendments). A bona fide prospective purchaser may purchase property with knowledge of contamination after performing all appropriate inquiries, provided the property owner meets or complies with all of the other statutory requirements set forth in CERCLA section 101(40). Conducting all appropriate inquiries *alone* does not provide a landowner with protection against CERCLA liability. Landowners who want to qualify as bona fide prospective purchasers must comply with all of the statutory requirements. The statutory requirements include, without limitation, that the landowner must:

- Have acquired a property after all disposal of hazardous substances at the property ceased;
- Provide all legally required notices with respect to the discovery or release of any hazardous substances at the property;
- Exercise appropriate care by taking reasonable steps to stop continuing releases, prevent any threatened future release, and prevent or limit human, environmental, or natural resources exposure to any previously released hazardous substance;
- Provide full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restorations;
- Comply with land use restrictions established or relied on in connection with a response action;
- Not impede the effectiveness or integrity of any institutional controls;
- Comply with any CERCLA request for information or administrative subpoena; and
- Not be potentially liable, or affiliated with any other person who is potentially liable for response costs for addressing releases at the property.

Persons claiming to be bona fide prospective purchasers should keep in mind that failure to identify an environmental condition or identify a release or threatened release of a hazardous substance on, at, in or to a property during the conduct of all appropriate inquiries does not relieve a landowner from complying with the other post-acquisition statutory requirements for obtaining the liability protections. Landowners must comply with all the statutory requirements to obtain the liability protection. For example, an inability to identify a release or threatened release during the conduct of all appropriate inquiries does not negate the landowner's responsibilities under the statute to take reasonable steps to stop a release, prevent a threatened release, and prevent exposure to any previous release once any release is identified. Compliance with the other statutory requirements for the bona fide prospective purchaser liability protection is not contingent upon the findings of all appropriate inquiries.

2. Contiguous Property Owner

The Brownfields Amendments added a new contiguous property owner provision at CERCLA section 107(q). This provision excludes from the definition of "owner" or "operator" under CERCLA section 107(a)(1) and (2) a person who owns property that is "contiguous to, or otherwise similarly situated with respect to, and that is or may be contaminated by a release or threatened release of a hazardous substance from" property owned by someone else. To qualify as a contiguous property owner, a landowner must have no knowledge or reason to know of contamination at the time of acquisition, have conducted all appropriate inquiries, and meet all of the criteria set forth in CERCLA section 107(q)(1)(A), which include, without limitation:

- Not causing, contributing, or consenting to the release or threatened release;
- Not being potentially liable nor affiliated with any other person who is potentially liable for response costs at the property;
- Taking reasonable steps to stop continuing releases, prevent any threatened release, and prevent or limit human, environmental, or natural resource exposure to any hazardous substances released on or from the landowner's property;
- Providing full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restorations;
- Complying with land use restrictions established or relied on in connection with a response action;
- Not impeding the effectiveness or integrity of any institutional controls;
- Complying with any CERCLA request for information or administrative subpoena;
- Providing all legally required notices with respect to discovery or release of any hazardous substances at the property.

The contiguous property owner liability protection "protects parties that

are essentially victims of pollution incidents caused by their neighbor's actions." S. Rep. No. 107–2, at 10 (2001). Contiguous property owners must perform all appropriate inquiries prior to purchasing property. However, performing all appropriate inquiries in accordance with the regulatory requirements alone is not sufficient to assert the liability protections afforded under CERCLA. Property owners must fully comply with all of the statutory requirements to be afforded the contiguous property owner liability protection. Persons who know, or have reason to know, that the property is or could be contaminated at the time of acquisition of a property cannot qualify for the liability protection as a contiguous property owner, but may be entitled to bona fide prospective purchaser status.

Persons claiming to be contiguous property owners should keep in mind that failure to identify an environmental condition or identify a release or threatened release of a hazardous substance on, at, in or to a property during the conduct of all appropriate inquiries, does not relieve a landowner from complying with the other statutory requirements for obtaining the contiguous landowner liability limitation. Landowners must comply with all the statutory requirements to qualify for the liability protections. For example, an inability to identify a release or threatened release during the conduct of all appropriate inquiries does not negate the landowner's responsibilities under the statute to take reasonable steps to stop the release, prevent a threatened release, and prevent exposure to previous releases once a release is identified. None of the other statutory requirements for the contiguous property owner liability protection is contingent upon the results of the conduct of all appropriate inquiries.

3. Innocent Landowner

The Brownfields Amendments also clarify the innocent landowner defense. To qualify as an innocent landowner, a person must conduct all appropriate inquiries and meet all of the statutory requirements. The requirements include, without limitation:

- Having no knowledge or reason to know that any hazardous substance which is the subject of a release or threatened release was disposed of on, in, or at the facility;
- Providing full cooperation, assistance and access to persons authorized to conduct response actions at the property;
- Complying with any land use restrictions and not impeding the effectiveness or integrity of any institutional controls;
- Taking reasonable steps to stop continuing releases, prevent any threatened release, and prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substances;

To successfully assert an innocent landowner liability defense, a property owner must demonstrate compliance with CERCLA section 107(b)(3) as well. Such persons must establish, by a preponderance of the evidence:

- That the release or threat of release of hazardous substances and the resulting damages were caused by an act or omission of a third party with whom the person does not have employment, agency, or a contractual relationship;
- The person exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances;
- Took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.

Like contiguous property owners, innocent landowners must perform all appropriate inquiries prior to or on the date of acquisition of a property and cannot know, or have reason to know, of contamination to qualify for this landowner liability protection. Persons claiming to be innocent landowners also should keep in mind that failure to identify an environmental condition or identify a release or threatened release of a hazardous substance on, at, in or to a property during the conduct of all appropriate inquiries, does not relieve or exempt a landowner from complying with the other statutory requirements for asserting the innocent landowner defense. Landowners must comply with all the statutory requirements to obtain the defense. For example, an inability to identify a release or threatened release during the conduct of all appropriate inquiries does not negate the landowner's responsibilities under the statute to take reasonable steps to stop the release, prevent a threatened release, and prevent exposure to a previous release. Compliance with the other statutory requirements for the innocent landowner defense is not contingent upon the results of an all appropriate inquiries investigation.

E. What Criteria Did Congress Establish for the All Appropriate Inquiries Standard?

Congress included in the Brownfields Amendments a list of criteria that the Agency must include in the regulations establishing standards and practices for conducting all appropriate inquiries. In addition to providing these criteria in the statute, Congress instructed EPA to develop regulations establishing standards and practices for conducting all appropriate inquiries in accordance with generally accepted good commercial and customary standards and practices. The criteria are set forth in CERCLA section 101(35)(2)(B)(iii) and include:

- The results of an inquiry by an environmental professional.
- Interviews with past and present owners, operators, and occupants of the facility for the purpose of gathering information regarding the potential for contamination at the facility.
- Reviews of historical sources, such as chain of title documents, aerial photographs, building department records, and land use records, to determine previous uses and occupancies of the real property since the property was first developed.
- Searches for recorded environmental cleanup liens against the facility that are filed under federal, state, or local law.
- Reviews of federal, state, and local government records, waste disposal records, underground storage tank records, and hazardous waste handling, generation, treatment, disposal, and spill records, concerning contamination at or near the facility.
- Visual inspections of the facility and of adjoining properties.
- Specialized knowledge or experience on the part of the defendant.
- The relationship of the purchase price to the value of the property, if the property was not contaminated.
- Commonly known or reasonably ascertainable information about the property.
- The degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation.

III. Summary of Comments and Changes From Proposed Rule to Final Rule

EPA received over 400 public comments in response to the August 26, 2004 proposed rule. Comments were received from environmental consultants with experience in performing site assessments, trade

associations, state government agencies, environmental interest groups, and other public interest associations. Commenters generally supported the purpose and goals of the proposed rule. Many commenters complimented the Agency on its decision to develop the proposed rule using the negotiated rulemaking process. However, commenters had differing views on certain aspects of the proposed rule. In particular, the Agency received widely differing views on the proposed definition of "environmental professional." Although many commenters supported the definition as proposed, other commenters raised concerns regarding the stringency of the proposed qualifications. A significant number of commenters applauded the proposed definition of an environmental professional and stated that it may increase the rigor and caliber of environmental site investigations. Commenters who would not qualify as an environmental professional under the proposed definition raised concerns with regard to the specific qualifications proposed.

EPA received a significant number of comments regarding the statutory requirements for qualifying for the CERCLA liability protections. Several commenters also raised concerns with regard to the performance-based approach to the all appropriate inquiries investigation included in the proposed rule. Commenters were concerned that the proposed performance-based approach would make it more difficult to qualify for the CERCLA liability protections than an approach that requires strict adherence to prescriptive data gathering requirements that do not allow for the application of professional judgment. However, the vast majority of commenters who commented on the performance-based nature of the proposed rule supported the proposed approach.

Other commenters raised concerns with regard to the proposed rule's requirements to identify and comment upon the significance of "data gaps" where the lack of information may affect the ability of an environmental professional to render an opinion regarding conditions at a property that are indicative of releases or threatened releases of hazardous substances. Commenters were concerned that if any data gaps exist potential contamination would not be identified, allowing property owners to escape liability for contamination. Other commenters supported the proposed requirement to identify data gaps, or missing information, that may affect the environmental professional's ability to render an opinion regarding the environmental conditions at a property and comment on their significance in this regard and stated that the requirement would lend credibility to the inquiry's final report.

We received many comments on the proposed provision to compare the purchase price of a property to the fair market value of the property (if the property were not contaminated). One concern raised is that commenters believe that the exact market value of a property is difficult to determine. Some commenters took exception to the fact that EPA did not propose that prospective landowners have to conduct formal real estate appraisals of the property to determine fair market value. Although this provision has been a statutory requirement for the conduct of all appropriate inquiries since 1986, some commenters thought the requirement should not be included within the scope of all appropriate inquiries. Other commenters stated that the environmental professional should not be required to undertake the comparison.

We received some comments on the results of the economic impact analysis that was conducted to assess the potential costs and impacts of the proposed rule. Many commenters generally agreed with the Agency's conclusion that the average incremental cost increase associated with the requirements in the proposed rule over the current industry standard would be minimal. However, some commenters asserted that EPA underestimated the incremental costs associated with the proposed rule. Although a few commenters mentioned particular activities included as requirements in the proposed rule that would increase the burdens and costs associated with conducting all appropriate inquiries, most of these commenters did not provide specific reasons for claimed cost increases over baseline activities. Some commenters simply stated that the proposed requirements would result in an increase in the price of phase I environmental site assessments. We provide a summary of the comments received on the economic impact analysis for the proposed rule, our responses to issues raised by commenters, and the results of some additional analyses conducted based on some of the issues raised, in an addendum to the economic impact analysis, which is provided in the docket for today's final rule.

In section IV of this preamble, we discuss the requirements of the final rule, including a summary of the provisions included in the August 26, 2004 proposed rule, the significant comments raised in response to the proposed provisions, and a summary of our rationale for the final rule requirements. Generally, the final rule closely resembles the provisions included in the proposed rule. We adopted relatively minor changes in response to public comments. For example, we received a number of comments urging EPA to modify the proposed definition of environmental professional to allow individuals who have significant experience in conducting environmental site assessments, but do not have a Baccalaureate degree, to qualify as environmental professionals. We were convinced by the arguments presented in many of these public comments. Therefore, the definition of an environmental professional included in today's final rule allows individuals with ten years of relevant full time experience to qualify as an environmental professional for the purpose of overseeing and performing all appropriate inquiries.

With respect to the proposed requirements governing the use of previously-conducted environmental site assessments for a particular property, we agreed with commenters who pointed out the proposed rule was unclear. In today's final rule, we modify the proposed rule language to allow for the use of information contained in previously-conducted assessments, even if the information was collected more than a year prior to the date on which the subject property is acquired. The final rule does require that all aspects of a site assessment, or all appropriate inquiries investigation, completed more than one year prior to the date of acquisition of the subject property be updated to reflect current conditions and current property-specific information. In the case of all appropriate inquiries investigations completed less than one year prior to the date of acquisition of the subject property but more than 180 days before the acquisition date, the final rule retains the requirements of the proposed rule that only certain aspects of the all appropriate inquiries must be updated.

In the case of the requirement to search for institutional controls that was included in the proposed requirements to review federal, state, tribal and local government records, we agreed with commenters who pointed out that searching for institutional controls associated with properties located within a half mile of the subject property is overly burdensome and without sufficient benefit to the purpose of the investigation. The final rule

requires that the search for institutional controls be confined to the subject property only.

We adopted one other change in the final rule, based upon public comments. In the proposed rule, we delineated responsibilities for particular aspects of the all appropriate inquiries investigation between the environmental professional and the prospective landowner of the subject property (or grantee). We defined the inquiry of the environmental professional to include: interviews with past and present owners, operators and occupants; reviews of historical sources of information; reviews of federal state tribal and local government records; visual inspections of the facility and adjoining property; commonly known or reasonably ascertainable information; and degree of obviousness of the presence or likely presence of contamination at the property and the ability to detect the contamination by appropriate investigation. We also defined "additional inquiries" that must be conducted by the prospective landowner or grantee (or an individual on the prospective landowner's or grantee's behalf). These "additional inquiries" include: specialized knowledge or experience of the prospective landowner (or grantee); the relationship of the purchase price to the fair market value of the property, if the property was not contaminated; and commonly known or reasonably ascertainable information. The requirement to search for environmental cleanup liens was proposed to be the responsibility of the prospective landowner (or grantee), if the search is not conducted by the environmental professional. The proposed rule required the prospective landowner (or grantee) to provide all information collected as part of the "additional inquiries" to the environmental professional.

The final rule retains the proposed delineation of responsibilities. However, based upon the input provided in public comments, the final rule does not require the prospective landowner (or grantee) to provide the information collected as part of the "additional inquiries" to the environmental professional. Although we continue to believe that the information collected or held by the prospective landowner (or grantee) should be provided to the environmental professional overseeing the other aspects of the all appropriate inquiries, we agree with commenters who asserted that prospective landowners and grantees should not be required to provide this information to the environmental professional. Commenters argued that property owners (and grantees) may want to hold some information (*e.g.*, the purchase price of the property) confidential. CERCLA liability rests with the owner or operator of a property and not with an environmental professional hired by the prospective landowner and who is not involved with the ownership or operation of the property. Since it ultimately is up to the owner or operator of a property to defend his or herself against any claims to liability, we agree with commenters that asserted that the regulations should not require that prospective landowners (or grantees) provide information collected to comply with the "additional inquiries" provisions to the environmental professional. Should the required information not be provided to the environmental professional, the environmental professional should assess the impact that the lack of such information may have on his or her ability to render an opinion with regard to conditions indicative of releases or threatened releases of hazardous substances on, at, in or to the property. If the lack of information does impact the ability of the environmental professional to render an opinion with regard to the environmental conditions of the property, the environmental professional should note the missing information as a data gap in the written report. We discuss each of the requirements of the final rule in Section IV of this preamble.

IV. Detailed Description of Today's Rule

A. What Is the Purpose and Scope of the Rule?

The purpose of today's rule is to establish federal standards and practices for the conduct of all appropriate inquiries. Such inquiries must be conducted by persons seeking any of the landowner liability protections under CERCLA prior to acquiring a property (as outlined in Section II.D. of this preamble). In addition, persons receiving federal brownfields grants under the authorities of CERCLA section 104(k)(2)(B) to conduct site characterizations and assessments must conduct such activities in compliance with the all appropriate inquiries regulations.

In the case of persons claiming one of the CERCLA landowner liability protections, the scope of today's rule includes the conduct of all appropriate inquiries for the purpose of identifying releases and threatened releases of hazardous substances on, at, in or to the property that would be the subject of a response action for which a liability protection would be needed and such a property is owned by the person asserting protection from liability. CERCLA liability is limited to releases and threatened releases of hazardous substances which cause the incurrence of response costs. Therefore, in the case of all appropriate inquiries conducted for the purpose of qualifying for protection from CERCLA liability (CERCLA section 107), the scope of the inquiries is to identify releases and threatened releases of hazardous substances which cause or threaten to cause the incurrence of response costs.

In the case of persons receiving Federal brownfields grants to conduct site characterizations and assessments, the scope of the all appropriate inquiries standards and practices may be broader. The Brownfields Amendments include a definition of a "brownfield site" that includes properties contaminated or potentially contaminated with substances not included in the definition of "hazardous substance" in CERCLA section 101(14). Brownfields sites include properties contaminated with (or potentially contaminated with) hazardous substances, petroleum and petroleum products, controlled substances, and pollutants and contaminants (as defined in CERCLA section 101(33)). Therefore, in the case of persons receiving federal brownfields grant monies to conduct site assessment and characterization activities at brownfields sites, the scope of the all appropriate inquiries may include these other substances, as outlined in § 312.1(c)(2), to ensure that persons receiving brownfields grants can appropriately and fully assess the properties as required. It is not the case that every recipient of a brownfields assessment grant has to include within the scope of the all appropriate inquiries petroleum and petroleum products, controlled substances and CERCLA pollutants and contaminants (as defined in CERCLA section 101(33)). However, in those cases where the terms and conditions of the grant or the cooperative agreement with the grantee designate a broader scope to the investigation (beyond CERCLA hazardous substances), then the scope of the all appropriate inquiries should include the additional substances or contaminants.

The scope of today's rule does not include property purchased by a non-governmental entity or non-commercial entity for "residential use or other similar uses * * * [where] a facility inspection and title search * * * reveal no basis for further investigation." (Pub. L. 107–118 § 223). CERCLA section

101(35)(B)(v) states that in those cases, title search and facility inspection that reveal no basis for further investigation shall satisfy the requirements for all appropriate inquiries.

We note that today's rule does not affect the existing CERCLA liability protections for state and local governments that acquire ownership to properties involuntarily in their functions as sovereigns, pursuant to CERCLA sections 101(20)(D) and 101(35)(A)(ii). Involuntary acquisition of properties by state and local governments fall under those CERCLA provisions and EPA's policy guidance on those provisions, not under the all appropriate inquiry provisions of CERCLA section 101(35)(B).

B. To Whom Is the Rule Applicable?

Today's rule applies to any person who may seek the landowner liability protections of CERCLA as an innocent landowner, contiguous property owner, or bona fide prospective purchaser. The statutory requirements to obtain each of these landowner liability protections include the conduct of all appropriate inquiries. In addition, the rule applies to individuals receiving Federal grant monies under CERCLA section 104(k)(2)(B) to conduct site characterization and assessment activities. Persons receiving such grant monies must conduct the site characterization and assessment in compliance with the all appropriate inquiries regulatory requirements.

C. Does the Final Rule Include Any New Reporting or Disclosure Obligations?

The final rule does not include any new reporting or disclosure obligations. The rule only applies to those property owners who may seek the landowner liability protections provided under CERCLA for innocent landowners, contiguous property owners or bona fide prospective purchasers. The documentation requirements included in this rule are primarily intended to enhance the inquiries by requiring the environmental professional to record the results of the inquiries and his or her conclusions regarding conditions indicative of releases and threatened releases on, at, in, or to the property and to provide a record of the environmental professional's inquiry. Today's rule contains no new requirements to notify or submit information to EPA or any other government entity.

Although today's rule does not include any new disclosure requirements, CERCLA section 103 does require persons in charge of vessels and facilities, including on-shore and off-shore facilities, to notify the National Response Center of any release of a hazardous substance from the vessel or facility in a quantity equal to or greater than a "reportable quantity," as defined in CERCLA section 102(b). Today's rule includes no changes to this reporting requirement nor any changes to any other reporting or disclosure requirements under federal, tribal, or state law.

D. What Are the Final Documentation Requirements?

The proposed rule required that the environmental professional, on behalf of the property owner, document the results of the all appropriate inquiries in a written report. As explained in the preamble to the proposed rule, the property owner could use this report to document the results of the inquiries. Such a report can be similar in nature to the type of report previously provided under generally accepted commercial practices. We proposed no requirements regarding the length, structure, or specific format of the written report. In addition, the proposed rule did not require that a written report of any kind be submitted to EPA or any other government agency, or that a written report be maintained on-site at the subject property for any length of time.

Today's final rule retains the requirements, as proposed, for documenting the results of the all appropriate inquiries investigation conducted under the supervision or responsible charge of an environmental professional. As noted above, the primary purpose of the documentation requirement is to enhance the inquiry of the environmental professional by requiring that the environmental professional record the results of the inquiries and his or her conclusions. The written report may allow any person claiming one of the CERCLA landowner liability protections to offer documentation in support of his or her claim that all appropriate inquiries were conducted in compliance with the federal regulations.[1] The Agency notes that while today's final regulation does not require parties conducting all appropriate inquiries to retain the written report or any other documentation discovered, consulted, or created in the course of conducting the inquiries, the retention of such documentation and records may be helpful should the property owner need to assert protection from CERCLA liability after purchasing a property.

The final rule requires that a written report documenting the results of the all appropriate inquiries include an opinion of an environmental professional as to whether the all appropriate inquiries conducted identified conditions indicative of releases or threatened releases of hazardous substances on, at, in or to the subject property. The rule also requires that the report identify data gaps in the information collected that affect the ability of the environmental professional to render such an opinion and that the environmental professional comment on the significance of the data gaps.

Several commenters raised issues with regard to the proposed requirement that the environmental professional document and comment on the significance of data gaps that affect the ability of the environmental professional to identify conditions indicative of releases or threatened releases of hazardous substances on at, in, or to the subject property. Some commenters stated that the need to identify data gaps will make it difficult to determine when an all appropriate inquiries investigation is complete and therefore the requirement would act as a disincentive to the development of potentially contaminated properties. Other commenters asserted that the fact that the regulations recognize data gaps creates a loophole that would result in property owners claiming to be protected from CERCLA liability after conducting an incomplete investigation that includes significant data gaps. These commenters raised concerns that CERCLA liability protection could be claimed by property owners simply because they conducted an all appropriate inquiries investigation, even in those cases where releases on, at, in, or to the property were missed during the investigation. Other commenters stated their support for the requirements to document data gaps, as proposed. A summary of EPA's response to these comments and the requirements for documenting data gaps included in the final rule is provided below in Section IV.N.

The final rule, at § 312.21(d), retains the proposed requirement that the environmental professional who conducts or oversees the all appropriate inquiries sign the written report. There are two purposes for the requirement to include a signature in the report. First, the individual signing the report must declare, on the signature page, that he or she meets the definition of an

[1] Nothing in this regulation or preamble is intended to suggest that any particular documentation prepared in conducting all appropriate inquiries will be admissible in court in any litigation where a party raises one of the liability protections, or will in any way alter the judicial rules of evidence

environmental professional, as provided in § 312.10. In addition, the rule requires that the environmental professional declare that: [I, We] have developed and performed the all appropriate inquiries in conformance with the standards and practices set forth in 40 CFR part 312.

Some commenters raised concerns about whether the proposed rule would require the environmental professional to certify the all appropriate inquiries report and its findings. Today's final rule does not require the environmental professional to "certify" the results of the all appropriate inquiries when signing the report. The two statements or declarations mentioned above and required to be included in the final written report documenting the conduct of all appropriate inquiries are meant to document that an individual meeting the qualifications of an environmental professional was involved in the conduct of the all appropriate inquiries and that the activities performed by, or under the supervision or responsible charge of, the environmental professional were performed in conformance with the regulations. Reports signed by individuals holding a Professional Engineer (P.E.) or Professional Geologist (P.G.) license, need not include the individual's professional seal.

A few commenters requested that EPA include specific requirements for the content of a final report in the final rule. Given that the type and extent of information available on a particular property may vary greatly with its size, type, past uses, and location, and the type and extent of information necessary for an environmental professional to render an opinion regarding conditions indicative of releases or threatened releases of hazardous substances associated with any property may vary, we decided not to include in the final rule specific requirements governing the content of all reports.

The provisions of the final rule allow for the property owner (or grantee) and any environmental professional engaged in the conduct of all appropriate inquiries for a specific property to design and develop the format and content of a written report that will meet the prospective landowner's (or grantee's) objectives and information needs in addition to providing documentation that all appropriate inquiries were completed prior to the acquisition of the property, should the landowner (or grantee) need to assert protection from liability after purchasing a property.

E What Are the Qualifications for an Environmental Professional?

Proposed Rule

In the Brownfields Amendments, Congress required that all appropriate inquiries include "the results of an inquiry by an environmental professional" (CERCLA section 101(35)(B)(iii)(I)). The proposed rule included minimal qualifications for persons managing or overseeing all appropriate inquiries. The intent of setting minimum professional qualifications, is to ensure that all inquiries are conducted at a high level of professional ability and ensure the overall quality of both the inquiries conducted and the conclusions or opinions rendered with regard to conditions indicative of the presence of a release or threatened release on, at, in, or to a property, based upon the results of all inquiries. The proposed rule required that an environmental professional conducting or overseeing all appropriate inquiries possess sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding the presence of releases or threatened releases of hazardous substances to the surface or subsurface of a property. In addition, the proposed rule included minimum qualifications, including minimum levels of education and experience, that characterize the type of professional who is best qualified to oversee and direct the development of comprehensive inquiries and provide the landowner with sound conclusions and opinions regarding the potential for releases or threatened releases to be present at the property. The proposed rule allowed for individuals not meeting the proposed definition of an environmental professional to contribute to and participate in the all appropriate inquiries on the condition that such individuals are conducting inquiries activities under the supervision or responsible charge of an individual that meets the regulatory definition of an environmental professional.

The proposed rule required that the final review of the all appropriate inquiries and the conclusions that follow from the inquiries rest with an individual who qualifies as an environmental professional, as defined in proposed section § 312.10 of the proposed rule. The proposed rule also required that in signing the report, the environmental professional must document that he or she meets the definition of an "environmental professional" included in the regulations.

The proposed definition first and foremost required that, to qualify as an environmental professional, a person must "possess sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding the presence of releases or threatened releases * * * to the surface or subsurface of a property, sufficient to meet the objectives and performance factors" that are provided in the proposed regulation. The proposed definition of an environmental professional included individuals who possess the following combinations of education and experience.

- Hold a current Professional Engineer's (P.E.) or Professional Geologist's (P.G.) license or registration from a state, tribe, or U.S. territory and have the equivalent of three (3) years of full-time relevant experience; or
- Be licensed or certified by the federal government, a state, tribe, or U.S. territory to perform environmental inquiries as defined in § 312.21 and have the equivalent of three (3) years of full-time relevant experience; or
- Have a Baccalaureate or higher degree from an accredited institution of higher education in a relevant discipline of engineering, environmental science, or earth science and the equivalent of five (5) years of full-time relevant experience; or
- As of the date of the promulgation of the final rule, have a Baccalaureate or higher degree from an accredited institution of higher education and the equivalent of ten (10) years of full-time relevant experience.

Public Comments

We received a significant number of public comments on the proposed definition of environmental professional. Many commenters supported the definition of environmental professional as proposed. However, a significant number of commenters raised concerns with regard to the proposed educational requirements. Commenters pointed out that the proposed minimum qualifications for an environmental professional did not allow for individuals with many years of relevant experience in conducting environmental site assessments to qualify as environmental professionals, if such individuals do not have college degrees. The proposed rule only allowed for persons with a Baccalaureate degree or higher in specific disciplines of science and engineering, and a specific number of years of experience, to qualify as an

environmental professional, unless an individual was otherwise licensed as an environmental professional by a state, tribe or the federal government. Some commenters questioned the Agency's reasoning for restricting the degree requirements to only certain types of science or engineering. Commenters requested that EPA provide more specific definitions of the types of science and engineering degrees that would be necessary to qualify as an environmental professional.

Commenters also asserted that the proposed "grandfather clause" allowing for individuals having a Baccalaureate degree (or higher) and who accumulated ten years of full time relevant experience on or before the promulgation date of the final rule to qualify as an environmental professional was too stringent and provided too small of a window of opportunity for individuals not otherwise meeting the proposed definition of environmental professional to qualify.

Some commenters stated that the definition of environmental professional should not be restricted to those individuals licensed as P.E.s or P.G.s. A few commenters stated that a licensed professional is no more qualified to perform all appropriate inquiries investigations than other individuals with a significant number of years of experience in conducting such activities. Other commenters asserted that only licensed P.E.s and P.G.s are qualified to supervise all appropriate inquiries activities.

EPA also received comments from independent professional certification organizations and members of these organizations, including the Academy of Certified Hazardous Materials Managers, requesting that their organizations' certification programs be named in the regulatory definition of an environmental professional.

Final Rule

After careful consideration of the issues raised by commenters regarding the proposed definition of environmental professional, we made a few modifications to the proposed definition to reduce the potential burden that the proposed definition may have placed upon individuals who have significant experience in conducting environmental site assessments but do not meet the proposed educational, or college degree, requirements. We agree with those commenters who asserted that individuals with a significant number of years of experience in performing environmental site assessments, or all appropriate inquiries investigations, should qualify as environmental professionals for the purpose of conducting all appropriate inquiries, even in cases where such individuals do not have a college degree. Therefore, in the final rule, persons with ten or more years of full-time relevant experience in conducting environmental site assessments and related activities may qualify as environmental professionals, without having received a college degree.

In addition, we agreed with commenters who pointed out that the requirement that environmental professionals hold specific types of science or engineering degrees was too limiting. In the final rule, persons with any science or engineering degree (regardless of specific discipline in science or engineering) can qualify as an environmental professional, if they also meet the other required qualifications, including the requirement to have five (5) years of full-time relevant experience.

We also agree with commenters who asserted that the proposed grandfather clause was too restrictive. As mentioned above, we agree with commenters who pointed out that individuals with a significant number of years of experience in conducting environmental site assessments or all appropriate inquiries investigations should be able to qualify as environmental professionals, for the purpose of carrying out the provisions of today's rulemaking. In addition, we agree with commenters who stated that the ability for experienced professionals to qualify as an environmental professional should not be limited to those who meet the threshold qualifications on the effective date of the final rule. Therefore, the proposed grandfather clause is not included within the definition of environmental professional in the final rule. As explained above, in today's final rule, individuals with ten or more years of full-time relevant experience in conducting environmental site assessments and related investigations will qualify as environmental professionals for the purposes of this rulemaking.

The final rule retains the provision recognizing as environmental professionals those individuals who are licensed by any tribal or state government as a P.E. or P.G., and have three years of full-time relevant experience in conducting all appropriate inquiries. We continue to contend that such individuals have sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding conditions indicative of releases or threatened releases on, at, in, or to a property, including the presence of releases to the surface or subsurface of the property, sufficient to meet the objectives and performance factors provided in the regulation. The rigor of the tribal- and state-licensed P.E. and P.G. certification processes, including the educational and training requirements, as well as the examination requirements, paired with the requirement to have three years of relevant professional experience conducting all appropriate inquiries will ensure that all appropriate inquiries are conducted under the supervision or responsible charge of an individual well qualified to oversee the collection and interpretation of site-specific information and render informed opinions and conclusions regarding the environmental conditions at a property, including opinions and conclusions regarding conditions indicative of releases or threatened releases of hazardous substances and other contaminants on, at, in, or to the property. The Agency's decision to recognize tribal and state-licensed P.E.s and P.G.s reflects the fact that tribal governments and state legislatures hold such professionals responsible (legally and ethically) for safeguarding public safety, public health, and the environment. To become a P.E. or P.G. requires that an applicant have a combination of accredited college education followed by approved professional training and experience. Once a publicly-appointed review board approves a candidate's credentials, the candidate is permitted to take a rigorous exam. The candidate must pass the examination to earn a license, and perform ethically to maintain it. After a state or tribe grants a license to an individual, and as a condition of maintaining the license, many states require P.E.s and P.G.s to maintain proficiency by participating in approved continuing education and professional development programs. In addition, tribal and state licensing boards can investigate complaints of negligence or incompetence on the part of licensed professionals, and may impose fines and other disciplinary actions such as cease and desist orders or license revocation.

Although the final rule recognizes tribal and state-licensed P.E. and P.G.s and other such government licensed environmental professionals with three years of experience to be environmental professionals, the rule does not restrict the definition of an environmental professional to these licensed individuals. The definition of an

environmental professional also includes individuals who hold a Baccalaureate or higher degree from an accredited institution of higher education in engineering or science and have the equivalent of five (5) years of full-time relevant experience in conducting environmental site assessments, or all appropriate inquiries. In addition, individuals with ten years of full-time relevant experience in conducting environmental site assessments, or all appropriate inquiries qualify as environmental professionals for the purpose of conducting all appropriate inquiries. Individuals with these qualifications most likely will possess sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding conditions indicative of releases or threatened releases on, at, in, or to a property, sufficient to meet the objectives and performance factors included in § 312.20(e) and (f).

In addition to the qualifications for environmental professionals mentioned above, EPA is retaining the proposed provision to include within the definition of an environmental professional individuals who are licensed to perform environmental site assessments or all appropriate inquiries by the Federal government (e.g., the Bureau of Indian Affairs) or under a state or tribal certification program, provided that these individuals also have three years of full-time relevant experience. We contend that individuals licensed by state and tribal governments, or by any department or agency within the federal government, to perform all appropriate inquiries or environmental site assessments, should be allowed to qualify as an environmental professional under today's regulation. State and tribal agencies may best determine the qualifications defining individuals who "possess sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding conditions indicative of releases or threatened releases on, at, in, or to a property, sufficient to meet the rule's objectives and performance factors" within any particular state or tribal jurisdiction.

In response to requests from members of independent certification organizations that EPA recognize in the regulation those organizations whose certification requirements meet the environmental professional qualifications included in the final rule, we point out that today's final rule does not reference any private party professional certification standards. Such an approach would require that EPA review the certification requirements of each organization to determine whether or not each organization's certification requirements meet or exceed the regulatory qualifications for an environmental professional. Given that there may be many such organizations and given that each organization may review and change its certification qualifications on a frequent or periodic basis, we conclude that such a undertaking is not practicable. EPA does not have the necessary resources to review the procedures of each private certification organization and review and approve each organization's certification qualifications. Therefore, the final rule includes within the regulatory definition of an environmental professional, general performance-based standards or qualifications for determining who may meet the definition of an environmental professional for the purposes of conducting all appropriate inquiries. These standards include education and experience qualifications, as summarized below. The final rule does not recognize, or reference, any private organization's certification program within the context of the regulatory language. However, the Agency notes that any individual with a certification from a private certification organization where the organization's certification qualifications include the same or more stringent education and experience requirements as those included in today's final regulation will meet the definition of an environmental professional for the purposes of this regulation.

Based upon the input received from the public commenters, EPA determined that the definition of environmental professional included in today's final rule establishes a balance between the merits of setting a high standard of excellence for the conduct of all appropriate inquiries through the establishment of stringent qualifications for environmental professionals and the need to ensure that experienced and highly competent individuals currently conducting all appropriate inquiries are not displaced.

Summary of Final Rule's Definition of Environmental Professional

In summary, the definition of environmental professional included in today's final rule includes individuals who possess the following qualifications:

- Hold a current Professional Engineer's or Professional Geologist's license or registration from a state, tribe, or U.S. territory and have the equivalent of three (3) years of full-time relevant experience; or
- Be licensed or certified by the federal government, a state, tribe, or U.S. territory to perform environmental inquiries as defined in § 312.21 and have the equivalent of three (3) years of full-time relevant experience; or
- Have a Baccalaureate or higher degree from an accredited institution of higher education in science or engineering and the equivalent of five (5) years of full-time relevant experience; or
- Have the equivalent of ten (10) years of full-time relevant experience.

The definition of "relevant experience" is "participation in the performance of environmental site assessments that may include environmental analyses, investigations, and remediation which involve the understanding of surface and subsurface environmental conditions and the processes used to evaluate these conditions and for which professional judgment was used to develop opinions regarding conditions indicative of releases or threatened releases * * * to the subject property."

The final rule retains the proposed requirement that environmental professionals remain current in their field by participating in continuing education or other activities and be able to demonstrate such efforts.

The final rule also retains the allowance for individuals not meeting the definition of an environmental professional to contribute to and participate in the all appropriate inquiries on the condition that such individuals are conducting inquiries activities under the supervision or responsible charge of an individual that meets the regulatory definition of an environmental professional. This provision allows for a team of individuals working for the same firm or organization (e.g., individuals working for the same government agency) to share the workload for conducting all appropriate inquiries for a single property, provided that one member of the team meets the definition of an environmental professional and reviews the results and conclusions of the inquiries and signs the final report.

The final rule requires that the final review of the all appropriate inquiries and the conclusions that follow from the inquiries rest with an individual who qualifies as an environmental professional, as defined in § 312.10. The final rule also requires that in signing

the report, the environmental professional must document that he or she meets the definition of an "environmental professional" included in the regulations.

F. References

Proposed Rule

In the proposed rule, the Agency reserved a reference section and stated in the preamble that we may include references to applicable voluntary consensus standards developed by standards' developing organizations that are not inconsistent with the final regulatory requirements for all appropriate inquiries or otherwise impractical. The Agency requested comments regarding available commercially accepted voluntary consensus standards that may be applicable to and compliant with the proposed federal standards for all appropriate inquiries.

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104–113, section 12(d) (15 U.S.C. 272 note), directs agencies to use technical standards that are developed or adopted by voluntary consensus standards bodies, unless their use would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. When developing the proposed rule, EPA considered using an existing voluntary consensus standard developed by ASTM International as the federal standard for all appropriate inquiries. This standard is known as the ASTM E1527–2000 standard (entitled "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process"). In the preamble to the proposed rule, we acknowledged the prevalent use of the ASTM E1527–2000 standard and the fact that it generally is recognized as good and customary commercial practice. However, when we proposed the federal standards for all appropriate inquiries, EPA determined that the ASTM E1527–2000 standard is inconsistent with applicable law. As a result, EPA chose not to reference the ASTM E1527–2000 standard because it was inconsistent with applicable law.

Public Comments

We received relatively few comments citing available and applicable voluntary consensus standards for conducting all appropriate inquiries. Several commenters did argue that the interim standard cited in the statute, the ASTM E1527–97 Environmental Site Assessments: Phase I Environmental Site Assessment Process, or the updated ASTM E1527–2000, is sufficient to meet the statutory criteria. A few commenters stated a preference for the ASTM E1527–2000 standard over the requirements included in the proposed rule. ASTM International is a standards development organization whose committees develop voluntary consensus standards for a variety of materials, products, systems and services. ASTM International is the only standards development organization that submitted a comment requesting that the Agency consider its standard, the ASTM E1527–2000 Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process, as an equivalent standard to the federal regulations.

Final Rule

Since publication of the proposed rule, ASTM International and its E50 committee, the committee responsible for the development of the ASTM E1527–2000 Phase I Environmental Site Assessment Process, has reviewed and updated the "2000" version of the E1527 standard to address EPA's concerns regarding the differences between the ASTM E1527–2000 standard and the criteria established by Congress in the Brownfields Amendments to CERCLA. These activities were conducted within the normal review and updating process that ASTM International undertakes for each standard over a five-year cycle.

In today's final rule, EPA is referencing the standards and practices developed by ASTM International and known as Standard E1527–05 (entitled "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process") and recognizing the E1527–05 standard as consistent with today's final rule. The Agency determined that this voluntary consensus standard is consistent with today's final rule and is compliant with the statutory criteria for all appropriate inquiries. Persons conducting all appropriate inquiries may use the procedures included in the ASTM E1527–05 standard to comply with today's final rule.

It is the Agency's intent to allow for the use of applicable and compliant voluntary consensus standards when possible to facilitate implementation of the final regulations and avoid disruption to parties using voluntary consensus standards that are found to be fully compliant with the federal regulations.

G. What Is Included in "All Appropriate Inquiries?"

Proposed Rule

The proposed regulations for conducting all appropriate inquiries outlined the standards and practices for conducting the activities included in each of the statutory criterion established by Congress in the Brownfields Amendments. These criteria are set forth in CERCLA section 101(35)(B)(iii) and are:

- The results of an inquiry by an environmental professional (proposed § 312.21).
- Interviews with past and present owners, operators, and occupants of the facility for the purpose of gathering information regarding the potential for contamination at the facility (proposed § 312.23).
- Reviews of historical sources, such as chain of title documents, aerial photographs, building department records, and land use records, to determine previous uses and occupancies of the real property since the property was first developed (proposed § 312.24).
- Searches for recorded environmental cleanup liens against the facility that are filed under Federal, State, or local law (proposed § 312.25).
- Reviews of Federal, State, and local government records, waste disposal records, underground storage tank records, and hazardous waste handling, generation, treatment, disposal, and spill records, concerning contamination at or near the facility (proposed § 312.26).
- Visual inspections of the facility and of adjoining properties (proposed § 312.27).
- Specialized knowledge or experience on the part of the defendant (proposed § 312.28).
- The relationship of the purchase price to the value of the property, if the property was not contaminated (proposed § 312.29).
- Commonly known or reasonably ascertainable information about the property (proposed § 312.30).
- The degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation (proposed § 312.31).

Public Comments

We received a few comments addressing the statutory criteria and the

inclusion of certain particular criteria within the scope of the proposed rule. Some commenters requested that EPA not include in the final rule the criterion to consider the relationship of the purchase price of the property to the fair market value of the property, if the property is not contaminated. In addition, a few commenters stated the final rule should not include within the scope of the all appropriate inquiries the specialized knowledge or experience on the part of the prospective landowner.

The Agency notes that both criteria that commenters requested be removed from the scope of the all appropriate inquiries regulations are criteria specifically required by Congress to be included in the regulations. In addition, both criteria have been part of the all appropriate inquiries provisions under the CERCLA innocent landowner defense since 1986. The proposed rule included no changes from the previous statutory provisions.

Final Rule

The final rule retains provisions addressing each of the statutory criteria for the conduct of all appropriate inquiries included in CERCLA section 101(35)(B)(iii).

H Who Is Responsible for Conducting the All Appropriate Inquiries?

The Brownfields Amendments to CERCLA require persons claiming any of the landowner liability protections to conduct all appropriate inquiries into the past uses and ownership of the subject property. The criteria included in the Brownfields Amendments for the regulatory standards for all appropriate inquiries require that the inquiries include an inquiry by an environmental professional. The statute does not require that all criteria or inquiries be conducted by an environmental professional.

Proposed Rule

The proposed rule required that many, but not all, of the inquiries activities be conducted by, or under the supervision or responsible charge of, an individual meeting the qualifications of the proposed definition of an environmental professional. The proposed rule also provided that several of the activities included in the inquiries could be conducted either by the prospective landowner or grantee, and not have to be conducted under the supervision or responsible charge of the environmental professional. The proposed rule required that the results of all activities conducted by the prospective landowner or grantee, and not conducted by or under the supervision or responsible charge of the environmental professional, be provided to the environmental professional to ensure that such information could be fully considered when the environmental professional develops an opinion, based on the inquiry activities, as to whether conditions at the property are indicative of a release or threatened release of a hazardous substance (or other contaminant) on, at, in, or to the property.

The proposed rule allowed for the following activities to be the responsibility of, or conducted by, the prospective landowner or grantee and not necessarily be conducted by the environmental professional, provided the results of such inquiries or activities are provided to an environmental professional overseeing the all appropriate inquiries:

- Searches for environmental cleanup liens against the subject property that are filed or recorded under federal, tribal, state, or local law, as required by proposed § 312.25.
- Assessments of any specialized knowledge or experience on the part of the landowner, as required by § 312.28.
- An assessment of the relationship of the purchase price to the fair market value of the subject property, if the property was not contaminated, as required by § 312.29.
- An assessment of commonly known or reasonably ascertainable information about the subject property, as required by § 312.30.

The proposed rule required that all other required inquiries and activities, beyond those listed above to be conducted by, or under the supervision or responsible charge of, an environmental professional.

Public Comments

Several commenters asserted that the mandatory nature of the proposed provision requiring the prospective landowner to provide information regarding the four criteria listed above to the environmental professional is problematic. Particularly with regard to the requirement to provide "specialized knowledge or experience of the defendant," commenters pointed out difficulties in a prospective landowner being able to document such knowledge and experience sufficiently. Also, with regard to the information related to the "relationship of the purchase price to the fair market value of the property, if the property was not contaminated," many commenters pointed out that prospective landowners may not want to divulge information regarding the price paid for a property. Commenters pointed out that the requirement to consider "commonly known or reasonably ascertainable information" about a property is implicit to all aspects of the all appropriate inquiries requirements. In addition, commenters stated that CERCLA liability lies solely with the owners and operators of a vessel or property. A decision on the part of a prospective landowner to not furnish an environmental professional with certain information related to any of the statutory criteria can only affect the property owner's ability to claim a liability protection provided under the statute. In addition, the statute does not mandate that information deemed to be the responsibility of the prospective landowner and not part of the "inquiry of the environment professional" be provided to the environmental professional or even be part of the inquiry of the environmental professional. Some of the statutory criteria are inherently the responsibility of the prospective landowner.

Final Rule

We agree with the commenters who asserted that the results and information related to the criteria identified as being the responsibility of the prospective landowner should not, as a matter of law, have to be provided to the environmental professional. The statute does not mandate that a prospective landowner provide all information to an environmental professional. Given that the burden of potential CERCLA liability ultimately falls upon the property owner or operator, a prospective landowner's decision not to provide the results of an inquiry or related information to an environmental professional he or she hired to undertake other aspects of the all appropriate inquiries investigation can only affect the liability of the property owner. In addition, we believe that the environmental professional may be able to develop an opinion with regard to conditions indicative of releases or threatened releases on, at, in, or to a property based upon the results of the criteria identified to be part of the "inquiry of an environmental professional." Any information not furnished to the environmental professional by the prospective landowner that may affect the environmental professional's ability to render such an opinion may be identified by the environmental professional as a "data gap." The provisions of the final rule (as did the proposed rule) then require that the environmental professional comment on the significance of the data gap or missing information on his or her ability to render such an opinion, in light of all

other information collected and all other data sources consulted.

As a result of our consideration of the issues raised by commenters, today's final rule modifies the requirements of § 312.22 "additional inquiries" by stating (in paragraph (a)) that "persons * * * may provide the information associated with such inquiries [i.e., the information for which the prospective landowner or brownfields grantee is responsible] to the environmental professional * * *." The proposed rule provided that such information "must be provided" to the environmental professional. Although we expect that most prospective landowners and grantees will furnish available information or knowledge about a property to an environmental professional he or she hired when such information could assist the environmental professional in ascertaining the environmental conditions at a property, we affirm that compliance with the statutory criteria does not require that such information be disclosed. Ultimately, CERCLA liability rests with the owner or operator of a facility or property owner and it is the information held by the property owner or operator that may be reviewed in a court of law when determining an owner or operator's liability status, regardless of whether all information was disclosed to an environmental professional during the conduct of all appropriate inquiries.

I. When Must All Appropriate Inquiries Be Conducted?

CERCLA section 101(40)(B)(i), as amended, requires bona fide prospective purchasers to conduct all appropriate inquiries into "previous ownerships and uses of the facility." In the case of contiguous property owners, CERCLA section 107(q)(1)(A)(viii) requires that a person claiming to be a contiguous property owner conduct all appropriate inquiries "at the time at which the person acquired the property." In the case of innocent landowners, section 101(35)(B)(i)(I) of CERCLA requires that the property owner conduct all appropriate inquiries "on or before the date on which the defendant acquired the facility."

Proposed Rule

Other than to specify that all appropriate inquiries must be conducted on or prior to the date a person acquires a property, the statute is silent regarding how close to the actual date of acquisition the inquiries must be completed. The proposed rule required that all appropriate inquiries be conducted or updated within one year prior to taking title to a property. The proposed rule provided that prospective landowners could use information collected as part of previous inquiries for the same property, if the inquiries were completed or updated within one year prior to the date the property is acquired. The proposed rule required that certain information collected as part of a previous all appropriate inquiries be updated if it was collected more than 180 days prior to the date a person purchased the property. In addition, in the preamble to the proposed rule, Agency defined the date of acquisition of a property as the date on which the prospective landowner acquires title to the property.

Public Comments

Commenters generally agreed with the proposed provision to define the date of acquisition of a property as the date on which a person acquires title to the property. A few commenters stated that the requirement for an all appropriate inquiries investigation to be completed within a year of the date of acquisition of the property is too stringent and may not allow sufficient time for some property transactions to be completed. Some commenters also asserted that the proposed requirement to update certain aspects of the all appropriate inquiries investigation, if the investigation was conducted more than 180 days prior to the date of the acquisition of the property was too stringent.

Final Rule

The Agency continues to believe that the event that most closely reflects the Congressional intent of the date on which the defendant acquired the property is the date on which a person received title to the property. As explained in the preamble to the proposed rule, the Agency considered other dates, such as the date a prospective landowner signs a purchase or sale agreement. However, it could be burdensome to require a prospective landowner to have completed the all appropriate inquiries prior to having an agreement with a seller to complete a sales transaction. In fact, the time period between the date on which a sales agreement is signed and the date on which the title to the property is actually transferred to the prospective landowner may be the most convenient time for the prospective landowner to obtain access to the property and undertake the all appropriate inquiries. In addition, requiring that all appropriate inquiries be completed on some date prior to the date of title transfer could result in requiring prospective landowners to undertake all appropriate inquiries so early in the property acquisition process as to require the inquiries to be completed prior to the prospective landowner making a final decision on whether to actually acquire the property.

To increase the potential that the information collected for the all appropriate inquiries accurately reflects the proposed objectives and performance factors, as well as to increase the potential that opinions and judgments regarding the environmental conditions at a property that are included in an all appropriate inquiries report are based on current and relevant information, the Agency is retaining the proposed provision that all appropriate inquiries be conducted within one year prior to the prospective landowner acquiring the property. Today's final rule includes regulatory language at § 312.20(a) clarifying that all appropriate inquiries must be conducted within one year prior to the date on which a person acquires a property.

All appropriate inquiries may include information collected for previous inquiries that were conducted or updated within one year prior to the acquisition date of the property. In addition, as explained in more detail below, the final rule retains the requirement that several of the components of the inquiries be updated within 180 days prior to the date the property is purchased. Today's final rule includes a definition of the "date of acquisition," or purchase date, of a property (i.e., the date the landowner obtains title to the property).

Although commenters may be correct in their assertions that some property transactions may take more than a year to close, we continue to believe that it is important for the all appropriate inquiries investigation to be completed within one year prior to the date the property is acquired. We point out that the final regulation, as did the proposed regulation, allows for information from an older investigation to be used in a current investigation. However, if the prior all appropriate inquiries investigation was completed more than a year prior to the property acquisition date, all parts of the investigation must be reviewed and updated for the all appropriate inquiries to be complete. We believe that a year is sufficient time for conditions at a property to change. In particular, in cases where there is a release or threatened release at a property, significant changes to the environmental conditions of a property could occur during the course of a year. In addition, depending upon the uses and ownership of a property during the

course of a one-year time period, overall conditions at a property could change and new evidence of a release or threatened release could appear. Therefore, today's final rule requires that all appropriate inquiries completed for a particular property more than one year prior to the date of acquisition of that property, be updated in their entirety. As summarized below, the final rule does allow for the use of information contained in previous inquiries, even when the inquiries were completed more than a year prior to the property acquisition date, as long as all information was updated within a year and includes any changes that may have occurred during the interim.

J. Can a Prospective Landowner Use Information Collected for Previous Inquiries Completed for the Same Property?

Proposed Rule

The proposed rule allowed parties conducting all appropriate inquiries to use the results of and information from previous inquiries completed for the same property, under certain conditions. First, the previous inquiries must have been conducted in compliance with the proposed rule and with CERCLA sections 101(35)(B), 101(40)(B) and 107(q)(A)(viii). In addition, the information in the previous inquiries must have been collected or updated within one year prior to the date of acquisition of the property. Certain types of information collected more than 180 days prior to the current date of acquisition must be updated for the current all appropriate inquiries. Also, the information required under some specific criterion (e.g., relationship of purchase price to property value, specialized knowledge on part of defendant) must be collected specifically for the current transaction.

Public Comments

A significant number of commenters pointed out that the regulatory language in proposed § 312.20(b)(1) of the proposed rule precludes the use of information contained in assessments or the results of all appropriate inquiries conducted more than a year prior to the date of acquisition of a property. Commenters pointed out that since the language in the proposed rule stated that previously collected information had to have been collected "in compliance with the requirements of * * * 40 CFR Part 312," any information included in all appropriate inquiries reports completed prior to the promulgation of the final rule could not be used, since compliance with the regulation could not be achieved prior to its publication.

Final Rule

It is not the Agency's intent to disallow the use of information contained in previous inquiries, if the environmental professional and the prospective landowner find the previously collected information to be accurate and valid. However, EPA continues to believe that information collected as part of a prior all appropriate inquiries investigation for the same property should be updated to reflect current environmental conditions at the property and to include any specific information or specialized knowledge held by the prospective landowner. The regulatory language in today's final rule (at § 312.20(c)(1)) allows for the use of information collected as part of prior all appropriate inquiries investigation for the same property provided that the prior information was collected "during the conduct of all appropriate inquiries in compliance with CERCLA sections 101(35)(B), 101(40)(B) and 107(q)(A)(viii)." We have deleted the proposed language that would have required the previously conducted investigation to have been done in compliance with the final regulation. This allows for the use of information collected as part of previous all appropriate inquiries, as long as the information was collected in compliance with the statutory provisions for all appropriate inquiries. For property purchased on or after May 31, 1997, therefore, any information collected as part of an assessment in compliance with the ASTM E1527–97 standard or the ASTM E1527–2000 standard may be used as part of a current all appropriate inquiries investigation. For property purchased before May 31, 1997, information from assessments completed and in compliance with the statutory provisions at CERCLA section 101(35)(B)(iv)(I) may be used as part of a current all appropriate inquiries investigation. However, this prior information may only be used if updated in accordance with §§ 312.20(b) and (c) of today's rule.

The final rule continues to recognize that there is value in using previously collected information when such information was collected in accordance with the statutory provisions and good customary business practices, particularly when the use of such previously-collected information will reduce the need to undertake duplicative efforts.

The final rule also retains the requirement that certain aspects of the all appropriate inquiries investigation be updated if the investigation was completed more than 180 days prior to the date of acquisition of the property (or the date on which the prospective landowner takes title to the property) to ensure that an all appropriate inquiries investigation accurately reflects the current environmental conditions at a property. To increase the potential that information collected about the conditions of a property is accurate, as well as increase the potential that opinions and judgments regarding the environmental conditions at a property that are included in an all appropriate inquiries report are based on current and relevant information, the final rule requires that many of the components of the previous inquiries be updated within 180 days prior to the date of acquisition of the property. The components of the all appropriate inquiries that must be updated within 180 days prior to the date on which the property is acquired are:

- Interviews with past and present owners, operators, and occupants (§ 312.23);
- Searches for recorded environmental cleanup liens (§ 312.25);
- Reviews of federal, tribal, state, and local government records (§ 312.26);
- Visual inspections of the facility and of adjoining properties (§ 312.27); and
- The declaration by the environmental professional (§ 312.21(d)).

Also, the final rule retains the proposed requirement that in all cases where a prospective landowner is using previously collected information, the all appropriate inquiries for the current purchase must be updated to include a summary of any relevant changes to the conditions of the property and any specialized knowledge of the prospective landowner.

In today's final rule, we continue to recognize that it is not sufficient to wholly adopt previously conducted all appropriate inquiries for the same property without any review. Certain aspects of the all appropriate inquiries investigation are specific to the current prospective landowner and the current purchase transaction. Therefore, the final rule requires that each all appropriate inquiries investigation include current information related to:

- Any relevant specialized knowledge held by the current prospective landowner and the environmental professional responsible for overseeing and signing the all appropriate inquiries report (i.e., requirements of § 312.28);

- The relationship of the current purchase price to the value of the property, if the property were not contaminated (i.e., requirements of § 312.29); and
- Commonly known or reasonably ascertainable information about the property.

K. Can All Appropriate Inquiries Be Conducted by One Party and Transferred to Another Party?

Proposed Rule

The proposed rule allowed for all appropriate inquiries to be conducted by one party and transferred to another party, provided that certain conditions are met. Under certain circumstances, the prospective landowner, or a grantee, may use a report of all appropriate inquiries conducted for the property by or for another party, including the seller of the property or another party. For example, there are situations where the federal government or a state government agency may conduct the all appropriate inquiries on behalf of the local government for a property being purchased by a local government, such as the "targeted brownfields assessments" conducted on behalf of local governments by EPA. This situation also may occur when a state government covers the cost of the all appropriate inquiries for a property owned by a local government or actually conducts the all appropriate inquiries itself when the local government does not have access to appropriate staff or capital resources. A local government may conduct all appropriate inquiries for a third party in its community, such as a private prospective landowner. In addition, local redevelopment agencies may locate a contaminated property, conduct all appropriate inquiries, acquire the property, and then sell the property to a private developer.

The proposed rule allowed for a person acquiring a property, or a grantee, to use the results of an all appropriate inquiries report conducted by or for another party, if the report meets the proposed rule's objectives and performance factors and the person who is seeking to use the previously-collected information or report reviews all information collected and updates the contents of the report as required by § 312.20(c) and necessary to accurately reflect current conditions at the property. In addition, the proposed rule required that the prospective landowner, or grantee, update the inquiries and the report to include any commonly known and reasonably ascertainable information, relevant specialized knowledge held by the prospective landowner and the environmental professional, and the relationship of the purchase price to the value of the property, if it were not contaminated.

Public Comments

Commenters generally supported the proposed provision allowing for all appropriate inquiries investigations conducted by or for one party to be used by another party.

Final Rule

For the reasons discussed in the preamble to the proposed rule and summarized above, the final rule retains the provision allowing that all appropriate inquiries investigations may be conducted by or for one party and used by another party. In all cases, the all appropriate inquiries investigation must be updated to include commonly known and reasonably ascertainable information and any relevant specialized knowledge held by the prospective landowner and environmental professional. In addition, the evaluation of the relationship between the purchase price and the fair market value of the property must reflect the current sale of the property. In all other aspects of the investigation, the all appropriate inquiries must be in compliance with the provisions of the final regulation.

L. What Are the Objectives and Performance Factors for the All Appropriate Inquiries Requirements?

Proposed Rule

As explained in the preamble to the proposed rule, when developing the proposed standards, EPA and the Negotiated Rulemaking Committee structured the proposal around the statutory criteria established by Congress in section 101(35)(B)(iii) of CERCLA. As development of the proposed rule progressed, it became apparent that the purposes and objectives for the individual criterion and the types of information that must be collected to meet the objectives of each criterion often overlapped. For example, in developing standards addressing the criterion requiring a review of historical information, a search for recorded environmental cleanup liens, and a review of government records, the Committee concluded that the objectives of each criterion or activity were similar, which could lead to the collection of the same information to fulfill each of the criterion's objectives. For example, a chain of title document is historic information that may include information on environmental cleanup liens, as well as information on past owners of the property indicating that previous owners managed hazardous substances on the property.

To avoid requiring duplicative efforts, but to ensure that the proposed regulations included standards and practices that result in a comprehensive assessment of the environmental conditions at a property, the proposed all appropriate inquiries standards were structured around a concise set of objectives and performance factors. The proposed objectives and performance factors applied to the standards comprehensively. In conducting the inquiries collectively, the landowner and the environmental professional must seek to achieve the objectives and performance factors and use the objectives and standards as guidelines in implementing, in total, all of the other proposed regulatory standards and practices.

Public Comments

Commenters overwhelmingly supported the proposed approach of structuring the all appropriate inquiries standards around a definitive set of performance factors and objectives. Commenters stated that the establishment of performance factors will improve the quality of environmental site assessments because the performance factors allow for the application of professional judgement and provide flexibility.

A few commenters did not support the proposed approach of structuring the regulations around a set of performance factors and objectives. These commenters asserted that the objectives and performance factors made the regulation too vague and open-ended. In addition, the commenters stated that they want the regulation to be centered around a "checklist" of activities, each of which should be required to be completed independently and without consideration of a comprehensive performance approach. Commenters who argued for a checklist approach said that such an approach would ensure that the environmental professional only would have to undertake a finite list of activities and it would be easier (in the commenter's opinion) for property owners to obtain liability protection if the list of activities could be completed without regard to performance goals or an overall objective. These commenters also expressed concern that, if the regulations are based on performance factors that the all appropriate inquiries investigation would not have an

endpoint at which prospective landowners could stop looking for evidence of releases or threatened releases. The commenters believed that under a checklist approach liability protection would be awarded upon completion of all activities on the checklist.

Final Rule

We are retaining the proposed performance factors and objectives in the final rule. We continue to believe, as did many commenters, that basing the regulations on a set of overall performance factors and specific objectives lends clarity and flexibility to the standards. Such an approach also allows for the application of professional judgment and expertise to account for site-specific circumstances. The primary objective of an all appropriate inquiries investigation is to identify conditions indicative of releases and threatened releases of hazardous substances on, at, in, or to the subject property. In the case of recipients of brownfields grants, the objective may be expanded to include petroleum and petroleum products, pollutants, contaminants, and controlled substances, depending upon the scope of the grantee's cooperative agreement.

The performance factors are meant to guide the individual aspects of the investigation toward meeting both the statutory criteria for all appropriate inquiries and the regulatory objectives of (1) collecting necessary information about the uses and ownerships of a property and (2) identifying, through the collection of this information, conditions indicative of releases and threatened releases on, at, in, or to the subject property. By establishing a concise set of objectives and setting some boundaries on the information collection activities through the establishment of performance factors, we believe that the final rule fulfills the statutory objectives, provides for a comprehensive assessment of the environmental conditions at the property, and avoids the conduct of duplicative investigations and data collection efforts.

EPA disagrees with the commenters who argued that the proposed approach of establishing overall objectives and performance factors for the all appropriate inquiries standards would result in an approach that is too vague and open-ended. In fact, by establishing clear objectives and setting parameters to the investigation through a set of performance factors that include gathering information that is publicly available, obtainable from its source within reasonable time and cost constraints, and which can practicably be reviewed, the approach taken in the final rule provides reasonable goals and endpoints to the information collection requirements. The proposed objectives provide a discrete list of the types of information that must be collected as part of the all appropriate inquiries investigation. In addition, the performance factors set boundaries around the efforts that must be taken and the cost burdens that must be incurred to obtain the required information. The fact that the rule is framed within a primary objective, to "identify conditions indicative of releases and threatened releases of hazardous substances," actually reduces the open-ended nature of the investigation and establishes an overall goal for the inquiries.

Commenters who advocated that a checklist approach (or an approach not based upon overall objectives and performance factors) is superior because they believe that it would better provide for a stopping point in the investigation may have misunderstood the statutory requirements that must be met to obtain a defense to CERCLA liability. These commenters may have incorrectly assumed that the completion of the all appropriate inquiries investigation is all that is required to obtain liability protection. The conduct of all appropriate inquiries is only one requirement for obtaining relief from CERCLA liability. Prospective landowners must conduct all appropriate inquiries prior to acquiring a property to qualify for a defense to CERCLA liability as an innocent landowner, bona fide prospective purchaser or contiguous landowner. However, once a property is acquired, the property owner must comply with all of the other statutory criteria necessary to qualify for the liability protections. In particular, landowners must undertake "reasonable steps" to "stop any continuing releases." Therefore, the final rule's objective of identifying conditions indicative of releases and threatened releases of hazardous substances on, at, in, or to a property links appropriately with the statutory criteria requiring the landowner to address such releases to qualify for the liability protections.

Conducting the inquiries merely in compliance with a checklist and without the purpose of meeting an overall objective could result in an inability to recognize the value of certain types of information or in chasing down multiple sources of information that may not have added value for meeting the overall objective of the investigation. A lack of information or an inability to obtain information that may affect the ability of an environmental professional to determine whether or not there are conditions indicative of a release or threatened release of a hazardous substance (or other contaminant) on, at, in or to a property can have significant consequences regarding a prospective landowner's ultimate ability to claim protection from CERCLA liability. Failure to identify a release during the conduct of all appropriate inquiries does not relieve the property owner from the responsibility to take reasonable steps and address the release. Even if the Agency agreed with the commenters and adopted a "checklist" approach for the regulation, simply conducting the checklist of activities and ending the investigation after each activity is conducted would not result in protection from CERCLA liability (as commenters claimed).

The final rule also establishes that in those cases where certain information included in the list of regulatory objectives (§ 312.20(e)) cannot be found or obtained within the parameters of the performance factors, such data gaps must be identified and the significance of the missing information with regard to the environmental professional's ability to render an opinion on the presence of conditions indicative of releases and threatened releases be documented. Exhaustive and costly efforts do not have to be made to access all available sources of data and find every piece of data and information about a property. Nor does the rule require that duplicative information be sought from multiple sources. The inquiries and the overall investigation must be undertaken to meet the data collection objectives and primarily determine the environmental conditions of the property. Structuring the standards around such objectives will render the results of the investigation more valuable to a landowner in his or her efforts to comply with the post acquisition continuing obligations for obtaining the CERCLA liability protections than an approach framed around a mere checklist of activities.

In retaining the proposed objectives and performance factors, the final rule allows that an all appropriate inquiries investigation need not address each of the regulatory criterion in any particular sequence. In addition, information relevant to more than one criterion need not be collected twice, and a single source of information may satisfy the requirements of more than one criterion and more than one objective. However, the information required to achieve each

of the objectives and performance factors must be obtained for the all appropriate inquiries investigation to be complete. Although compliance with the all appropriate inquiries requirements ultimately will be determined in court, the final rule allows the prospective landowner or grantee and environmental professional to determine the best process and sequence for collecting and analyzing all required information. The sequence of activities and the sources of information used to collect any required information is left to the judgment and expertise of the environmental professional, provided that the overall objectives and the performance factors established for the final rule are met.

In performing the inquiries, including but not limited to conducting interviews, collecting historical data and government records, and inspecting the subject property and adjoining properties, all parties undertaking all appropriate inquiries must be attentive to the fact that the primary objectives of the regulation are to identify the following types of information about the subject property:

- Current and past property uses and occupancies;
- Current and past uses of hazardous substances;
- Waste management and disposal activities that could have caused releases or threatened releases of hazardous substances;
- Current and past corrective actions and response activities undertaken to address past and on-going releases of hazardous substances;
- Engineering controls;
- Institutional controls; and
- Properties adjoining or located nearby the subject property that have environmental conditions that could have resulted in conditions indicative of releases or threatened releases of hazardous substances on, at, in, or to the subject property.

EPA notes that in the case of brownfields grantees, the scope of each of the activities listed above may be broader if the grant or cooperative agreement includes within its scope the assessment of a property for conditions indicative of releases or threatened releases of petroleum and petroleum products, controlled substances, or other contaminants.

The final performance factors for achieving the objectives set forth above are set forth in § 312.20(e) and require the persons conducting the inquiries to: (1) Gather the information that is required for each standard and practice that is publicly available, obtainable from its source within reasonable time and cost constraints, and which can practicably be reviewed, and (2) review and evaluate the thoroughness and reliability of the information gathered in complying with each standard and practice, taking into account information gathered in the course of complying with the other standards and practices of this subpart. In complying with § 312.20(f)(2), if the environmental professional or person conducting the inquiries determines through such review and evaluation that the information is either not thorough or not reliable, then further inquiries should be made to ensure that the information gathered is both thorough and reliable. The performance factors are provided as guidelines to be followed in conjunction with the final objectives for the all appropriate inquiries.

M. What Are Institutional Controls?

The final rule requires the identification of institutional controls placed on the subject property. As defined in § 312.10, institutional controls are non-engineered instruments, such as administrative and legal controls, that among other things, can help to minimize the potential for human exposure to contamination, and protect the integrity of a remedy by limiting land or resource use. For example, an institutional control might prohibit the drilling of a drinking water well in a contaminated aquifer or disturbing contaminated soils. Institutional controls also may be referred to as land use controls, activity and use limitations, etc., depending on the program under which a response action is conducted or a release is addressed.

Institutional controls are typically used whenever contamination precludes unlimited use and unrestricted exposure at the property. Thus, institutional controls may be needed both before and after completion of the remedial action or may be employed in place of a remedial action. Institutional controls often must remain in place for an indefinite duration and, therefore, generally need to survive changes in property ownership (i.e., run with the land) to be legally and practically effective. Some common examples of institutional controls include zoning restrictions, building or excavation permits, well drilling prohibitions, easements and covenants.

The importance of identifying institutional controls during all appropriate inquiries is twofold. First, institutional controls are usually necessary and important components of a remedy. Failure to abide by an institutional control may put people at risk of harmful exposure to hazardous substances. Second, an owner wishing to maintain protections from CERCLA liability as an innocent landowner, contiguous property owner, or bona fide prospective purchaser must fulfill ongoing obligations to: (1) Comply with any land use restrictions established or relied on in connection with a response action and (2) not impede the effectiveness or integrity of any institutional control employed in connection with a response action. For a more detailed discussion of these requirements please see EPA, 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, 2003).

Those persons conducting all appropriate inquiries may identify institutional controls through several of the standards and practices set forth in this rule. As noted, implementation of institutional controls may be accomplished through the use of several administrative and legal mechanisms, such as zoning restrictions, building permit requirements, easements, covenants, etc. For example, an easement implementing an institutional control might be identified through the review of chain of title documents under § 312.24(a). Furthermore, interviews with past and present owners, operators, or occupants pursuant to § 312.23; and reviews of federal, tribal, state, and local government records under § 312.26, may identify an institutional control or refer a person to the appropriate source to find an institutional control. For example, a review of federal Superfund records, including Records of Decision and Action Memoranda, as well as other information contained in the CERCLIS database, may indicate that zoning was selected as an institutional control or an interview with a current operator may reveal an institutional control as part of an operating permit.

The final rule requires that all appropriate inquiries include a search for institutional controls placed upon the subject property as part of the requirements for reviewing federal, state, tribal, and local government records. A discussion of these requirements is provided in section IV.S below.

N. How Must Data Gaps Be Addressed in the Conduct of All Appropriate Inquiries?

Proposed Rule

The proposed rule required environmental professionals, prospective landowners, and brownfields grant recipients to identify data gaps that affect their ability to identify conditions indicative of releases or threatened releases of hazardous substances (and, in the case of grant recipients, pollutants, contaminants, petroleum and petroleum products, and controlled substances). The proposed rule also required these persons to identify the sources of information consulted to address, or fill, the data gaps and then comment upon the significance of the data gaps with regard to the ability to identify conditions indicative of releases or threatened releases of hazardous substances on, at, in or to the subject property. The proposed rule defined a data gap as a lack of or an inability to obtain information required by the standards and practices listed in the proposed regulation, despite good faith efforts by the environmental professional or the prospective landowner or grant recipient to gather such information.

Public Comments

Some commenters raised concerns that the proposed definition of a data gap may result in difficulties in determining when an all appropriate inquiries investigation is complete. These commenters stated that the need to identify and comment on the significance of data gaps may render it difficult to complete an investigation, that could potentially affect a property owner's ability to claim protection from CERCLA liability. Other commenters asserted that because an investigation could be considered complete despite the existence of a data gap, a regulatory loophole exists (in the opinion of the commenters) that will result in the property owner's being able to claim protection from CERCLA liability even when the all appropriate inquiries investigation results in a failure to identify a release or threatened release at a property.

Some commenters stated that the proposed requirement to identify data gaps, or missing information, that may affect the environmental professional's ability to render an opinion regarding the environmental conditions at a property and comment on their significance in this regard will lend credibility to the inquiry's final report.

Final Rule

We are retaining the proposed definition of data gap and the proposed requirements for identifying and commenting on the significance of data gaps. For the purposes of today's final rule, a "data gap" is a lack of or inability to obtain information required by the standards and practices listed in the regulation, despite good faith efforts by the environmental professional or the prospective landowner (or grant recipient) to gather such information pursuant to the objectives for all appropriate inquiries. In today's final rule, § 312.20(g) requires environmental professionals, prospective landowners, and grant recipients to identify data gaps that affect their ability to identify conditions indicative of releases or threatened releases of hazardous substances (and in the case of grant recipients pollutants, contaminants, petroleum and petroleum products, and controlled substances). The final rule requires such persons to identify the sources of information consulted to address the data gaps and comment upon the significance of the data gaps with regard to the ability to identify conditions indicative of releases or threatened releases. Section 312.21(c)(2) also requires that the inquiries report include comments regarding the significance of any data gaps on the environmental professional's ability to provide an opinion as to whether the inquiries have identified conditions indicative of releases or threatened releases.

In response to issues raised by commenters, we point out that the final regulation, as did the proposal, requires that environmental professionals document and comment on the significance of only those data gaps that "affect the ability of the environmental professional to identify conditions indicative of releases or threatened releases of hazardous substances * * * on, at, in, or to the subject property." If certain information included within the objectives and performance factors for the final rule cannot be found and the lack of certain information, in light of all other information that was collected about the property, has no bearing on the environmental professional's ability to render an opinion regarding the environmental conditions at the property, the final rule does not require the lack of such information to be documented in the final report. Given the restriction on the type of data gaps that must be documented, and given that the documentation is restricted to instances where the lack of information hinders the ability of the environmental professional to render an opinion regarding the environmental conditions at the property, we disagree with the commenters who assert that the requirement is overly burdensome or will result in the inability to complete the required investigations.

Commenters who asserted that the requirement to document data gaps would result in a "loophole" that would allow property owners to claim protection from CERCLA liability after conducting an incomplete all appropriate inquiries investigation may have misunderstood the scope of the rule and the statutory requirements for obtaining the liability protections. As explained in detail in Section II of this preamble, the conduct of all appropriate inquiries is only one requirement necessary for obtaining protection from CERCLA liability. The mere fact that a prospective landowner conducted all appropriate inquiries does not provide an individual with protection from CERCLA liability. To qualify as a bona fide prospective purchaser, innocent landowner or a contiguous property owner, a person must, in addition to conducting all appropriate inquiries prior to acquiring a property, comply with all of the other statutory requirements. These criteria are summarized in section II.D. of this preamble. The all appropriate inquiries investigation may provide a prospective landowner with necessary information to comply with the other post-acquisition statutory requirements for obtaining liability protections. The conduct of an incomplete all appropriate inquiries investigation, or the failure to detect a release during the conduct of all appropriate inquiries, does not exempt a landowner from his or her post-acquisition continuing obligations under other provisions of the statute. Failure to comply with any of the statutory requirements may be problematic in a claim for protection from liability.

The final rule retains the requirement to identify data gaps, address them when possible, and document their significance. Prospective landowners may wish to consider the potential significance of any data gaps, that may exist after conducting the pre-acquisition all appropriate inquiries in assessing their obligations to fulfill the additional statutory requirements after purchasing a property.

If a person properly conducts all appropriate inquiries pursuant to this rule, including the requirements concerning data gaps at §§ 312.10, 312.20(g) and 312.21(c)(2), the person may fulfill the all appropriate inquiries requirements of CERCLA sections

107(q), 107(r), and 101(35), even when there are data gaps in the inquiries. However, as explained further in this preamble, fulfilling the all appropriate inquiries requirements does not, by itself, provide a person with a protection from or defense to CERCLA liability. Failure to identify a release or threatened release during the conduct of all appropriate inquiries does not negate the landowner's continuing responsibilities under the statute, including the requirements to take reasonable steps to stop the release, prevent a threatened release, and prevent exposure to the release or threatened release once the landowner has acquired a property. Also, if an existing institutional control or land use restriction is not identified during the conduct of all appropriate inquiries prior to the acquisition of a property, a landowner is not exempt from complying with the institutional control or land use restriction after acquiring the property. None of the other statutory requirements for the liability protections is satisfied by the results of the all appropriate inquiries.

We emphasize that the mere fact that a prospective landowner conducted all appropriate inquiries does not provide an individual with a defense to or limitation from CERCLA liability. To qualify as a bona fide prospective purchaser, innocent landowner or a contiguous property owner, a person must, in addition to conducting all appropriate inquiries prior to acquiring a property, comply with all of the other statutory requirements. These criteria are summarized in section II.D. of this preamble. The all appropriate inquiries investigation may provide a prospective landowner with necessary information to comply with the other post-acquisition statutory requirements for obtaining liability protections. The failure to detect a release during the conduct of all appropriate inquiries does not exempt a landowner from his or her post-acquisition continuing obligations under other provisions of the statute.

Section 312.20(g) of the final rule points out that one way to address data gaps may be to conduct sampling and analysis. The final regulation does not require that sampling and analysis be conducted to comply with the all appropriate inquiries requirements. The regulation only notes that sampling and analysis may be conducted, where appropriate, to obtain information to address data gaps. The Agency notes that sampling and analysis may be valuable in determining the possible presence and extent of potential contamination at a property. Such information may be valuable for determining how a landowner may best fulfill his or her post-acquisition continuing obligations required under the statute for obtaining protection from CERCLA liability.

O. Do Small Quantities of Hazardous Substances That Do Not Pose Threats to Human Health and the Environment Have To Be Identified in the Inquiries?

Proposed Rule

The environmental professional should identify and evaluate all evidence of releases or threatened releases on, at, in or to the subject property, in accordance with generally accepted good commercial and customary standards and practices. However, the proposed rule provided that the environmental professional need not specifically identify, in the written report prepared pursuant to § 312.21(c), extremely small quantities or amounts of contaminants, so long as the contaminants generally would not pose a threat to human health or the environment.

Public Comments

EPA received no significant comment on the proposed provision on the identification of extremely small quantities of contamination.

Final Rule

The final retains the provision that the environmental professional need not specifically identify, in the written report prepared pursuant to § 312.21(c), extremely small quantities or amounts of contaminants, so long as the contaminants generally would not pose a threat to human health or the environment.

P. What Are the Requirements for Interviewing Past and Present Owners, Operators, and Occupants?

Proposed Rule

CERCLA section 101(35)(B)(iii)(II) requires EPA to include in the standards and practices for all appropriate inquiries "interviews with past and present owners, operators, and occupants of the facility for the purpose of gathering information regarding the potential for contamination at the facility." The Agency proposed that the inquiry of the environmental professional include interviews with the current owner(s) and occupant(s) of the subject property. In addition, the proposed rule required that interviews be conducted with current and past facility managers with relevant knowledge of the property, as well as past owners, occupants, or operators, and employees of current and past occupants of the property, as necessary, to meet the proposed objectives and performance factors. In the case of abandoned properties, the Agency proposed that the inquiry of the environmental professional include interviewing one or more owners or occupants of neighboring or nearby properties to obtain information on current and past uses of the property and other information necessary to meet the objectives and performance factors.

Public Comments

Several commenters asserted that the requirement to interview current and past owners and occupants of a property may be burdensome. Commenters gave several reasons for asserting that interviews may be burdensome. Some commenters said it is difficult to locate current and past owners and occupants. Other commenters questioned the accuracy of any information that would be provided by a current or past owner or occupant. One commenter expressed concern that the requirement to conduct interviews of current and past owners and occupants of a property could result in the environmental professional divulging information regarding the sale of the property against the prospective landowner's wishes.

In the case of the proposed interview requirements for abandoned properties, some commenters opposed the requirement to interview at least one owner or occupant of a neighboring property. Commenters stated that the proposed requirement was unreasonable and that it is impractical to attempt to find and contact neighboring property owners and occupants. Some commenters said that neighboring property owners and occupants can not be relied upon to provide accurate information about a property.

Final Rule

The requirements for conducting interviews of past and present owners, operators, and occupants of the subject property are included in § 312.23. The final rule identifies these interviews as being within the scope of the inquiry of the environmental professional. Therefore, all interviews must be conducted by the environmental professional or by someone under the supervision or responsible charge of the environmental professional. The intent is that an individual meeting the definition of an environmental professional (§ 312.10) must oversee the conduct of, or review and approve the results of, the interviews to ensure the interviews are conducted in compliance with the objectives and performance

factors (§ 312.20). This is to ensure that the information obtained from the interviews provides sufficient information, in conjunction with the results of all other inquiries, to allow the environmental professional to render an opinion with regard to conditions at the property that may be indicative of releases or threatened releases of hazardous substances (and pollutants, contaminants, petroleum and petroleum products, and controlled substances, if applicable).

The final rule requires the environmental professional's inquiry to include interviewing the current owner and occupant of the subject property. In addition, the rule provides that the inquiry of the environmental professional include interviews of additional individuals, including current and past facility managers with relevant knowledge of the property, past owners, occupants, or operators of the subject property, or employees of current and past occupants of the subject property, as necessary to meet the rule's objectives and in accordance with the performance factors. A primary purpose of the interviews portion of the all appropriate inquiries is to obtain information regarding the current and past ownership and uses of the property, and obtain information regarding the potential environmental conditions of the property. The final rule does not prescribe particular questions that must be asked during the interview. The type and content of any questions asked during interviews will depend upon the site-specific conditions and circumstances and the extent of the environmental professional's (or other individual's under the supervision or responsible charge of the environmental professional) knowledge of the property prior to conducting the interviews. Therefore, the final rule does not include specific questions for the interviews, but requires that the interviews be conducted in a manner that achieves the objectives and performance factors. Interviews with current and past owners and occupants may provide opportunities to collect information about a property that was not previously recorded nor well documented and may provide valuable perspectives on how to find or interpret information required to complete other aspects of the all appropriate inquiries. Information gathered during the interview portion of the all appropriate inquiries may in turn provide valuable information for the on-site visual inspection. Persons conducting the interviews of current and past owners and occupants may want to spend some time during the interviews requesting information on the locations of operations or units used to store or manage hazardous substances on the property.

In the case of properties where there may be more than one owner or occupant, or many owners or occupants, the final rule requires the inquiry to include interviews of major occupants and those occupants that are using, storing, treating, handling or disposing (or are likely to have used, stored, treated, handled or disposed) of hazardous substances (or pollutants, contaminants, petroleum and petroleum products, and controlled substances, as applicable) on the property. The rule does not specify the number of owners and occupants to be interviewed. The environmental professional must perform this function in the manner that best fulfills the objectives and performance factors for the inquiries in § 312.20(e) and (f). Environmental professionals may use their professional judgment to determine the specific occupants to be interviewed and the total number of occupants to be interviewed in seeking to comply with the objectives and performance factors for the inquiries. Interviews must be conducted with individuals most likely to be knowledgeable about the current and past uses of the property, particularly with regard to current and past uses of hazardous substances on the property.

In response to commenters who asserted that the proposed interview requirements are burdensome, we point out that the statutory criteria in CERCLA section 101(35)(B)(iii) include "interviews with past and present owners, operators, and occupants of the facility for the purpose of gathering information regarding the potential for contamination at the facility." EPA asserts that it was clearly congressional intent that the all appropriate inquiries investigation include the conduct of interviews with current and past owners and occupants. We also assert that current and past owners and occupants of a property may be excellent sources of information regarding past and on-going uses of the property as well as the types of waste management activities that were undertaken at the property. Given that the ASTM E1527 Phase 1 Environmental Site Assessment Process, the interim standard for the conduct of all appropriate inquiries, includes requirements for conducting interviews with the current owners and occupants of a property and provides that other owners and occupants are good additional sources of information about property uses and potential contamination at a property, we disagree with commenters who asserted that the proposed and final requirements for conducting interviews will be overly burdensome.

In the case of abandoned properties, the final rule requires the inquiry of the environmental professional to include interviews with one or more owners or occupants of neighboring or nearby properties. In the case of abandoned properties, it most likely will be difficult to identify or interview current or past owners and occupants of the property. Therefore, the final rule requires that at least one owner or occupant of a neighboring property be interviewed to obtain information regarding past owners or uses of the property in cases where the subject property is abandoned and no current owner is available to be interviewed. The final rule defines an abandoned property as a "property that can be presumed to be deserted, or an intent to relinquish possession or control can be inferred from the general disrepair or lack of activity thereon such that a reasonable person could believe that there was an intent on the part of the current owner to surrender rights to the property." As is the case with interviews conducted with current and past owners and occupants of the property, interview questions should be developed prior to the conduct of the interviews, and tailored to gather information to achieve the rule's objectives and performance factors. The final rule contains no specific requirements with regard to the type or content of questions that must be asked during the interviews.

EPA disagrees with commenters who stated that it will be difficult to locate and contact neighboring property owners and occupants. The final rule, as did the proposed rule, requires that the environmental professional only locate and interview one neighboring property owner or occupant and only in those cases where no owner or occupant of the subject property can be identified. An environmental professional should be able to locate one owner or occupant of a neighboring property when conducting the on-site visual inspection of the property. If the environmental professional cannot easily locate an owner and occupant of a neighboring property, he or she may enlist the assistance of local government officials in identifying a neighboring property owner or occupant. As is the case with information ascertained from any interview, the environmental professional must apply his or her judgment when drawing conclusions

based on the information provided in interviews with neighboring property owners and occupants and should attempt to verify any information provided by reviewing other available sources of information.

Q. What Are the Requirements for Reviews of Historical Sources of Information?

Proposed Rule

Historical documents and records may contain information regarding past ownership and uses of a property that may be essential to assessing the potential for environmental conditions indicative of releases or threatened releases of hazardous substances to be present at the property. Historical documents and records, among others, may include chain of title documents, land use records, aerial photographs of the property, fire insurance maps, and records held at local historical societies. The proposed rule required that the inquiry of the environmental professional include a review of historical documents and records for the subject property that document the ownership and use of the property for a period of time as far back in the history of the property as it can be shown that the property contained structures, or from the time the property was first used for residential, agricultural, commercial, industrial, or governmental purposes.

Public Comments

Some commenters raised concerns regarding the proposed requirements to review historical records covering "a period of time as far back in the history of the subject property as it can be shown that the property contained structures or from the time the property was first used for residential, agricultural, commercial, industrial, or governmental purposes." Commenters said that the proposed historical scope of the records search is too extensive. Some commenters requested that in the final rule EPA adopt the provisions for historical records searches provided in the ASTM E1527–2000 standard. Several commenters requested that EPA explicitly require as part of the review of historical records a review of chain of title documents. The commenters asserted that a review of chain of title documents is the only reliable way to identify previous owners of a property.

Final Rule

The statutory criteria in the Brownfields Amendments require that reviews of historical sources of information be conducted to "determine previous uses and occupancies of the real property since the property was first developed." The final rule requires (as did the proposed rule) that historical records on the subject property be searched for information on the property covering a time period as far back in history as there is documentation that the property contained structures or was placed into use of some form. This provision follows the statutory language. In addition, the final rule requires that historical documents and information be reviewed to obtain necessary information for meeting the objectives and performance factors in § 312.20(e) and (f). If a search of historical sources of information results in an inability of the environmental professional to document previous uses and occupancies of the property as far back in history as it can be shown that the property contained structures or was placed into use of some form, and such information is not acquired elsewhere during the investigation then it must be documented as a data gap to the inquiries. The requirements of §§ 312.20(g) and 312.21(c)(2) are applicable to all instances in the all appropriate inquiries that result in data gaps.

Despite the concerns raised by some commenters regarding the scope of the historical records review, we assert that the scope of the requirements in the final rule (as did the scope of the proposed requirements) reflects the statutory language provided in CERCLA section 101(35)(B)(iii). The statutory criterion provide that all appropriate inquiries include "reviews of historical sources * * * to determine previous uses and occupancies of the real property since the property was first developed." We point out that the final rule does allow the environmental professional to exercise his or her professional judgment "in context of the facts available at the time of the inquiry as to how far back in time it is necessary to search historical records." We believe that this provides sufficient flexibility to allow for any circumstances where, due to the availability of other information about a property an environmental professional may conclude that a comprehensive search of historical records is not necessary to meet the objectives and performance factors.

In response to commenters that requested that EPA adopt the provisions of the ASTM E1527–2000 standard for conducting searches of historical records, we assert that the scope of the historical records search in today's final rule is very similar to the scope of ASTM E1527 standard. The ASTM E1527 standard, at section 7.3.1, requires that historical sources of information be searched to identify "all obvious uses of the property* * *from the present, back to the property's obvious first developed use, or back to 1940, whichever is earlier." Given that the language of both the ASTM E1527 standard and the requirements in the final rule for conducting historical records searches is very similar, we conclude that the intent is the same and the final rule represents no change from current good customary business practice. In addition, the final rule provides for sufficient flexibility both within the application of the performance factors to the historical records search requirements and in allowing the environmental professional to apply his or her judgment "in the context of the facts available at the time of the inquiry."

The final rule does not require that any specific type of historic information be collected. In particular, the rule does not require that persons obtain a chain of title document for the property. The rule allows for the environmental professional to use professional judgment when determining what types of historical documentation may provide the most useful information about a property's ownership, uses, and potential environmental conditions when seeking to comply with the objectives and performance factors for the inquiries. Although we agree with commenters that chain of title documents may serve as an important source of information regarding past ownership of a property, it may not be the only source of this information. To the extent that chain of title documents are otherwise obtained for other purposes during the conduct of a property sale or transaction, we believe that these documents can easily be made available to the environmental professional by the prospective landowner. Given that the final rule requires that historical records be searched for information on previous uses and ownership of a property for as far back in the history of property as can be shown that the property contained structures or was first used for residential, agricultural, commercial, industrial or governmental purposes, if chain of title documents are the best and most easily attainable source of this information, we assume that such documents will be obtained and used by the environmental professional.

Given the wide variety of property types and locations to which the final rule could apply, any list of specific documents could result in undue burdens on many prospective

landowners and grantees due to difficulties in collecting any specific document for any particular property or property location. Therefore, the final requirements for reviewing historical documents allow the prospective landowner or grantee and the environmental professional to use their judgment, in accordance with generally accepted good commercial and customary standards and practices, in locating the best available sources of historical information and reviewing such sources for information necessary to comply with the rule's objectives and performance factors.

As explained in section IV.J of this preamble, the prospective landowner, grantee, or environmental professional may make use of previously collected information about a property when conducting all appropriate inquiries. The collection of historical information about a property may be a particular case where previously collected information may be valuable, as well as easily accessible. In addition, nothing in the rule prohibits a person from using secondary sources (*e.g.*, a previously conducted title search) when gathering information about historical ownership and usage of a property. As explained in section IV.J, information must be updated if it was last collected more than 180 days prior to the date of acquisition of the property.

R. What Are the Requirements for Searching for Recorded Environmental Cleanup Liens?

For purposes of this rule, recorded environmental cleanup liens are encumbrances on property for the recovery of incurred cleanup costs on the part of a state, tribal or federal government agency or other third party. Recorded environmental cleanup liens often provide an indication that environmental conditions either currently exist or previously existed on a property that may include the release or threatened release of a hazardous substance. The existence of an environmental cleanup lien should be viewed as an indicator of potential environmental concerns and as a basis for further investigation into the potential existence of on-going or continued releases or threatened releases of hazardous substances on, at, in, or to the subject property.

Proposed Rule

The proposed rule required that prospective landowners and grantees, or environmental professionals on their behalf, search for environmental cleanup liens that are recorded under federal, tribal, state, or local law. Environmental cleanup liens that are not recorded by government entities or agencies are not addressed by the language of the statute (the statute speaks only of "recorded liens"); therefore, the proposed rule required that only a search for recorded environmental liens be included in the all appropriate inquiries investigation.

Public Comments

Some commenters asked that EPA state more clearly that the responsibility for searching for environmental cleanup liens rests with the prospective landowner and not the environmental professional. A few commenters requested that the Agency provide some guidance on where to find recorded environmental cleanup liens.

Final Rule

EPA is finalizing the proposed requirements to search for recorded environmental cleanup liens without changes. The all appropriate inquiries investigation must include a search for recorded environmental cleanup liens. The final rule allows that the search for recorded environmental cleanup liens be performed either by the prospective landowner or grantee, or through the inquiry of the environmental professional. The search for such liens may not necessarily require the expertise of an environmental professional and therefore may be more efficiently or more cost-effectively performed by the prospective landowner or grantee, or his or her agent. Such liens may be included as part of the chain of title documents or may be recorded in some other manner or format by state or local government agencies. If such information is collected by the prospective landowner or grantee, or other agent who is not under the supervision or responsible charge of the environmental professional, the final rule allows for, but does not require, the information that is collected by or on the behalf of the prospective landowner or grantee to be provided to the environmental professional. If the information is provided to the environmental professional, he or she can then make use of such information during the conduct of the all appropriate inquiries and when rendering conclusions or opinions regarding the environmental conditions of the property. If such information is not provided to the environmental professional and the lack of such information affects the ability of the environmental professional to identify conditions indicative of releases or threatened releases of hazardous substances on, at, in or to the property, the lack of information should be noted as a data gap (per the requirements of § 312.21(b)(2)).

Although some commenters requested that EPA be more explicit in the final rule in requiring that the search for recorded environmental cleanup liens be conducted by the prospective landowner (or grantee), we believe that the decision of who conducts the search may be best left up to the judgment of the prospective landowner or grantee and environmental professional. The final rule provides in § 312.22 that the search for recorded environmental cleanup liens can fall outside the inquiries conducted by the environmental professional. The search for recorded environmental cleanup liens is not included as part of the requirements governing the results of an inquiry by an environmental professional (§ 312.21). Therefore, the search may be conducted by the prospective landowner or grantee, his or her attorney or agent, or the environmental professional.

We offer one caution about the conclusion that might be drawn if no recorded environmental cleanup liens are found. If EPA is conducting a cleanup at site at the time it is transferred or acquired, EPA is able to record a lien post acquisition. For example, one type of lien, often referred to as a windfall lien, has no statute of limitations and arises at the time EPA first spends Superfund money. States and localities may have similar mechanisms. Therefore, even if a recorded environmental cleanup lien is not found during the conduct of the all appropriate inquiries investigation, one may be recorded at a later date if EPA is undertaking a cleanup or response action at the property.

With regard to commenters who requested that EPA provide guidance on where to search for environmental cleanup liens, we advise that prospective landowners and grantees to seek the advice of a local realtor, real estate attorney, title company, or other real estate professional. Environmental cleanup liens may be recorded as part of the land title records or as part of other state or local government land or real estate records. Recorded environmental cleanup liens may be recorded in different places, depending upon the particular state and particular locality in which the property is located.

S. What Are the Requirements for Reviewing Federal, State, Tribal, and Local Government Records?

Federal, tribal, state and local government records may contain

information regarding environmental conditions at a property. In particular, government records, or data bases of such information, may include information on previously reported releases of hazardous substances, pollutants, contaminants, petroleum and petroleum products and controlled substances. Government records and available databases can provide valuable information on remedial actions and emergency response activities that may have been conducted at a particular property. Government records also may include information on institutional controls related to a particular property. For example, in the case of NPL sites, EPA Superfund records, including Action Memoranda and Records of Decision, may have information on institutional controls in place at such properties. Government records also may include information on activities or property uses that could cause releases or threatened releases to be present at a property.

Proposed Rule

The proposed rule required that federal, state, tribal and local government records be searched for information necessary to achieve the objectives and performance factors, including information regarding the use and occupancy of and the environmental conditions at the subject property and conditions of nearby or adjoining properties that could have a impact upon the environmental conditions of the subject property. The proposed rule included requirements to search federal, tribal, state, and local government records for information indicative of environmental conditions at the subject property.

The proposed rule also included requirements to review government records, or data bases of information contained in government records, for information about nearby and adjoining properties. Reviews of such records may provide valuable information regarding the potential impact to the subject property from hazardous substances and petroleum contamination migrating from contiguous or nearby properties. The proposed rule included required minimum search distances for government records searches of nearby properties.

To account for property-specific and regionally-specific conditions that can influence the appropriateness of the proposed search distances for any given type of record and property, the proposed rule allowed the environmental professional to adjust the applicable search distances when searching for information about off-site properties by applying professional judgment. For example, appropriate search distances for properties located in rural settings may differ from appropriate search distances for urban settings. In addition, ground water flow direction, depth to ground water, arid weather conditions, the types of facilities located on nearby properties, and other factors may influence the degree of impact to a property from off-site sources. Therefore, the proposed rule allowed the environmental professional to adjust any or all of the proposed minimum search distances for any of the record types, based upon professional judgment and the consideration of site-specific conditions or circumstances when seeking to achieve the proposed objectives and performance factors for the required inquiries.

Public Comments

The Agency received a variety of comments in which commenters expressed concerns about the applicability or adequacy of specific types of government records included in the proposed rule (e.g., CERCLIS records, information on RCRA facilities, ERNS). A few commenters raised concerns about the availability of tribal records. Several commenters raised concerns regarding the availability of government records on institutional controls. Commenters also pointed out that, given the lack of available databases and other information on institutional controls, it may be particularly difficult to search for institutional controls associated with adjoining and nearby properties.

Final Rule

We are finalizing the requirements for reviewing federal, state, tribal, and local government data bases as proposed, with one exception. The final rule requires that government records and available lists for institutional and engineering controls be searched only for information on such controls at the subject property. All appropriate inquiries investigations do not have to include searches for institutional and engineering controls in place at nearby and adjoining properties. We made this change because we agree with commenters who pointed out that information on institutional and engineering controls may be difficult to find as there are no available national sources of this information. Only a few states have available lists of institutional controls. In addition, the information that may be inferred from knowledge of institutional and engineering controls that are in place at adjoining and nearby properties, i.e., that there was a response action, a remedial action, or corrective action taken at the site, can be inferred from information obtained from other sources (e.g., CERCLIS, RCRIS, state records of response actions).

It is important that prospective landowners obtain information on institutional and engineering controls in place at the property being acquired. It also may be important to locate information on such controls in place at nearby properties. To obtain the liability protections afforded under CERCLA (i.e., innocent landowner, contiguous property owner, bona fide prospective purchaser), the statute requires, as part of the "continuing obligations," that the property owner comply with all land use restrictions and not impede the effectiveness of institutional controls. Therefore, it is important that information on institutional and engineering controls be obtained by prospective landowners, even though information about such controls may not have been routinely obtained as part of due diligence practices prior to today's final rule (we note that the current interim standard does include provisions for searching for "activity and use limitations").

Routine "chain of title" reports may not always contain information labeled as institutional or engineering controls. However, title companies may include, as part of the chain of title reports "restrictions of record on title" when such restrictions are recorded because of underlying environmental conditions at a property. Therefore, when requesting information on "institutional controls" or "engineering controls" about a property, prospective landowners, grantees, and environmental professionals may want to request information on "restrictions of record on title" as well, in case any available information on institutional or engineering controls is so labeled in the chain of title records. In addition to chain of title records, information on institutional controls and engineering controls may be recorded in local land records. Also, some states are beginning to create registries to track information on institutional and engineering controls. Therefore, prospective landowners and grantees should consider consulting these other sources of information in addition to chain of title records for information on institutional and engineering controls.

In response to the commenters who pointed out particular shortcomings with specific sources of information (e.g., CERCLIS, RCRIS, ERNS) we point out that the requirement to review government records explicitly provides

that the reviews be conducted in compliance with the objectives and performance standards. If a particular source of information cannot be accessed within a reasonable time frame or within reasonable costs, then the information should be sought from other sources. In addition, if a particular source of information will only provide information that can more easily or readily be found elsewhere, the particular source does not have to be obtained or consulted. If application of the objectives and performance standards to the requirement to review government records results in an inability to provide necessary information (or information identified as necessary in the objectives for the final rule), then the lack of information should be documented as a data gap in the final report. In addition, the environment professional should comment on the significance the lack of any information has on his or her ability to identify conditions at the property that are indicative of releases or threatened releases of hazardous substances (in compliance with § 312.21(c)(2)).

In response to commenters who pointed out that it may be difficult to obtain or gain access to tribal government records, we point out that such records need only be searched for and reviewed in those instances where the subject property is located on or near tribal-owned lands. In these cases, it is important to attempt, within the scope of the rule's objectives and performance factors, to review such records. When such records are not available, necessary information should be sought from other sources. When no information is available and the objectives and performance factors of the final rule cannot be met and the result is a lack of information that may affect the environmental professional's ability to render an opinion regarding the environmental conditions of a property, the lack of information must be documented as a data gap in compliance with § 312.21(c)(2).

The final rule requires that the following types of government records or data bases of government records be reviewed to obtain information on the subject property and nearby properties necessary to meet the rule's objectives and performance standards:

1. Government records of reported releases or threatened releases at the subject property, including previously conducted site investigation reports.

2. Government records of activities, conditions, or incidents likely to cause or contribute to releases or threatened releases, including records documenting regulatory permits that were issued to current or previous owners or operators at the property for waste management activities and government records that identify the subject property as the location of landfills, storage tanks, or as the location for generating and handling activities for hazardous substances, pollutants, contaminants, petroleum and petroleum products, or controlled substances.

3. CERCLIS records—EPA's Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS) database contains general information on sites across the nation and in the U.S. territories that have been assessed by EPA, including sites listed on the National Priorities List (NPL). CERCLIS includes information on facility location, status, contaminants, institutional controls, and actions taken at particular sites. CERCLIS also contains information on sites being assessed under the Superfund Program, hazardous waste sites and potential hazardous waste sites.

4. Government-maintained records of public risks—the all appropriate inquiries government records search should include a search for available records documenting public health threats or concerns caused by, or related to, activities currently or previously conducted at the site.

5. Emergency Response Notification System (ERNS) records—ERNS is EPA's data base of oil and hazardous substance spill reports. The data base can be searched for information on reported spills of oil and hazardous substances by state.

6. Government registries, or publicly available lists of engineering controls, institutional controls, and land use restrictions. The all appropriate inquiries government records search must include a search for registries or publicly available lists of recorded engineering and institutional controls and recorded land use restrictions. Such records may be useful in identifying past releases on, at, in, or to the subject property or identifying continuing environmental conditions at the property.

The final rule requires that government records be searched to identify information relative to the objectives and in accordance with the performance factors on: (1) Adjoining and nearby properties for which there are governmental records of reported releases or threatened releases (e.g., properties currently listed on the National Priorities List (NPL), properties subject to corrective action orders under the Resource Conservation and Recovery Act (RCRA), properties with reported releases from leaking underground storage tanks); (2) adjoining and nearby properties previously identified or regulated by a government entity due to environmental conditions at a site (e.g., properties previously listed on the NPL, former CERCLIS sites with notices of no further response actions planned (NFRAP)); and (3) adjoining and nearby properties that have government-issued permits to conduct waste management activities (e.g., facilities permitted to manage RCRA hazardous wastes).

In the case of government records searches for nearby properties, the final rule includes minimum search distances (e.g., properties located either within one mile or one-half mile of the subject property) for obtaining and reviewing records or data bases concerning activities and facilities located on nearby properties. The search distances are based upon our best judgment regarding the potential impacts that incidents or circumstances at an adjoining property may have on the subject property. With the exception of the required searches for institutional and engineering controls, the search distances finalized in today's rule are the search distances that were proposed in the proposed rule. For example, government records identifying properties listed on the NPL must be searched to obtain information on NPL sites located within one mile of the subject property. NPL sites located beyond one mile of a property most likely will have little or no impact on the environmental conditions at the subject property. In the case of two types of records, records of hazardous waste handler and generator records and permits, records of registered storage tanks, the final requirements specify that such records only be searched for information specific to the subject property and adjoining properties (the rule contains no requirement to search for these two types of government records for other nearby properties). The final rule requires that available lists of institutional controls and engineering controls only be searched for information on the subject property.

In the case of all the government records listed above and in the final rule in § 312.26, the requirements of this criterion may be met by searching data bases containing the same government records mentioned in the list above that are accessible and available through government entities or private sources. The review of actual records is not necessary, provided that the same information contained in the government records and required to

meet the requirements of this criterion and achieve the objectives and performance factors for these regulations is attainable by searching available data bases.

The final rule allows the environmental professional to adjust the search distances for reviewing government records of nearby properties based upon his or her professional judgment. Environmental professionals may consider one or more of the following factors when determining an alternative appropriate search distance:

- The nature and extent of a release;
- Geologic, hydrogeologic, or topographic conditions of the subject property and surrounding environment;
- Land use or development densities;
- The property type;
- Existing or past uses of surrounding properties;
- Potential migration pathways (e.g., groundwater flow direction, prevalent wind direction); or
- Other relevant factors.

The final rule requires environmental professionals to document the rationale for making any modifications to the required minimum search distances included in § 312.26 of the regulation.

T. What Are the Requirements for Visual Inspections of the Subject Property and Adjoining Properties?

Proposed Rule

The proposed rule required that an on-site visual inspection of the subject property be conducted as part of the all appropriate inquiries investigations, with one limited exception. The proposed on-site visual inspection requirements included requirements to inspect any facilities and improvements on the property as well as all areas where hazardous substances are or may have been used, stored, treated, handled, or disposed. In addition, the proposed rule included requirements to visually inspect adjoining properties. The proposal required that inspections of adjoining properties be conducted from the property line, public right-of-way, or other vantage point.

The proposed rule included a limited exception from the requirement to conduct the visual inspection "on-site." The proposed exception provided that in unusual circumstances where an on-site visual inspection cannot be performed because of physical limitations, remote and inaccessible location, or another inability to obtain access to the property, provided good faith efforts are taken to obtain such access and access to the property could not be obtained, a visual inspection could be conducted from an off-site vantage point (e.g., property-line, airplane, public right-of-way). To qualify for the exception from the requirement to conduct the inspection on site, the proposed rule required that the environmental professional document the good faith efforts undertaken to gain access to the property and explain why such efforts were unsuccessful. The proposed rule also required that the environmental professional document what other sources of information were consulted to obtain information regarding the potential environmental conditions at the property and the significance of the failure to conduct the inspection on site on his or her ability to identify conditions indicative of releases or threatened releases of hazardous substances on, at, in, or to the subject property.

In the preamble to the proposed rule, EPA recommended that an environmental professional conduct the on-site visual inspection.

Public Comments

A few commenters stated that EPA should not recommend, as we did in the preamble to the proposed rule, that an individual meeting the definition of environmental professional conduct the on-site visual inspection. These commenters stated that anyone under the responsible charge or supervision of an environmental professional should be able to conduct the on-site visual inspection. Commenters stated, that by recommending in the preamble that the environmental professional conduct the on-site visual inspection, the Agency was effectively requiring an environmental professional to conduct the visual inspection. Other commenters expressed support for the Agency's recommendation.

A few other commenters thought the proposed exception from the requirement to conduct the visual inspection on site was "broad" and "would increase the likelihood of inspections not being performed and contamination not being detected." These commenters expressed a concern that any exception from the requirement to conduct an on-site visual inspection could open the door to abuse and result in properties being transferred without being inspected. Commenters raised concerns that owners of uninspected properties could obtain liability protection by claiming to have fulfilled the requirements of all appropriate inquiries without knowledge of on-going releases at a property.

Final Rule

The final rule, at § 312.27, retains the proposed requirement that a visual on-site inspection be conducted of the subject property. The final visual on-site inspection requirements include requirements to inspect the facilities and any improvements on the property, as well as visually inspect areas on the property where hazardous substances may currently be or in the past may have been used, stored, treated, handled, or disposed of. We continue to assert that, and commenters agreed, that every all appropriate inquiries investigation must include an on-site visual inspection of the property. The on-site inspection of a property most likely will be an excellent source of information regarding indications of environmental conditions on a property. The final rule requires that a visual on-site inspection of the subject property be conducted in all but a few very limited cases. In addition, the final rule retains the proposed requirement that in those cases where physical limitations restrict the portions of the property that may be visually inspected, that the physical limitations encountered during the visual on-site inspection (e.g., weather conditions, physical obstructions) must be documented.

We note that persons conducting all appropriate inquiries with monies provided in a grant awarded under CERCLA section 104(k)(2)(B) must, depending on the terms and conditions of the grant or cooperative agreement, include within the scope of the on-site visual inspection an inspection of the facilities, improvements, and other areas of the property where pollutants, contaminants, petroleum and petroleum products, or controlled substances may currently be or in the past may have been used, stored, treated, handled, or disposed.

The visual on-site inspection of a property during the conduct of all appropriate inquiries may be the most important aspect of the inquiries and the primary source of information regarding the environmental conditions on the property. In all cases, every effort must be made to conduct an on-site visual inspection of a property when conducting all appropriate inquiries.

We understand that a prospective landowner, grantee, or environmental professional, in some limited circumstances, may not be able to obtain on-site access to a property. Extreme and prolonged weather conditions and remote locations can impede access to a property. A prospective landowner, grantee or environmental professional also could be unable to gain on-site

access to a property if the owner refuses to provide access to the party, even after the party exercises all good faith efforts to gain access to the property (e.g., seeking assistance from state government officials). Such circumstances may arise in cases where a local government becomes a last resort purchaser of a potentially-contaminated property that has little economic value. The unique nature of such transactions may result in a local government facing an uncooperative or recalcitrant property owner. Unlike commercial property transactions between private parties, where the parties' economic and legal liability interests and the ability to abandon the transaction can work in favor of the purchasing party's ability to gain access to a property prior to acquisition, property transactions between a private party and a local government may not afford the local government the same leverage, even if it is in the public interest to attain ownership of the property. This situation may occur when the local government seeks to assess, clean up, and revitalize an area, but the owner of the property is unreachable, unavailable, or otherwise unwilling to provide access to the property. In such limited circumstances, the public benefit attained from a government entity gaining ownership of a property may outweigh the need to gain on-site access to the property prior to the transfer of ownership.

The final rule requires, in unusual circumstances, that the prospective landowner or grantee make good faith efforts to gain access to the property. However, the mere refusal of a property owner to allow the prospective property owner or grantee to have access to the property does *not* constitute an unusual circumstance, absent the making of good faith efforts to otherwise gain access. The final rule, at § 312.10, defines "good faith" as "the absence of any intention to seek an unfair advantage or to defraud another party; an honest and sincere intention to fulfill one's obligations in the conduct or transaction concerned."

In those unusual circumstances where a prospective landowner, a grantee, or an environmental professional, after undertaking good faith efforts, cannot gain access to a property and therefore cannot conduct an on-site visual inspection, the final rule requires that the property be visually inspected, or observed, by another method, such as through the use of aerial photography, or be inspected, or observed, from the nearest accessible vantage point, such as the property line or a public road that runs through or along the property. In addition, the rule requires that the all appropriate inquiries report include documentation of efforts undertaken by the prospective landowner, grantee, or the environmental professional to obtain on-site access to the subject property and include an explanation of why good faith efforts to gain access to subject property were unsuccessful. The all appropriate inquiries report must include documentation of other sources of information that were consulted to obtain information necessary to achieve the objectives and performance factors. This documentation should include comments, from the environmental professional who signs the report, regarding any significant limitations on the ability of the environmental professional to identify conditions indicative of releases or threatened releases on, at, in, or to the subject property, that may arise due to the inability of the prospective landowner, grantee, or environmental professional to obtain on-site access to the property.

In those limited cases where an on-site visual inspection cannot be conducted prior to the date a property is acquired, we remind prospective landowners that protection from CERCLA liability depends upon the prospective landowner complying with all of the post-acquisition continuing obligations provided in the statute. Therefore, to ensure that adequate information is attained about a property to ensure that the property owner can fulfill these obligations, we recommend that once a property is purchased, the property owner conduct an on-site visual inspection of the property once the property is acquired, if it could not be conducted prior to acquisition. Such an inspection may provide important information necessary for the property owner to fully comply with the other statutory provisions, including on-going obligations, governing the CERCLA liability protections.

We disagree with the commenters who argued that the exception from the requirement to conduct the visual inspection on-site is "broad." We point out that the exception is limited to the requirement that the visual inspection be conducted on-site. In all cases where the exception applies, the visual inspection must still be conducted from another vantage point. In addition, the exception is limited to only those circumstances where all good faith efforts are made to gain access the property. The final rule requires that all good faith efforts to gain access be documented and requires that the environmental professional comment on the consequences that the inability to gain access to the property may have on his or her ability to render an opinion on property conditions that may be indicative of releases or threatened releases on, at, in, or to the property. The exception is very limited in scope and the documentation requirements should limit the use of the exception as well as provide the prospective landowner with useful information for determining the potential need for further investigations of the property after acquisition.

The final rule also requires that the all appropriate inquiries investigation include visual inspections of properties that adjoin the subject property. Visual inspections of adjoining properties may provide excellent information on the potential for the subject property to be affected by contamination migrating from adjoining properties. Visual inspections of adjoining properties may be conducted from the subject property's property line, one or more public rights-of-way, or other vantage point (e.g., via aerial photography). Where practicable, a visual on-site inspection is recommended and may provide greater specificity of information. The visual inspections of adjoining properties must include observing areas where hazardous substances currently may be, or previously may have been, stored, treated, handled, or disposed. Visual inspections of adjoining properties otherwise also must be conducted to achieve the objectives and performance goals for all the appropriate inquiries. Physical limitations to the visual inspections of adjoining properties should be noted.

As explained in the preamble to the proposed rule, EPA and the Negotiated Rulemaking Committee considered, when developing the proposed rule, requiring that all activities in the all appropriate inquiries investigation to be conducted by persons meeting the proposed definition of an environmental professional. Requiring that an environmental professional conduct all activities could ensure that all data collection and investigations are conducted in a manner and to a degree of specificity that allows the environmental professional to make best use of all information in forming opinions and conclusions regarding the environmental conditions at a property. However, after careful review of the specific activities included in the statutory criteria and conducting an assessment of the costs and burdens of such a requirement, EPA and the Committee concluded that it is not necessary for each and every regulatory requirement to be conducted by an environmental professional. As outlined

in section IV.H of this preamble, today's final rule, as did the proposed rule, allows for certain aspects of the inquiries to be conducted solely by the prospective landowner or grantee, while providing that all other aspects be conducted under the supervision or responsible charge of the environmental professional. Among the activities required to be conducted under the supervision or responsible charge of an environmental professional is the on-site visual inspection.

It continues to be EPA's recommendation that visual inspections of the subject property and adjoining properties be conducted by an individual who meets the regulatory definition of an environmental professional. Although many other aspects of the all appropriate inquiries may be conducted sufficiently and accurately by individuals other than an environmental professional (e.g., a research associate or librarian may be well qualified to search government records, an attorney may be well qualified to conduct a search for an environmental lien), EPA believes that an environmental professional is best qualified to conduct a visual inspection and locate and interpret information regarding the physical and geological characteristics of the property as well as information on the location and condition of equipment and other resources located on the property. EPA recognizes that other individuals who do not meet the regulatory definition of an environmental professional, particularly when these individuals are conducting such activities under the supervision or responsible charge of an environmental professional, may have the required skills and knowledge to conduct an adequate on-site visual inspection. However, EPA believes that the professional judgment of an individual meeting the definition of an environmental professional is important to ensuring that all circumstances at the property that are indicative of environmental conditions and potential releases or threatened releases are properly identified and analyzed. An environmental professional is best qualified for identifying such situations and conditions and rendering a judgment or opinion regarding the potential existence of conditions indicative of environmental concerns.

Although some commenters stated that EPA should not recommend that the visual inspection be conducted by a person meeting the definition of environmental professional, we point out that other commenters stated their support for our recommendation and some even stated that EPA should require in the regulation that the inspection be conducted by an environmental professional. We remain convinced that the on-site visual inspection of the property can be the single most important source of information regarding the environmental conditions of a property and that an individual meeting the regulatory definition of environmental professional is best able to interpret such observations of a property and ascertain the probability of conditions indicative of releases or threatened releases of hazardous substances being present at the property. In addition, we point out that the definition of environmental professional included in the final rule is less stringent than the proposed definition. Therefore, commenter concerns regarding any significant cost burdens associated with the environmental professional conducting the on-site visual inspection may be alleviated. We emphasize that EPA is recommending that the on-site visual inspection be conducted by an individual who meets the definition of environmental professional included in the final rule; it is not a requirement that the inspection be conducted by an environmental professional. The rule requires only that the inspection be conducted by an individual who is under the supervision or responsible charge of an individual meeting the definition of environmental professional. EPA agrees that if the final rule required that the on-site visual inspection be conducted by an individual meeting the definition of an environmental professional, the requirement could impose undue burdens in certain circumstances. In addition, there may be circumstances that in the best professional judgment of an environmental professional, another person under the responsible charge of the environmental professional may be more qualified to conduct the on-site inspection. To allow for flexibility and the application of professional judgment to specific circumstances, EPA continues to recommend that an environmental professional conduct the on-site inspection, but the Agency is not requiring that the inspection be conducted by an environmental professional.

U. What Are the Requirements for the Inclusion of Specialized Knowledge or Experience on the Part of the "Defendant?"

Because the conduct of all appropriate inquiries is one element of a legal defense to CERCLA liability, the statute refers to the prospective landowner, or the user of the all appropriate inquiries investigation, as the "defendant." This ensures that any information or special knowledge held by the prospective landowner with regard to a property and its conditions be included in the pre-acquisition inquiries and be considered, along with all information collected during the conduct of all appropriate inquiries, when an environmental professional renders a judgment or opinion regarding conditions indicative of environmental conditions indicative of releases or potential releases of hazardous substances on, at, in, or to the subject property. It is recommended that this information be revealed to the parties conducting the all appropriate inquiries so that any specialized knowledge may be taken into account during the conduct of the required aspects of the all appropriate inquiries.

Congress first added the innocent landowner defense to CERCLA in the Superfund Amendments and Reauthorization Act (SARA) of 1986. The Brownfields Amendments amended the innocent landowner defense and added to CERCLA the bona fide prospective purchaser and the contiguous property owner liability protections to CERCLA liability. The 1986 SARA amendments to CERCLA established that among other elements necessary for a defendant to successfully assert the innocent landowner defense, a defendant must demonstrate that he or she had, on or before the date of acquisition of the property in question, made all appropriate inquiries into previous ownership and uses of the property. Congress directed courts evaluating a defendant's showing of all appropriate inquiries to take into account, among other things, "any specialized knowledge or experience on the part of the defendant." Nothing in today's rule changes the nature or intent of this requirement as it has existed in the statute since 1986.

Proposed Rule

The proposed rule retained, as part of the federal all appropriate inquiries requirements, the consideration of any specialized knowledge or experience of the prospective landowner (or grantee if the grantee is or will be the property owner). The proposed rule did not extend this requirement beyond what already was required under CERCLA and established through case law. The proposed rule required that all appropriate inquiries include the consideration of specialized knowledge held by the prospective landowner or grantee with regard to the subject property, the area surrounding the subject property, the conditions of

adjoining properties, as well as other experience relative to the inquiries that may be applicable to identifying conditions indicative of releases or threatened releases at the subject property. The proposed rule also required that the results of the inquiries take into account any specialized knowledge related to the property, surrounding areas, and adjoining properties held by the persons responsible for undertaking the inquiries, including any specialized knowledge on the part of the environmental professional.

Public Comments

EPA did not receive significant comment on the proposed requirements for considering the specialized knowledge or experience on the part of the defendant. A few commenters mentioned that the proposed requirements would result in the all appropriate inquiries investigations having to include interviews with all previous owners and occupants of the property. These commenters may have mistakenly interpreted the proposed provisions as requiring that the specialized knowledge of all current owners and occupants be considered as part of the all appropriate inquiries investigation. We clarify that only the specialized knowledge of the prospective landowner or grantee, and the environmental professional overseeing the conduct of the inquiries need be considered.

Final Rule

The final rule retains the proposed provisions governing the consideration of specialized knowledge or experience on the part of the prospective landowner (or grantee) and the environmental professional conducting the all appropriate inquiries investigation on the part of the prospective landowner or grantee.

As provided in the preamble to the proposed rule, existing case law related to the innocent landowner defense shows that courts appear to have interpreted the "specialized knowledge" factor to mean that the professional or personal experience of the defendant may be taken into account when analyzing whether the defendant made all appropriate inquiries. For example, in *Foster* v. *United States*, 922 F. Supp. 642 (D. D.C. 1996), the owner of a property formerly owned by the General Services Administration and contaminated by, among other things, lead, mercury and PCBs, brought an action against the United States and District of Columbia, prior owners or operators of the site. The plaintiff was a principal in Long & Foster companies and purchased the property through a general partnership, and received it by quitclaim deed. The innocent landowner defense requires a property owner to demonstrate that when he or she purchased a property, he or she did not know and had no reason to know of contamination at, on, in, or to the property. The court rejected the plaintiff's claim to the innocent landowner defense based in part on the plaintiff's specialized knowledge. The court found that his specialized knowledge included his position at Long & Foster, which did hundreds of millions of dollars of commercial real estate transactions, and his position as a partner in at least 15 commercial real estate partnerships. The partnership was involved as an investor in a number of real estate transactions, some of which involved industrial or commercial or mixed-use property. The court ruled that "it cannot be said that [the partnership] is a group unknowledgeable or inexperienced in commercial real estate transactions." *Foster*, 922 F. Supp. at 656.

In *American National Bank and Trust Co. of Chicago* v. *Harcros Chemicals, Inc.*, 1997 WL 281295 (N.D. Ill. 1997), the plaintiff was a company "involved in brownfields development, purchasing environmentally distressed properties at a discount, cleaning them up, and selling them for a profit." *American National Bank*, 1997 WL 281295 at *4. As a counter-claim defendant, the company asserted it was an innocent landowner and therefore not liable pursuant to CERCLA. The court found that among other reasons the defense failed because the company possessed specialized knowledge. The court ruled that the company was an expert environmental firm and possessed knowledge that should have alerted it to the potential problems at the site.

The final rule requires that the specialized knowledge of prospective landowners and the persons responsible for undertaking the all appropriate inquiries, including grantees, be taken into account when conducting the all appropriate inquiries for the purposes of identifying conditions indicative of releases or threatened releases at a property. However, as evidenced by the case law cited above, the determination of whether or not the all appropriate inquiries standard is met with regard to specialized knowledge (as well as in regard to all the criteria) remains within the discretion of the courts.

V. What Are the Requirements for the Relationship of the Purchase Price to the Value of the Property, if the Property Was Not Contaminated?

Congress included in the statutory criteria for all appropriate inquiries a requirement to consider the relationship of the purchase price of a property to the value of the property, if the property was not contaminated. The criteria was retained in the criteria included in the Brownfields Amendments from the all appropriate inquiries provisions of the innocent landowner defense established by Congress in the 1986 amendments to CERCLA.

Proposed Rule

The proposed rule required that the prospective landowner or grantee consider whether or not the purchase price of the property reflects the fair market value of the property, assuming that the property is not contaminated. The proposed rule required that the prospective landowner or grantee consider whether any differential between the purchase price and the value of the property is due to the presence of releases or threatened releases of hazardous substances at the property. There may be many reasons that the price paid for a particular property is not an accurate reflection of the fair market value. The all appropriate inquiries investigation need only include a consideration of whether a significant difference between the price paid for a property and the fair market value of a property, if the property were not contaminated, is an indication that the property may be contaminated.

Public Comments

Many commenters asserted that an environmental professional should not be required to consider the relationship of the purchase price to the value of the property as part of the all appropriate inquiries investigation. Concerns raised by commenters include whether environmental professionals are qualified to assess the fair market value of a property. Some commenters thought that a requirement that prospective landowners or environmental professionals consider the relationship of the purchase price of property to the value of the property could violate federal or state laws governing property appraisals. Some commenters argued that the all appropriate inquiries investigation should not include the requirement to consider the relationship of the purchase price to the value of the property because the fair market value

is not always easily ascertainable. Other commenters requested that the preamble to the final rule include a recommendation that an appraisal be performed to determine a property's fair market value. In addition, commenters requested that in cases where an appraisal is conducted to determine the fair market value of a property, the rule should require that it meet the Uniform Standards of Professional Appraisal Practice. Still other commenters supported including the requirement in the final rule, but asked the Agency to require prospective landowners to obtain a property appraisal conducted by a trained or certified real estate appraiser. Some commenters stated that prospective landowners should not be required to divulge information on the price paid for a property to the environmental professional or other third party.

Final Rule

The final rule retains the requirement to consider the relationship of the purchase price to the fair market value of the property, if the property were not contaminated. The requirement is part of the statutory criteria established by Congress and has been part of the statutory provisions governing all appropriate inquiries, within the innocent landowner defense, since 1986. Today's rule does not change the previously existing provision. As did the proposed rule, today's final rule allows for this criterion to be conducted by the prospective landowner or the grantee or undertaken as part of the inquiry by an environmental professional. If an environmental professional is not qualified to consider the relationship of the purchase price to the value of the property, the prospective landowner or grantee may undertake the task or hire another third party to make the comparison of price and fair market value and consider whether any differential is due to potential environmental contamination.

If the relationship of the purchase price to the fair market value of the property, assuming the property is not contaminated, is determined by the prospective landowner or grantee, or other agent who is not under the supervision or responsible charge of the environmental professional, the final rule allows for, but does not require, the information that is collected and the determination made by or on the behalf of the prospective landowner to be provided to the environmental professional. If the information is provided to the environmental professional, he or she can then make use of such information during the conduct of the all appropriate inquiries and when rendering conclusions or opinions regarding the environmental conditions of the property. If the information is not provided to the environmental professional and the environmental professional determines that the lack of such information affects his or her ability to identify conditions indicative of releases or threatened releases of hazardous substances on, at, in, or to the property, then the environmental professional should identify the lack of information as a data gap and comment on its significance in the written report for the all appropriate inquiries investigation.

The rule does not require that a real estate appraisal be conducted to achieve compliance with this criterion. Although some commenters requested that the final rule require that a formal appraisal be conducted and we acknowledge that there may be potential value in conducting an appraisal, we determined that a formal appraisal is not necessary for the prospective landowner or grantee to make a general determination of whether the price paid for a property reflects its fair market value. In the case of many property transactions, a formal appraisal may be conducted for other purposes (*e.g.*, to establish the value of the property for the purposes of establishing the conditions of a mortgage or to provide information of relevance where a windfall lien may be filed). In cases where the results of a formal property appraisal are available, the appraisal results may serve as an excellent source of information on the fair market value of the property.

In cases where the results of a formal appraisal are not available, the determination of fair market value may be made by comparing the price paid for a particular property to prices paid for similar properties located in the same vicinity as the subject property, or by consulting a real estate expert familiar with properties in the general locality and who may be able to provide a comparability analysis. The objective is not to ascertain the exact value of the property, but to determine whether or not the purchase price paid for the property generally is reflective of its fair market value. Significant differences in the purchase price and fair market value of a property should be noted and the reasons for any differences also should be noted.

Although some commenters requested that EPA be more explicit in the final rule in requiring that the comparison of the purchase price to the fair market value of the property be conducted by the prospective landowner or grantee (and not the environmental professional), we believe that the decision of who conducts the comparison may be best left up to the judgment of the individual prospective landowner (or grantee) and environmental professional. The final rule provides in § 312.22 that the comparison of the purchase price to the fair market value of the property, if it were not contaminated, can fall outside the inquiries conducted by the environmental professional. The criteria to consider the relationship of the purchase price to the fair market value of the property, if it was not contaminated is not included as part of the requirements governing the "results of an inquiry by an environmental professional" (§ 312.21). Therefore, the requirement may be conducted by the prospective landowner or grantee, his or her attorney or agent, or the environmental professional. Given that a prospective landowner or grantee can conduct the comparison of the purchase price and the fair market value of the property or hire another agent other than the environmental professional to conduct this task, we conclude that commenter concerns regarding the prospective landowner (or grantee) having to divulge the price paid for a property to the environmental professional are unfounded.

W What Are the Requirements for Commonly Known or Reasonably Ascertainable Information About the Property?

Commonly known or reasonably ascertainable information includes information about a property that generally is known to the public within the community where the property is located and can be easily sought and found from individuals familiar with the property or from easily attainable public sources of information. As mentioned above, the Brownfields Amendments to CERCLA amended the innocent landowner defense previously added to CERCLA in 1986. In addition, the Brownfields Amendments added to CERCLA the bona fide prospective purchaser and the contiguous property owner liability protections. The 1986 amendments to CERCLA established, that among other elements necessary for a defendant to successfully assert the innocent landowner defense, a defendant must take into account commonly known or reasonably ascertainable information about the property. Congress retained this criterion as part of the all appropriate inquiries requirements included in the Brownfields Amendments. Today's rule does not change the nature or intent of

this requirement as it has existed in the statute since 1986.

Proposed Rule

The proposed rule required that all appropriate inquiries include the collection and consideration of commonly known information about the potential environmental conditions at a property. The proposed rule required both the prospective landowner or grantee and the environmental professional obtain and consider commonly known or reasonably ascertainable information during the conduct of the all appropriate inquiries investigation. The proposed rule also provided a list of potential sources of such information.

Public Comments

A few commenters expressed concern that the requirement to consider commonly known or reasonably ascertainable information about a property renders the all appropriate inquiries requirements too vague and open-ended. Commenters stated that the requirement is broad and may result in the need to interview a large number of people and consult a wide variety of sources of information. One commenter expressed a preference that the federal standards include only a checklist of specific sources of information that must be consulted. A few commenters thought the list of potential sources of commonly known information included in the proposed rule was too broad.

Final Rule

The final rule retains the proposed provisions requiring that prospective landowners and environmental professionals consider commonly known or reasonably ascertainable information about a property when conducting all appropriate inquiries. This information may be ascertained from the owner or occupant of a property, members of the local community, including owners or occupants of neighboring properties to the subject property, local or state government officials, local media sources, and local libraries and historical societies. In many cases, this information may be incidental to other information collected during the inquiries, and separate or distinct efforts to collect the information may not be necessary. Information about a property, including its ownership and uses, that is commonly known or reasonably ascertainable within the community or neighborhood in which a property is located may be valuable to identifying conditions indicative of releases or threatened releases at the subject property. Such information, if not collected during the course of collecting other information necessary to complete the all appropriate inquiries investigation, may be obtained by interviewing community officials and other residents of the locality. For example, neighboring property owners and local community members may have information regarding undocumented uses of a property during periods when the property was idle or abandoned. Local community sources may be good (i.e., reasonably ascertainable) sources of commonly known information on uses of a property and activities conducted at a property, particularly in the case of abandoned properties.

The collection and use of commonly known information about a property may be done in connection with the collection of all other required information for the purposes of achieving the objectives and performance factors contained in § 312.20. Persons undertaking the all appropriate inquiries may collect commonly known or reasonably ascertainable information on the subject property from a variety of sources, including sources located in the community in which the property is located. The opinion provided by an environmental professional regarding the environmental conditions of a property and included in the all appropriate inquiries report should be based upon a balance of all information collected, including commonly known or reasonably ascertainable information about the property. The potential sources of commonly known or reasonably ascertainable information provided in the proposed rule and retained in the final rule are provided as suggestions for where such information may be found and the list provided is not meant as an exhaustive list of sources that must be consulted. Commonly known information may be collected from other sources and may be most easily collected during the conduct of other aspects of the all appropriate inquiries investigation (*e.g.*, interviews, reviews of historical sources of information, reviews of governmental records). The requirement is not meant to require exhaustive data collection efforts, as some commenters asserted. The intent of the requirement is to establish that a prospective landowner or grantee and an environmental professional conducting all appropriate inquiries on his or her behalf must make efforts to collect and consider information about a property that is commonly known within the local community or that can be reasonably ascertained.

There is some case law, related to the innocent landowner defense, that provides guidance on how a court may rule with regard to the need to consider commonly known or reasonably ascertainable information about the property. For example, in *Wickland Oil Terminals* v. *Asarco, Inc.*, 1988 WL 167247 (N.D. Cal. 1988), the court noted that Wickland was aware of potential water quality problems at the subject property due to large piles of mining slag stored at the property, even though Wickland argued that previous owners withheld such information, because the information was available from other sources consulted by Wickland prior to purchasing the property, including the Regional Water Quality Control Board and a consulting firm hired by Wickland. Such information was commonly known by local sources and therefore should have been considered by Wickland during its conduct of all appropriate inquiries.

In *Hemingway Transport Inc.* v. *Kahn*, 174 FR 148 (Bankr. D. Mass. 1994), the court ruled against an innocent landowner claim because it found "that had [the defendants] exerted a modicum of effort they may easily have discovered information that at a minimum would have compelled them to inspect the property further * * * the [defendants] could have taken a few significant steps, literally, to minimize their liability and discover information about the property * * *" The court noted that one action the defendants should have taken to collect available information about the property included phone calls to city officials to inquire about conditions at the property.

X. What Are the Requirements for "The Degree of Obviousness of the Presence or Likely Presence of Contamination at the Property, and the Ability to Detect the Contamination by Appropriate Investigation?"

Proposed Rule

The proposed rule required that the inquiries conducted by a prospective landowner (or grantee) and environmental professional take into account all the information collected during the conduct of the all appropriate inquiries in considering the degree of obviousness of and ability to detect the presence of a release or threatened release of hazardous substances at, in, on, or to a property. In addition, the proposed rule required the environmental professional to provide an opinion regarding additional appropriate investigation, if any may be

necessary in his or her opinion to determine the environmental conditions of the property.

Public Comments

A few commenters asserted that the proposed requirements regarding the degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate inquiry were too open-ended. Also, a few commenters suggested that the final rule should include requirements to conduct sampling and analysis to meet the "ability to detect contamination by appropriate investigation" portion of the statutory criteria. However, commenters overwhelmingly agreed that the standards for all appropriate inquiries should not require sampling and analysis.

Final Rule

The final rule requires that persons conducting all appropriate inquiries consider all the information collected during the conduct of the inquiries in totality to ascertain the potential presence of a release or threatened release at the property. Persons conducting all appropriate inquiries, following the collection of all required information, must assess whether or not an obvious conclusion may be drawn that there are conditions indicative of a release or threatened release of hazardous substances (or other pollutants, contaminants, petroleum or petroleum products, and controlled substances) on, at, in, or to the property. In addition, the rule requires parties to consider whether or not the totality of information collected prior to acquiring the property indicates that the parties should be able to detect a release or threatened release on, at, in, or to the property. The final rule also retains the proposed requirement that the environmental professional include as part of the results of his or her inquiry an opinion regarding additional appropriate investigation, if any may be necessary.

We interpret the statutory criterion to require consideration of information already obtained during the conduct of all appropriate inquiries investigation and not as a requirement to collect additional information. We do not agree with commenters who asserted that the criterion is open-ended. In fact, we see this criterion as providing direction on how all of the information collected while carrying out the other criteria and regulatory requirements must be viewed comprehensively. After collecting and considering all the information required to comply with the rule's objectives and performance standards, all the information should be considered in total to determine whether or not there are indications of releases or threatened releases of hazardous substances on, at, in, or to the property. In addition, the environmental professional should provide an opinion regarding whether or not additional investigation is necessary to detect potential contamination at the site, if in his or her opinion there are conditions indicative of releases or threatened releases of hazardous substances.

The previous innocent landowner defense (added to CERCLA in 1986) required a court to consider the degree of obviousness of the presence or likely presence of contamination at a property, and the ability of the defendant (i.e., the landowner) to detect the contamination by appropriate investigation. Nothing in today's rule changes the nature or intent of this requirement as it has existed in the statute since 1986.

Case law relevant to this criterion indicates that defendants may not be able to claim an innocent landowner defense if a preponderance of evidence available to a prospective landowner prior to acquiring the property indicates that the defendant should have concluded that there is a high likelihood of contamination at the site. In some cases (e.g., *Hemingway Transport Inc.* v. *Kahn*, 174 F.R. 148 (Bankr. D. Mass. 1994), and *Foster* v. *United States*, 922 F. Supp. 642 (D.D.C. 1996), courts have ruled that if a defendant had done a bit more visual inspection or further investigation, based upon information available to the defendant prior to acquiring the property, it would have been obvious that the property was contaminated. In *Foster* v. *United States*, the court determined that the innocent landowner defense was not available based in part on the fact that the partnership presumed the site was free of contamination based upon cursory visual inspections despite evidence in the record that, at the time of the sale, the soil was visibly stained by PCB-contaminated oil. In addition, although the property was located in a run-down industrial area, the defendant did no investigation into the environmental conditions at the site prior to acquiring the property.

EPA also notes that in *U.S.* v. *Domenic Lombardi Realty, Inc.*, 290 F. Supp. 2d 198, 211 (D.R.I. 2003), the court held that the defendant did not qualify for the innocent landowner defense. The defendant could not show he had "no reason to know" of contamination at the property or that he had performed all appropriate inquiries in accordance with "good commercial or customary practices." The court also found that the defendant had not performed even a minimal environmental assessment of the site despite having learned that the property had been used as an automobile scrapyard. The court noted the distinction between Phase I and Phase II environmental assessments and credited the testimony of the United States' expert who concluded that, under the circumstances of this case, the defendant should have conducted a Phase II assessment. *Id.* at 203–04.

With regard to the conduct of sampling and analysis, today's final rule does not require sampling and analysis as part of the all appropriate inquiries investigation. However, sampling and analysis may be valuable in determining the possible presence and extent of potential contamination at a property. In addition, the fact that the all appropriate inquiry standards do not require sampling and analysis does not prevent a court from concluding that, under the circumstances of a particular case, sampling and analysis should have been conducted to meet "the degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation" criterion and obtain protection from CERCLA liability. Prospective landowners should keep in mind that the conduct of all appropriate inquiries prior to acquiring a property is only one requirement that he or she must comply with to assert protection from CERCLA liability. The statute requires that persons, after acquiring a property, comply with continuing obligations to take reasonable steps to stop on-going releases at the property, prevent any threatened future releases, and prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substances (these criteria are summarized in detail in section II.D. of this preamble). In certain instances, depending upon site-specific circumstances and the totality of the information collected during the all appropriate inquiries prior to the property acquisition, it may be necessary to conduct sampling and analysis, either pre-or post-acquisition, to fully understand the conditions at a property, and fully comply with the statutory requirements for the CERCLA liability protections. In addition, sampling and analysis may help explain existing data gaps. Prospective landowners should be mindful of all the statutory requirements for obtaining the CERCLA liability protections when

considering whether or not to conduct sampling and analysis prior to or after acquiring a property. Today's final regulation does *not* require that sampling and analysis be conducted as part of the all appropriate inquiries investigation.

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735), the Agency must determine whether this regulatory action is "significant" and therefore subject to formal review by the Office of Management and Budget (OMB) and to the requirements of the Executive Order. The Executive Order defines "significant regulatory action" as one that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that today's final rule is a "significant regulatory action" because this rule contains novel policy issues, although it is not economically significant. As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations are documented in the docket for today's rule.

To estimate the economic effects of today's final rule, we conducted an evaluation of the potential effects of this rule on the universe of prospective landowners who may chose to comply with the provisions of today's final rule to obtain protection from CERCLA liability for potential releases and threatened releases of hazardous substances that may exist at properties they intend to purchase. The results of this analysis are included in the document titled "Economic Impact Analysis for the Final All Appropriate Inquiries Regulation," which is included in the docket for today's final rule. Based upon the results of the Economic Impact Analysis (EIA), EPA has determined that this final rule will have an annual effect on the economy of less than $100 million. The annualized benefits associated with the final rule have not been monetized but are identified and summarized in the EIA for the all appropriate inquiries rule.[2]

1. Methodology

The value of any regulatory action is traditionally measured by the net change in social welfare that it generates. The EIA conducted in support of today's rule examines both costs and qualitative benefits in an effort to assess the overall net change in social welfare. The primary focus of the EIA document is on compliance costs and economic impacts. Below, EPA summarizes the analytical methodology and findings for the all appropriate inquiries rule. The information presented is derived from the EIA.

The all appropriate inquiries regulation potentially will apply to most commercial property transactions. The requirements will be applicable to any public or private party, who may potentially claim protection from CERCLA liability as an innocent landowner, a bona fide prospective purchaser, or a contiguous property owner. However, the conduct of all appropriate inquiries, also known as environmental due diligence or Phase I Environmental Site Assessment, is not new to the commercial property market. Prior to the Brownfields Amendments to CERCLA, commercial property transactions often included an assessment of the environmental conditions at properties prior to the closing of any real estate transaction whereby ownership was transferred for the purposes of confirming the conditions at the property or to establish an innocent landowner defense should environmental contamination be discovered after the property was acquired. The process most prevalently used for conducting all appropriate inquiries, or environmental site assessments, is the process developed by ASTM International (formerly known as the American Society for Testing and Materials) and entitled "E1527, Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process." In addition, some properties, particularly in cases where the subject property is assumed not to be contaminated or was never used for industrial or commercial purposes, were assessed using a less rigorous process developed by ASTM International, sometimes referred to as a "transaction screen" and entitled "E1528, Standard Practice for Environmental Site Assessments: Transaction Screen Process."

Our first step in assessing the economic impacts of the rule was to establish a baseline to represent the relevant aspects to the commercial real estate market in the absence of any changes in regulations. Because under existing conditions almost all commercial property transactions are accompanied by either an environmental site assessment (ESA) conducted in accordance with ASTM E1527–2000 or a transaction screen as specified in ASTM E1528, it was assumed these practices would continue even in the absence of the all appropriate inquiries regulation. The numbers of each type of assessment were estimated on the basis of industry data for recent years, with recent growth rates in transactions assumed to continue for the 10-year period covered by the EIA. An adjustment in the relative numbers of ESAs and transaction screens was made to account for the fact that, under the rule, an ESA will provide more certain protection from liability. This adjustment was made by comparing shifts between the two procedures that occurred when the Brownfields Amendments established the ASTM E1527–2000 standard as the interim standard for all appropriate inquiries, and thus as one requirement for qualifying as an innocent landowner, bona fide prospective purchaser, or contiguous property owner.

We then considered the requirements included in the final rule and compared them to the requirements for environmental site assessments conducted under the ASTM E1527–2000 and ASTM E1528 standards.

When compared to the ASTM E1527–2000 standard (i.e., the baseline standard), today's final rule is expected to result in a reduced burden for the conduct of interviews in those cases where the subject property is abandoned; increased burden in those cases where past owners or occupants need to be interviewed; increased burden associated with documenting recorded environmental cleanup liens; increased burden for documenting the reasons for the price and fair market value of a property in those cases where the purchase price paid for the subject property is significantly below the fair

[2] The document titled "The Economic Impact Analysis for the Final All Appropriate Inquiries Regulation" includes (1) the EIA conducted for the proposed rulemaking and (2) the Addendum to the EIA. The cost estimates presented in the Addendum are the estimated costs of the final all appropriate inquiries regulation.

market value of the property; and increased burden for recording information about the degree of obviousness of contamination at a property.

To estimate the changes in costs resulting from the rule, we developed a costing model. This model estimates the total costs of conducting site assessments as the product of costs per assessment, numbers of assessments per year, and the number of years in the analysis. The costs per assessment, in turn, are calculated by dividing each assessment into individual labor activities, estimating the labor time associated with each, and assigning a per-hour labor cost to each activity on the basis of the labor category most appropriate to that activity. Labor times and categories are assumed to depend on the size and type of property being assessed, with the nationwide distribution of properties based on data from industry on environmental sites assessments and brownfield sites.[3] The estimates and assignments of categories are made based on the experience of professionals who have been involved in large numbers of site assessments, and who are therefore skilled in cost estimation for the relevant activities. Other costs, such as reproduction and the purchase of data, are added to the labor costs to form the estimates of total costs per assessment. These total costs, stratified by size and type of property, are then multiplied by estimated numbers of assessments of each size and type to generate our estimates of total annual costs. The model was tested by comparing its results to industry-wide estimates of average price of conducting assessments under baseline conditions, and generally found to agree. The difference between the estimated cost to comply with the final rule and the estimated cost in the baseline constitutes our estimate of the incremental regulatory costs.

The EIA provides a qualitative assessment of the benefits of the all appropriate inquiries rule. The benefits discussed are those that may be attributed to an increased level of certainty with regard to CERCLA liability provided to prospective purchasers of potentially contaminated properties, including brownfields, who comply with the provisions of the rule and the other statutory provisions associated with the liability protections. The basic premise for associating certain benefits to the rule is the expectation that the level of certainty provided by the liability protections may result in increased brownfields property transactions. However, it is difficult to predict how many additional transactions may occur that involve brownfields properties in direct response to the increased certainty of the liability protections. It also is difficult to obtain data on changes in behaviors and practices of prospective landowners in response to the liability protections. Therefore, EPA made no attempt to quantify potential benefits or compare the benefits to estimated incremental costs.

The Agency believes that increasing property transactions involving brownfields and other contaminated and potentially contaminated properties and improving information about environmental conditions at these properties may provide additional indirect benefits such as increased numbers of cleanups, reduced use of greenfields, potential increases in property values, and potential increases in quality of life measures (*e.g.*, decreases in urban blight, reductions in traffic, congestion, and reduced pollution due to mobile source emissions). However, as stated above, the benefits of the rule are considered only qualitatively, due to the difficulty of predicting how many additional brownfields and contaminated property transactions may occur in response to the increased certainty of liability protections provided by the rule, as well as the difficulty in getting data on changes in behaviors and practices in response to the availability of the liability protections. EPA is confident that the new liability protections afforded to prospective landowners, if they comply with the all appropriate inquiries provisions, will result in increased benefits. EPA is not able to quantify, with any significant level of confidence, the exact proportion of the benefits attributed only to the availability of the liability protections and the all appropriate inquiries regulations. For these reasons, the costs and benefits could not be directly compared.

2. Summary of Regulatory Costs in Proposed Rule

For a given property, the costs of compliance with the all appropriate inquiries rule relative to the baseline depend on whether that property would have been assessed, in absence of the all appropriate inquiries regulation, with an ASTM E1527–2000 assessment process or with the simpler ASTM E1528 transaction screen. EPA estimated the average incremental cost of the proposed rule relative to conducting an ASTM E1527–2000 to be between $41 and $47. For the small percentage of cases for which a transaction screen would have been preferred to the ASTM E1527–2000 in the baseline, but which would, as a result of the proposed rule, require an assessment in compliance with the all appropriate inquiries rule, the average incremental cost was estimated to be between $1,448 and $1,454. We estimated that approximately 97 percent of property transactions will bear only the incremental cost of the rule relative to the ASTM E1527–2000 process. Therefore, the weighted average incremental cost of the proposed rule, per transaction, was estimated to be fairly low, between $84 and $89.

3. Public Comments on EIA for Proposed Rule

EPA received a number of public comments on the EIA conducted to assess the potential costs and impacts of the proposed rule. We summarized the public comments received related to the cost and economic impacts in the document titled "Addendum to Economic Impact Analysis for the Final All Appropriate Inquiries Regulation" (Addendum to the EIA). This document is included in the docket for today's final rule. The Addendum to the EIA also summarizes EPA's responses to the comments received that addressed the estimated costs and economic impacts.

Many commenters generally agreed with EPA's conclusion that the average incremental cost increase per transaction associated with the requirements of the proposed rule would be minimal. Some commenters mentioned that the EIA conducted for the proposed rule underestimated the incremental costs associated with the proposed rule. However, only a few commenters provided an explanation as to why they thought our cost estimates were low or provided information regarding which particular activities would result in an incremental increase in the activities and costs associated with conducting an environmental site assessment, if conducted in compliance with the requirements of the proposed rule. Most commenters did not provide specific reasons for their claims of cost increases over the ASTM E1527–2000 standard. A few commenters suggested that the EIA for the proposed rule underestimated the level of effort necessary for locating and interviewing past owners or occupants, with one commenter providing an estimated level of effort of one to three hours for this task.

[3] The distribution of abandoned properties and properties with known owners, modeled as a range, is based on an estimate of vacant lands in urban areas and an estimate of abandoned Superfund sites

4. Estimate of Costs Associated With the Final Rule

EPA made one revision to the analysis of cost impacts associated with the requirements of the proposed and final rule in response to specific issues raised by commenters. EPA agrees with the commenters who asserted that locating past owners or occupants of a property may be more time consuming than locating the current owners or occupants, as was assumed in the analysis of costs conducted for the proposed rule. Locating past owners or occupants could require as little as one 5-minute phone call (e.g., if the current owner has the contact information for the past owner) or it could require multiple phone calls that could take in excess of one hour. For the purpose of estimating the cost under the final rule, EPA estimates the incremental burden for locating past owners or occupants to be, on average, 0.5 hours per interview regardless of the property type or size. EPA did not account for this incremental burden in our analysis of the costs associated with the proposed rule. EPA also recognizes that in some cases the environmental professional will need to complete the full interview with the current owner before determining that it is necessary to interview a past owner. In other words, the environmental professional may need to complete the interview with the current owner, and then perform a more focused interview of a past owner to fill data gaps. EPA estimates that the incremental burden for interviewing past owners or occupants will be 0.5 hours for undeveloped and residential properties, one hour for commercial and industrial properties (of all sizes except large industrial), and 1.5 hours for large industrial properties. Therefore, EPA estimates that the total incremental level of effort for locating and interviewing past property owners or occupants will range from one hour to two hours depending on the property type or size.

The additional incremental hour burden, however, will not be incurred in the case of every site assessment. EPA expects that the interview with past owners or occupants will be conducted only for properties with a higher than average owner or occupant turnover rate. To derive the number of potentially affected properties, we assume that the environmental professional will interview only the current property owner if the owner was in the possession of the subject property for more than two years. We assume that after two years of owning a property, the current property owner should have a reasonably good knowledge of its condition. EPA estimates that 19 percent of Phase I ESAs conducted in a given year are conducted on properties that were sold at least once in the previous two years (for a detailed explanation on the derivation of this estimate, see the Addendum to the EIA). Using the assumption that 15 percent of all properties are abandoned properties (see Section 5.6.5.2 of EIA) which would not be affected by the requirement to interview past owners or occupants, we revised our original cost estimate to account for non-abandoned properties that were sold over the past two years. Therefore, for the purpose of our revised cost analysis, we estimate that 16 percent of properties will require an additional interview with past owners or occupants.

Except for the increase in the level of effort for the interview task for non-abandoned properties, all other parameters used in modeling our cost estimates are the same as presented in the EIA conducted for the proposed rule. To derive the incremental average cost per transaction and the total annual cost of the final rule, we employed the methodology explained in detailed in Chapters 7 and 8 of the EIA conducted for the proposed rule. Based on our analysis, the cost of a Phase I ESA under the final regulation will increase, on average, between $52 and $58. The estimated average cost for a Phase I ESA thus will range between $2,185 and $2,190.[4]

Using our revised incremental cost estimate for conducting interviews of past owners or occupants, we revised our estimated total annual cost of the final rule and our incremental total annual cost estimate. Our revised total annual cost estimate for all activities included in the all appropriate inquiries investigations conducted under the final rule is between $693.5 and $695.3 million (calculated using a discount rate of three percent). Our revised estimate of the incremental total annual cost of the final rule is between $29.7 million and $31.4 million. A more detailed explanation of our revised cost estimates, including an additional sensitivity analysis performed in response to the public comments, is included in the document titled "Addendum to the Economic Impact Analysis for the Final All Appropriate Inquiries Regulation." This document is in the public docket for today's final rule.

[4] We assumed that the environmental professionals will need to complete the full interview with the current owner before conducting an interview with the past owners or occupants To the extent that this may not always be the case, the average incremental cost (and by extension, the average cost for an AAI Phase I ESA) is overestimated

B. Paperwork Reduction Act

The information collection requirements contained in this final rule were submitted for approval to the Office of Management and Budget under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* The information collection requirements are not enforceable until OMB approves them. The Information Collection Request (ICR) document prepared by EPA has been assigned EPA ICR Number 2144.02.

Under the PRA, EPA is required to estimate the notification, reporting and recordkeeping costs and burdens associated with the requirements specified in today's rule. Today's rule will require persons wanting to assert one of the liability protections under CERCLA to conduct some activities that go beyond current customary and usual business practices (i.e., beyond ASTM E1527–2000) and therefore will impose an information collection burden under the provisions of the Paperwork Reduction Act. The information collection activities are associated with the activities mandated in section 101 (35)(B) of CERCLA for those persons wanting to claim protection from CERCLA liability. None of the information collection burdens associated with the provisions of today's rule include requirements to submit the collected information to EPA or any other government agency. Information collected by persons affected by today's rule may be useful to such persons if their potential liability under CERCLA for the release or threatened release of a hazardous substance is challenged in a court.

The activities associated with today's rule that go beyond current customary and usual business practices include interviews with neighboring property owners and/or occupants in those cases where the subject property is abandoned, documentation of all environmental cleanup liens in the Phase I Environmental Site Assessment report, discussion of the relationship of purchase price to value of the property in the report, and consideration and discussion of whether additional environmental investigation is warranted. Paperwork burdens are estimated to be 546,179 hours annually, with a total cost of $29,583,206 annually. The estimated average burden hours per response is estimated to be approximately one hour (or 25 hours per response, assuming a transition from a transaction screen). The estimated average cost burden per response is estimated to be either $67 or $1,479,

depending on whether, under baseline conditions, an ASTM E1527–2000 process or a transaction screen (ASTM E1528) would have been used.

Under the Paperwork Reduction Act, "burden" means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9. This ICR is approved by OMB, and the Agency will publish a technical amendment to 40 CFR part 9 in the **Federal Register** to display the OMB control number for the approved information collection requirements contained in this final rule.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 *et. seq.*, generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For the purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business that is defined by the Small Business Administration by category of business using the North American Industrial Classification System (NAICS) and codified at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

Since all non-residential property transactions could be affected by today's rule, if it is promulgated, large numbers of small entities could be affected to some degree. However, we estimate that the effects, on the whole, will not be significant for small entities. We estimate that, for the majority of small entities, the average incremental cost of today's rule relative to conducting an ASTM E1527–2000 Phase I Environmental Site Assessment will be between $52 and $58. When we annualize the incremental cost of $58 per property transaction over ten years at a seven percent discount rate, we estimate that the average annual cost increase per establishment per property transaction will be $8. Thus, the cost impact to small entities is estimated to not be significant. A more detailed summary of our analysis of the potential impacts of today's rule to small entities is included in "Economic Impacts Analysis of the Final All Appropriate Inquiries Regulation." This document is included in the docket for today's rule.

After considering the economic impacts of today's final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. We estimate that, on average, 266,000 small entities may purchase commercial real estate in any given year and therefore could potentially be impacted by today's final rule. Though large numbers of small entities could be affected to some degree, we estimated that the effects, on the whole, would not be significant for small entities. We estimate that, for the majority of small entities, the average incremental cost of today's rule relative to conducting an ASTM E1527–2000 will be between $52 and $58. For the small percentage of cases for which a transaction screen would have been preferred to the ASTM E1527–2000 in the baseline, but which now will require an assessment in compliance with the rule, the average incremental cost of conducting an environmental site assessment will be between $1,459 and $1,465. When we annualize the incremental cost per property transaction over ten years at a seven percent discount rate, we estimate that for the majority of small entities the average annual cost increase per establishment per property transaction will be approximately $8. For the small percentage of entities transitioning from transaction screens to the all appropriate inquiries requirements of the final rule, the average annual cost increase per establishment per property transaction will be $209.[5]

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation of why that alternative was not adopted.

Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA, a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials to have meaningful and timely input in the development of regulatory proposals with significant federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

Today's rule contains no federal mandates (under the regulatory provisions of Title II of the UMRA) for

[5] For a very small percentage of entities transitioning from transaction screens to the all appropriate inquiries requirements, the maximum increase per establishment per property transaction is estimated to be approximately $2,845. When we annualize this incremental cost per property transaction over ten years at a seven percent discount rate, we estimate that the maximum annual cost increase per establishment per property transaction will be $405. We estimate that approximately one fifth of one percent of the properties transitioning from a transaction screen to a Phase I ESA will have an impact of this magnitude each year.

state, local, or tribal governments or the private sector. The rule imposes no enforceable duty on any state, local, or tribal governments. EPA also determined that today's rule contains no regulatory requirements that might significantly or uniquely affect small governments. In addition, as discussed above, the private sector is not expected to incur costs of $100 million or more as a result of today's rule. Therefore, today's rule is not subject to the requirements of Sections 202 and 205 of UMRA.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government."

Today's rule does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. No state and local government bodies will incur compliance costs as a result of today's rulemaking. Therefore, Executive Order 13132 does not apply to this rule.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." Today's rule does not have tribal implications, as specified in Executive Order 13175. Today's rule does not significantly or uniquely affect the communities of Indian tribal governments, nor would it impose direct compliance costs on them. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045: Protection of Children From Environmental Risks and Safety Risks

Executive Order 13045, entitled "Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children; and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

Today's rule is not subject to the Executive Order because it is not economically significant as defined in Executive Order 12866.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution or Use

Today's final rule is not a "significant energy action" as defined in Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001) because it is not likely to have a significantly adverse effect on the supply, distribution, or use of energy. Further, we have concluded that this rule is not likely to have any adverse energy effects.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104–113, section 12(d) (15 U.S.C. 272 note), directs EPA to use voluntary consensus standards in its regulatory activities, unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. Today's rule involves technical standards. Therefore, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272) apply.

Today's final rule is based upon a proposed rule that was developed with the assistance of a regulatory negotiation committee comprised of various affected stakeholder groups and modified slightly, based upon public comments received in response to the proposed rule. When developing the proposed rule, EPA considered using the existing standard developed by ASTM International as the federal standard for all appropriate inquiries. This standard is known as the ASTM E1527–2000 standard ("Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment Process"). However, when we proposed the federal standards for all appropriate inquiries, EPA determined that the ASTM E1527–2000 standard is inconsistent with applicable law.

In CERCLA section 101(35)(B), Congress included ten specific criteria to be used in promulgating the all appropriate inquiries rule. The 2000 version of the ASTM Phase I Environmental Site Assessment Process does not address all of the required criteria. For example, the ASTM International standard does not provide for interviews of past owners, operators, and occupants of a facility. The statute, however, states that the federally promulgated standard "shall include * * * interviews with past and present owners, operators, and occupants of the facility for the purpose of gathering information regarding the potential for contamination at the facility." CERCLA section 101(35)(B)(iii)(II). In addition, as outlined in the preamble to the proposed rule (69 FR 52541) the ASTM E1527–2000 standard also does not meet other statutory requirements. As a result, use of the ASTM E1527–2000 standard would be inconsistent with applicable law.

In today's final rule, EPA is referencing the updated standards and practices developed by ASTM International and known as Standard E1527–05 (entitled "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process"). The Agency has determined that this voluntary consensus standard is consistent with today's final rule and is compliant with the statutory criteria for all appropriate inquiries. Persons conducting all appropriate inquiries may use the procedures included in the ASTM E1527–05 standard to comply with today's final rule.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" (February 11, 1994), is designed to address the environmental and human health conditions of minority and low-income populations. EPA is committed to addressing environmental justice concerns and has assumed a leadership role in environmental justice initiatives to enhance environmental quality for all citizens of the United States. The Agency's goals are to ensure that no segment of the population, regardless of race, color, national origin, income, or net worth bears disproportionately high and adverse human health and environmental impacts as a result of EPA's policies, programs, and activities. Our goal is to ensure that all citizens live in clean and sustainable communities. In response to Executive Order 12898, and to concerns voiced by many groups outside the Agency, EPA's Office of Solid Waste and Emergency Response (OSWER) formed an Environmental Justice Task Force to analyze the array of environmental justice issues specific to waste programs and to develop an overall strategy to identify and address these issues (OSWER Directive No. 9200.3–17). EPA's brownfields program has a particular emphasis on addressing concerns specific to environmental justices communities. Many of the communities and neighborhoods that are most significantly impacted by brownfields are environmental justice communities. EPA's brownfields program targets such communities for assessment, cleanup, and revitalization. The brownfields program has a long history of working with environmental justice communities and advocates through our technical assistance and grant programs. In addition to the monies awarded to such communities in the form of assessment and cleanup grants, the brownfields program also works with environmental justice communities through our job training grants program. The job training grants provide money to government entities to facilitate the training of persons living in or near brownfields communities to attain skills for conducting site assessments and cleanups.

Given that environmental justice communities are significantly impacted by brownfields, and the federal standards for all appropriate inquiries may play a primary role in encouraging the assessment and cleanup of brownfields sites, EPA made it a priority to obtain input from representatives of environmental justice interest groups during the development of today's rulemaking. The Negotiated Rulemaking Committee tasked with developing the all appropriate inquiries proposed rule included three representatives from environmental justice advocacy groups. Each representative played a significant role in the negotiations and in the development of the proposed rule. Today's final rule includes no significant changes to the proposed rule and in particular, includes no changes that will significantly or disproportionately impact environmental justice communities.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective November 1, 2006.

List of Subjects in 40 CFR Part 312

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

Dated. October 21, 2005

Stephen L. Johnson,

Administrator.

■ For reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is amended by revising part 312 as follows:

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

Subpart A—Introduction

Sec.

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

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

Subpart A—Introduction

§ 312.1 Purpose, applicability, scope and disclosure obligations.

(a) *Purpose.* The purpose of this section is to provide standards and practices for "all appropriate inquiries" for the purposes of CERCLA sections 101(35)(B)(i)(I) and 101(35)(B)(ii) and (iii).

(b) *Applicability.* The requirements of this part are applicable to:

(1) Persons seeking to establish:

(i) The innocent landowner defense pursuant to CERCLA sections 101(35) and 107(b)(3);

(ii) The bona fide prospective purchaser liability protection pursuant to CERCLA sections 101(40) and 107(r);

(iii) The contiguous property owner liability protection pursuant to CERCLA section 107(q); and

(2) persons conducting site characterization and assessments with the use of a grant awarded under CERCLA section 104(k)(2)(B).

(c) *Scope.* (1) Persons seeking to establish one of the liability protections under paragraph (b)(1) of this section must conduct investigations as required in this part, including an inquiry by an environmental professional, as required under § 312.21, and the additional inquiries defined in § 312.22, to identify

conditions indicative of releases or threatened releases, as defined in CERCLA section 101(22), of hazardous substances, as defined in CERCLA section 101(14).

(2) Persons identified in paragraph (b)(2) of this section must conduct investigations required in this part, including an inquiry by an environmental professional, as required under § 312.21, and the additional inquiries defined in § 312.22, to identify conditions indicative of releases and threatened releases of hazardous substances, as defined in CERCLA section 101(22), and as applicable per the terms and conditions of the grant or cooperative agreement, releases and threatened releases of:

(i) Pollutants and contaminants, as defined in CERCLA section 101(33);

(ii) Petroleum or petroleum products excluded from the definition of "hazardous substance" as defined in CERCLA section 101(14); and

(iii) Controlled substances, as defined in 21 U.S.C. 802.

(d) *Disclosure obligations.* None of the requirements of this part limits or expands disclosure obligations under any federal, state, tribal, or local law, including the requirements under CERCLA sections 101(40)(c) and 107(q)(1)(A)(vii) requiring persons, including environmental professionals, to provide all legally required notices with respect to the discovery of releases of hazardous substances. It is the obligation of each person, including environmental professionals, conducting the inquiry to determine his or her respective disclosure obligations under federal, state, tribal, and local law and to comply with such disclosure requirements.

Subpart B—Definitions and References

§ 312.10 Definitions.

(a) Terms used in this part and not defined below, but defined in either CERCLA or 40 CFR part 300 (the National Oil and Hazardous Substances Pollution Contingency Plan) shall have the definitions provided in CERCLA or 40 CFR part 300.

(b) When used in this part, the following terms have the meanings provided as follows:

Abandoned property means: property that can be presumed to be deserted, or an intent to relinquish possession or control can be inferred from the general disrepair or lack of activity thereon such that a reasonable person could believe that there was an intent on the part of the current owner to surrender rights to the property.

Adjoining properties means: any real property or properties the border of which is (are) shared in part or in whole with that of the subject property, or that would be shared in part or in whole with that of the subject property but for a street, road, or other public thoroughfare separating the properties.

Data gap means: a lack of or inability to obtain information required by the standards and practices listed in subpart C of this part despite good faith efforts by the environmental professional or persons identified under § 312.1(b), as appropriate, to gather such information pursuant to §§ 312.20(e)(1) and 312.20(e)(2).

Date of acquisition or purchase date means: the date on which a person acquires title to the property.

Environmental Professional means:

(1) a person who possesses sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding conditions indicative of releases or threatened releases (see § 312.1(c)) on, at, in, or to a property, sufficient to meet the objectives and performance factors in § 312.20(e) and (f).

(2) Such a person must:

(i) Hold a current Professional Engineer's or Professional Geologist's license or registration from a state, tribe, or U.S. territory (or the Commonwealth of Puerto Rico) and have the equivalent of three (3) years of full-time relevant experience; or

(ii) Be licensed or certified by the federal government, a state, tribe, or U.S. territory (or the Commonwealth of Puerto Rico) to perform environmental inquiries as defined in § 312.21 and have the equivalent of three (3) years of full-time relevant experience; or

(iii) Have a Baccalaureate or higher degree from an accredited institution of higher education in a discipline of engineering or science and the equivalent of five (5) years of full-time relevant experience; or

(iv) Have the equivalent of ten (10) years of full-time relevant experience.

(3) An environmental professional should remain current in his or her field through participation in continuing education or other activities.

(4) The definition of environmental professional provided above does not preempt state professional licensing or registration requirements such as those for a professional geologist, engineer, or site remediation professional. Before commencing work, a person should determine the applicability of state professional licensing or registration laws to the activities to be undertaken as part of the inquiry identified in § 312.21(b).

(5) A person who does not qualify as an environmental professional under the foregoing definition may assist in the conduct of all appropriate inquiries in accordance with this part if such person is under the supervision or responsible charge of a person meeting the definition of an environmental professional provided above when conducting such activities.

Relevant experience, as used in the definition of environmental professional in this section, means: participation in the performance of all appropriate inquiries investigations, environmental site assessments, or other site investigations that may include environmental analyses, investigations, and remediation which involve the understanding of surface and subsurface environmental conditions and the processes used to evaluate these conditions and for which professional judgment was used to develop opinions regarding conditions indicative of releases or threatened releases (see § 312.1(c)) to the subject property.

Good faith means: the absence of any intention to seek an unfair advantage or to defraud another party; an honest and sincere intention to fulfill one's obligations in the conduct or transaction concerned.

Institutional controls means: non-engineered instruments, such as administrative and/or legal controls, that help to minimize the potential for human exposure to contamination and/or protect the integrity of a remedy.

§ 312.11 References.

The following industry standards may be used to comply with the requirements set forth in §§ 312.23 through 312.31:

(a) The procedures of ASTM International Standard E1527–05 entitled "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process."

(b) [Reserved]

Subpart C—Standards and Practices

§ 312.20 All appropriate inquiries.

(a) "All appropriate inquiries" pursuant to CERCLA section 101(35)(B) must be conducted within one year prior to the date of acquisition of the subject property and must include:

(1) An inquiry by an environmental professional (as defined in § 312.10), as provided in § 312.21;

(2) The collection of information pursuant to § 312.22 by persons identified under § 312.1(b); and

(3) Searches for recorded environmental cleanup liens, as required in § 312.25.

(b) Notwithstanding paragraph (a) of this section, the following components of the all appropriate inquiries must be conducted or updated within 180 days of and prior to the date of acquisition of the subject property:

(1) Interviews with past and present owners, operators, and occupants (see § 312.23);

(2) Searches for recorded environmental cleanup liens (see § 312.25);

(3) Reviews of federal, tribal, state, and local government records (see § 312.26);

(4) Visual inspections of the facility and of adjoining properties (see § 312.27); and

(5) The declaration by the environmental professional (see § 312.21(d)).

(c) All appropriate inquiries may include the results of and information contained in an inquiry previously conducted by, or on the behalf of, persons identified under § 312.1(b) and who are responsible for the inquiries for the subject property, provided:

(1) Such information was collected during the conduct of all appropriate inquiries in compliance with the requirements of CERCLA sections 101(35)(B), 101(40)(B) and 107(q)(A)(viii);

(2) Such information was collected or updated within one year prior to the date of acquisition of the subject property;

(3) Notwithstanding paragraph (b)(2) of this section, the following components of the inquiries were conducted or updated within 180 days of and prior to the date of acquisition of the subject property:

(i) Interviews with past and present owners, operators, and occupants (see § 312.23);

(ii) Searches for recorded environmental cleanup liens (see § 312.25);

(iii) Reviews of federal, tribal, state, and local government records (see § 312.26);

(iv) Visual inspections of the facility and of adjoining properties (see § 312.27); and

(v) The declaration by the environmental professional (see § 312.21(d)).

(4) Previously collected information is updated to include relevant changes in the conditions of the property and specialized knowledge, as outlined in § 312.28, of the persons conducting the all appropriate inquiries for the subject property, including persons identified in § 312.1(b) and the environmental professional, defined in § 312.10.

(d) All appropriate inquiries can include the results of report(s) specified in § 312.21(c), that have been prepared by or for other persons, provided that:

(1) The report(s) meets the objectives and performance factors of this regulation, as specified in paragraphs (e) and (f) of this section; and

(2) The person specified in § 312.1(b) and seeking to use the previously collected information reviews the information and conducts the additional inquiries pursuant to §§ 312.28, 312.29 and 312.30 and the all appropriate inquiries are updated in paragraph (b)(3) of this section, as necessary.

(e) *Objectives.* The standards and practices set forth in this part for All Appropriate Inquiries are intended to result in the identification of conditions indicative of releases and threatened releases of hazardous substances on, at, in, or to the subject property.

(1) In performing the all appropriate inquiries, as defined in this section and provided in the standards and practices set forth this subpart, the persons identified under § 312.1(b)(1) and the environmental professional, as defined in § 312.10, must seek to identify through the conduct of the standards and practices set forth in this subpart, the following types of information about the subject property:

(i) Current and past property uses and occupancies;

(ii) Current and past uses of hazardous substances;

(iii) Waste management and disposal activities that could have caused releases or threatened releases of hazardous substances;

(iv) Current and past corrective actions and response activities undertaken to address past and on-going releases of hazardous substances;

(v) Engineering controls;

(vi) Institutional controls; and

(vii) Properties adjoining or located nearby the subject property that have environmental conditions that could have resulted in conditions indicative of releases or threatened releases of hazardous substances to the subject property.

(2) In the case of persons identified in § 312.1(b)(2), the standards and practices for All Appropriate Inquiries set forth in this part are intended to result in the identification of conditions indicative of releases and threatened releases of hazardous substances, pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802) on, at, in, or to the subject property. In performing the all appropriate inquiries, as defined in this section and provided in the standards and practices set forth in this subpart, the persons identified under § 312.1(b) and the environmental professional, as defined in § 312.10, must seek to identify through the conduct of the standards and practices set forth in this subpart, the following types of information about the subject property:

(i) Current and past property uses and occupancies;

(ii) Current and past uses of hazardous substances, pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802);

(iii) Waste management and disposal activities;

(iv) Current and past corrective actions and response activities undertaken to address past and on-going releases of hazardous substances pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802);

(v) Engineering controls;

(vi) Institutional controls; and

(vii) Properties adjoining or located nearby the subject property that have environmental conditions that could have resulted in conditions indicative of releases or threatened releases of hazardous substances, pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802) to the subject property.

(f) *Performance factors.* In performing each of the standards and practices set forth in this subpart and to meet the objectives stated in paragraph (e) of this section, the persons identified under § 312.1(b) or the environmental professional as defined in § 312.10 (as appropriate to the particular standard and practice) must seek to:

(1) Gather the information that is required for each standard and practice listed in this subpart that is publicly available, obtainable from its source within reasonable time and cost constraints, and which can practicably be reviewed; and

(2) Review and evaluate the thoroughness and reliability of the information gathered in complying with each standard and practice listed in this subpart taking into account information gathered in the course of complying with the other standards and practices of this subpart.

(g) To the extent there are data gaps (as defined in § 312.10) in the information developed as part of the inquiries in paragraph (e) of this section that affect the ability of persons (including the environmental professional) conducting the all

appropriate inquiries to identify conditions indicative of releases or threatened releases in each area of inquiry under each standard and practice such persons should identify such data gaps, identify the sources of information consulted to address such data gaps, and comment upon the significance of such data gaps with regard to the ability to identify conditions indicative of releases or threatened releases of hazardous substances [and in the case of persons identified in § 312.1(b)(2), hazardous substances, pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802)] on, at, in, or to the subject property. Sampling and analysis may be conducted to develop information to address data gaps.

(h) Releases and threatened releases identified as part of the all appropriate inquiries should be noted in the report of the inquiries. These standards and practices however are not intended to require the identification in the written report prepared pursuant to § 312.21(c) of quantities or amounts, either individually or in the aggregate, of hazardous substances pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802) that because of said quantities and amounts, generally would not pose a threat to human health or the environment.

§ 312.21 Results of inquiry by an environmental professional.

(a) Persons identified under § 312.1(b) must undertake an inquiry, as defined in paragraph (b) of this section, by an environmental professional, or conducted under the supervision or responsible charge of, an environmental professional, as defined in § 312.10. Such inquiry is hereafter referred to as "the inquiry of the environmental professional."

(b) The inquiry of the environmental professional must include the requirements set forth in §§ 312.23 (interviews with past and present owners * * *), 312.24 (reviews of historical sources * * *), 312.26 (reviews of government records), 312.27 (visual inspections), 312.30 (commonly known or reasonably ascertainable information), and 312.31 (degree of obviousness of the presence * * * and the ability to detect the contamination * * *). In addition, the inquiry should take into account information provided to the environmental professional as a result of the additional inquiries conducted by persons identified in § 312.1(b) and in accordance with the requirements of § 312.22.

(c) The results of the inquiry by an environmental professional must be documented in a written report that, at a minimum, includes the following:

(1) An opinion as to whether the inquiry has identified conditions indicative of releases or threatened releases of hazardous substances [and in the case of inquiries conducted for persons identified in § 312.1(b)(2) conditions indicative of releases and threatened releases of pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802)] on, at, in, or to the subject property;

(2) An identification of data gaps (as defined in § 312.10) in the information developed as part of the inquiry that affect the ability of the environmental professional to identify conditions indicative of releases or threatened releases of hazardous substances [and in the case of inquiries conducted for persons identified in § 312.1(b)(2) conditions indicative of releases and threatened releases of pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802)] on, at, in, or to the subject property and comments regarding the significance of such data gaps on the environmental professional's ability to provide an opinion as to whether the inquiry has identified conditions indicative of releases or threatened releases on, at, in, or to the subject property. If there are data gaps such that the environmental professional cannot reach an opinion regarding the identification of conditions indicative of releases and threatened releases, such data gaps must be noted in the environmental professional's opinion in paragraph (c)(1) of this section; and

(3) The qualifications of the environmental professional(s).

(d) The environmental professional must place the following statements in the written document identified in paragraph (c) of this section and sign the document:

"[I, We] declare that, to the best of [my, our] professional knowledge and belief, [I, we] meet the definition of Environmental Professional as defined in § 312.10 of this part."

"[I, We] have the specific qualifications based on education, training, and experience to assess a property of the nature, history, and setting of the subject property. [I, We] have developed and performed the all appropriate inquiries in conformance with the standards and practices set forth in 40 CFR Part 312."

§ 312.22 Additional inquiries.

(a) Persons identified under § 312.1(b) must conduct the inquiries listed in paragraphs (a)(1) through (a)(4) below and may provide the information associated with such inquiries to the environmental professional responsible for conducting the activities listed in § 312.21:

(1) As required by § 312.25 and if not otherwise obtained by the environmental professional, environmental cleanup liens against the subject property that are filed or recorded under federal, tribal, state, or local law;

(2) As required by § 312.28, specialized knowledge or experience of the person identified in § 312.1(b);

(3) As required by § 312.29, the relationship of the purchase price to the fair market value of the subject property, if the property was not contaminated; and

(4) As required by § 312.30, and if not otherwise obtained by the environmental professional, commonly known or reasonably ascertainable information about the subject property.

§ 312.23 Interviews with past and present owners, operators, and occupants.

(a) Interviews with owners, operators, and occupants of the subject property must be conducted for the purposes of achieving the objectives and performance factors of § 312.20(e) and (f).

(b) The inquiry of the environmental professional must include interviewing the current owner and occupant of the subject property. If the property has multiple occupants, the inquiry of the environmental professional shall include interviewing major occupants, as well as those occupants likely to use, store, treat, handle or dispose of hazardous substances [and in the case of inquiries conducted for persons identified in § 312.1(b)(2) pollutants, contaminants, petroleum and petroleum products, and controlled substances (as defined in 21 U.S.C. 802)], or those who have likely done so in the past.

(c) The inquiry of the environmental professional also must include, to the extent necessary to achieve the objectives and performance factors of § 312.20(e) and (f), interviewing one or more of the following persons:

(1) Current and past facility managers with relevant knowledge of uses and physical characteristics of the property;

(2) Past owners, occupants, or operators of the subject property; or

(3) Employees of current and past occupants of the subject property.

(d) In the case of inquiries conducted at "abandoned properties," as defined in § 312.10, where there is evidence of potential unauthorized uses of the subject property or evidence of

uncontrolled access to the subject property, the environmental professional's inquiry must include interviewing one or more (as necessary) owners or occupants of neighboring or nearby properties from which it appears possible to have observed uses of, or releases at, such abandoned properties for the purpose of gathering information necessary to achieve the objectives and performance factors of § 312.20(e) and (f).

§ 312.24 Reviews of historical sources of information.

(a) Historical documents and records must be reviewed for the purposes of achieving the objectives and performance factors of § 312.20(e) and (f). Historical documents and records may include, but are not limited to, aerial photographs, fire insurance maps, building department records, chain of title documents, and land use records.

(b) Historical documents and records reviewed must cover a period of time as far back in the history of the subject property as it can be shown that the property contained structures or from the time the property was first used for residential, agricultural, commercial, industrial, or governmental purposes. For the purpose of achieving the objectives and performance factors of § 312.20(e) and (f), the environmental professional may exercise professional judgment in context of the facts available at the time of the inquiry as to how far back in time it is necessary to search historical records.

§ 312.25 Searches for recorded environmental cleanup liens.

(a) All appropriate inquiries must include a search for the existence of environmental cleanup liens against the subject property that are filed or recorded under federal, tribal, state, or local law.

(b) All information collected regarding the existence of such environmental cleanup liens associated with the subject property by persons to whom this part is applicable per § 312.1(b) and not by an environmental professional, may be provided to the environmental professional or retained by the applicable party.

§ 312.26 Reviews of Federal, State, Tribal, and local government records.

(a) Federal, tribal, state, and local government records or data bases of government records of the subject property and adjoining properties must be reviewed for the purposes of achieving the objectives and performance factors of § 312.20(e) and (f).

(b) With regard to the subject property, the review of federal, tribal, and state government records or data bases of such government records and local government records and data bases of such records should include:

(1) Records of reported releases or threatened releases, including site investigation reports for the subject property;

(2) Records of activities, conditions, or incidents likely to cause or contribute to releases or threatened releases as defined in § 312.1(c), including landfill and other disposal unit location records and permits, storage tank records and permits, hazardous waste handler and generator records and permits, federal, tribal and state government listings of sites identified as priority cleanup sites, and spill reporting records;

(3) CERCLIS records;

(4) Public health records;

(5) Emergency Response Notification System records;

(6) Registries or publicly available lists of engineering controls; and

(7) Registries or publicly available lists of institutional controls, including environmental land use restrictions, applicable to the subject property.

(c) With regard to nearby or adjoining properties, the review of federal, tribal, state, and local government records or databases of government records should include the identification of the following:

(1) Properties for which there are government records of reported releases or threatened releases. Such records or databases containing such records and the associated distances from the subject property for which such information should be searched include the following:

(i) Records of NPL sites or tribal- and state-equivalent sites (one mile);

(ii) RCRA facilities subject to corrective action (one mile);

(iii) Records of federally-registered, or state-permitted or registered, hazardous waste sites identified for investigation or remediation, such as sites enrolled in state and tribal voluntary cleanup programs and tribal- and state-listed brownfields sites (one-half mile);

(iv) Records of leaking underground storage tanks (one-half mile); and

(2) Properties that previously were identified or regulated by a government entity due to environmental concerns at the property. Such records or databases containing such records and the associated distances from the subject property for which such information should be searched include the following:

(i) Records of delisted NPL sites (one-half mile);

(ii) Registries or publicly available lists of engineering controls (one-half mile); and

(iii) Records of former CERCLIS sites with no further remedial action notices (one-half mile).

(3) Properties for which there are records of federally-permitted, tribal-permitted or registered, or state-permitted or registered waste management activities. Such records or data bases that may contain such records include the following:

(i) Records of RCRA small quantity and large quantity generators (adjoining properties);

(ii) Records of federally-permitted, tribal-permitted, or state-permitted (or registered) landfills and solid waste management facilities (one-half mile); and

(iii) Records of registered storage tanks (adjoining property).

(4) A review of additional government records with regard to sites identified under paragraphs (c)(1) through (c)(3) of this section may be necessary in the judgment of the environmental professional for the purpose of achieving the objectives and performance factors of § 312.20(e) and (f).

(d) The search distance from the subject property boundary for reviewing government records or databases of government records listed in paragraph (c) of this section may be modified based upon the professional judgment of the environmental professional. The rationale for such modifications must be documented by the environmental professional. The environmental professional may consider one or more of the following factors in determining an alternate appropriate search distance:

(1) The nature and extent of a release;

(2) Geologic, hydrogeologic, or topographic conditions of the subject property and surrounding environment;

(3) Land use or development densities;

(4) The property type;

(5) Existing or past uses of surrounding properties;

(6) Potential migration pathways (e.g., groundwater flow direction, prevalent wind direction); or

(7) Other relevant factors.

§ 312.27 Visual inspections of the facility and of adjoining properties.

(a) For the purpose of achieving the objectives and performance factors of § 312.20(e) and (f), the inquiry of the environmental professional must include:

(1) A visual on-site inspection of the subject property and facilities and improvements on the subject property,

including a visual inspection of the areas where hazardous substances may be or may have been used, stored, treated, handled, or disposed. Physical limitations to the visual inspection must be noted.

(2) A visual inspection of adjoining properties, from the subject property line, public rights-of-way, or other vantage point (e.g., aerial photography), including a visual inspection of areas where hazardous substances may be or may have been stored, treated, handled or disposed. Physical limitations to the inspection of adjacent properties must be noted.

(b) Persons conducting site characterization and assessments using a grant awarded under CERCLA section 104(k)(2)(B) must include in the inquiries referenced in § 312.27(a) visual inspections of areas where hazardous substances, and may include, as applicable per the terms and conditions of the grant or cooperative agreement, pollutants and contaminants, petroleum and petroleum products, and controlled substances as defined in 21 U.S.C. 802 may be or may have been used, stored, treated, handled or disposed at the subject property and adjoining properties.

(c) Except as noted in this subsection, a visual on-site inspection of the subject property must be conducted. In the unusual circumstance where an on-site visual inspection of the subject property cannot be performed because of physical limitations, remote and inaccessible location, or other inability to obtain access to the property, provided good faith (as defined in § 312.10) efforts have been taken to obtain such access, an on-site inspection will not be required. The mere refusal of a voluntary seller to provide access to the subject property does not constitute an unusual circumstance. In such unusual circumstances, the inquiry of the environmental professional must include:

(1) Visually inspecting the subject property via another method (such as aerial imagery for large properties), or visually inspecting the subject property from the nearest accessible vantage point (such as the property line or public road for small properties);

(2) Documentation of efforts undertaken to obtain access and an explanation of why such efforts were unsuccessful; and

(3) Documentation of other sources of information regarding releases or threatened releases at the subject property that were consulted in accordance with § 312.20(e). Such documentation should include comments by the environmental professional on the significance of the failure to conduct a visual on-site inspection of the subject property with regard to the ability to identify conditions indicative of releases or threatened releases on, at, in, or to the subject property, if any.

§ 312.28 Specialized knowledge or experience on the part of the defendant.

(a) Persons to whom this part is applicable per § 312.1(b) must take into account, their specialized knowledge of the subject property, the area surrounding the subject property, the conditions of adjoining properties, and any other experience relevant to the inquiry, for the purpose of identifying conditions indicative of releases or threatened releases at the subject property, as defined in § 312.1(c).

(b) All appropriate inquiries, as outlined in § 312.20, are not complete unless the results of the inquiries take into account the relevant and applicable specialized knowledge and experience of the persons responsible for undertaking the inquiry (as described in § 312.1(b)).

§ 312.29 The relationship of the purchase price to the value of the property, if the property was not contaminated.

(a) Persons to whom this part is applicable per § 312.1(b) must consider whether the purchase price of the subject property reasonably reflects the fair market value of the property, if the property were not contaminated.

(b) Persons who conclude that the purchase price of the subject property does not reasonably reflect the fair market value of that property, if the property were not contaminated, must consider whether or not the differential in purchase price and fair market value is due to the presence of releases or threatened releases of hazardous substances.

(c) Persons conducting site characterization and assessments with the use of a grant awarded under CERCLA section 104(k)(2)(B) and who know that the purchase price of the subject property does not reasonably reflect the fair market value of that property, if the property were not contaminated, must consider whether or not the differential in purchase price and fair market value is due to the presence of releases or threatened releases of hazardous substances, pollutants, contaminants, petroleum and petroleum products, or controlled substances as defined in 21 U.S.C. 802.

§ 312.30 Commonly known or reasonably ascertainable information about the property.

(a) Throughout the inquiries, persons to whom this part is applicable per § 312.1(b) and environmental professionals conducting the inquiry must take into account commonly known or reasonably ascertainable information within the local community about the subject property and consider such information when seeking to identify conditions indicative of releases or threatened releases, as set forth in § 312.1(c), at the subject property.

(b) Commonly known information may include information obtained by the person to whom this part applies in § 312.1(b) or by the environmental professional about releases or threatened releases at the subject property that is incidental to the information obtained during the inquiry of the environmental professional.

(c) To the extent necessary to achieve the objectives and performance factors of § 312.20(e) and (f), persons to whom this part is applicable per § 312.1(b) and the environmental professional must gather information from varied sources whose input either individually or taken together may provide commonly known or reasonably ascertainable information about the subject property; the environmental professional may refer to one or more of the following sources of information:

(1) Current owners or occupants of neighboring properties or properties adjacent to the subject property;

(2) Local and state government officials who may have knowledge of, or information related to, the subject property;

(3) Others with knowledge of the subject property; and

(4) Other sources of information (e.g., newspapers, Web sites, community organizations, local libraries and historical societies).

§ 312.31 The degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation.

(a) Persons to whom this part is applicable per § 312.1(b) and environmental professionals conducting an inquiry of a property on behalf of such persons must take into account the information collected under § 312.23 through 312.30 in considering the degree of obviousness of the presence of releases or threatened releases at the subject property.

(b) Persons to whom this part is applicable per § 312.1(b) and

environmental professionals conducting an inquiry of a property on behalf of such persons must take into account the information collected under § 312.23 through 312.30 in considering the ability to detect contamination by appropriate investigation. The inquiry of the environmental professional should include an opinion regarding additional appropriate investigation, if any.

[FR Doc. 05–21455 Filed 10–31–05; 8:45 am]
BILLING CODE 6560–50–P

CERCLA Enforcement Policies on the Internet

The address below lists all of EPA's CERCLA Enforcement policies.

http://www.epa.gov/compliance/resources/policies/cleanup/superfund

All CERCLA Enforcement policies from 1983 on are listed by name. To get into more specific policies that involve landowner liability issues, one can click on "landowner liability" to find those specific policies.

Helen Keplinger, Attorney-Advisor
OECA/OSRE/RSD
PHONE 301-229-5526
FAX 301-229-3954
VOICE MAIL 202-564-4221

NOTES

PRP Search Issues at Mercury Release Sites

WILDA WATSON COBB

Wilda Watson Cobb is an Associate Regional Counsel for the U.S. EPA Region 4 in the Environmental Accountability Division office of CERCLA/Water Legal Support. In her capacity as an attorney with Region 4 Ms. Cobb provides advice and assistance on legal matters including enforcement and policy matters Her particular areas of expertise in the CERCLA Office are emergency response and removal issues and issues involving the National Contingency Plan (NCP). Most recently Ms. Cobb has been working on the hurricane response and the revisions to the NCP.

Ms. Cobb has been involved in writing the recently published guidance document "Determinations Regarding Which Sites are "Eligible Response Sites" under CERCLA Section 101(41(C) (i), as added By the Small Business Liability Relief and Brownfields Revitalization Act." Ms Cobb has spoken on issues dealing with the new Brownfields Act and has lectured on the National Contingency Plan.

Ms. Cobb has received several bronze metals over the past 14 years for her work at EPA In 2002, she received a National Notable Achievement Award for her work on the 300 million gallon release of coal slurry into the waters of Martin County, Kentucky. She earned her J.D. in 1991 from the University Of South Carolina School of Law and her B.A. *Summa cum laude*, in 1986 from Wofford College. She is member of the Georgia Bar.

MERCURY RELEASES
(IN RESIDENCES AND PUBLIC BUILDINGS)

Wilda Cobb
Region 4

Mercury-specific Laws

- Mercury-Containing and Rechargeable Battery Management Act of 1996
- Clean Air Act
- Clean Water Act
- RCRA
- Safe Drinking Water Act

Three forms of Mercury

- Elemental Mercury
- Inorganic Mercury
- Organic Mercury

SPECIFIC ISSUES

- Use of federal dollars to cleanup and restore private property—(especially when the property owner is a PRP)
- Under what circumstance should EPA pursue cost recovery from education institutions and home owners.
- These are generally releases that are indoor.
- The cleanup may include disposal of personal property.
- Cleanups may require relocation of residents
- Medical issues concerning residents

WHERE IS THIS MERCURY

- People keep jars of mercury in their homes
- Blood Pressure devices and other medical instruments,
- Barometers and manometers
- Has been found at industrial sites
- Dental offices
- Schools labs
- Antique Grandfather clock

Cont'd

- Use in folk medicine and religious purposes
- Power Companies and other industries that use mercury switches, etc.

WHERE ARE THESE RELEASES OCCURRING

- Hospitals
- Doctor and dental offices
- Non-profit clinics
- Schools and school buses
- Private Residences and cars

WHY WORRY ABOUT SUCH A SMALL RELEASE

- Relatively small amounts can result in dangerous levels of mercury vapor.
- Exposure to mercury vapor can affect brain and central nervous system
- Low levels of mercury exposure have been associated with learning problems in children.
- Mercury can be absorbed through the skin and accumulate in the kidneys.

PRPs

- Owners of the property that is subject to the cleanup
- Owner of the mercury/or generator
- Who caused the release

LIABILITY

- Strict liability v. Negligence
- Enforcement discretion

Insurance

- Ask for all insurance polices
- There may be may be more than one policy
- Mortgage Insurance
- Get Assignments signed

ABILITY TO PAY

- Along with Insurance policies you will need to get all the financial information.

QUESTIONS

- Where did the mercury come from?
- How did the release occur?
- Were responsible actions taken to contain the release?
- Was an adult (over 18 years old) involved in the acquisition, ownership, storage, or release of the mercury?

EDUCATIONAL INSTITUTIONS

- Did the mercury come from the school?
- How was it stored?
- Why did the School have the mercury?

REPLACEMENT & RELOCATION COSTS

Temporary relocation of the residents may be required during the cleanup for their health/safety.

In some cases permanent relocations are required.

Private/personal property may be contaminated and need to be disposed of

NOTES

Corporate Business Practices & Liability

LEO J. MULLIN

Mr. Mullin is a cost recovery expert for the United States Environmental Protection Agency, Region III. He joined EPA as a civil investigator in October 1989. Mr. Mullin's responsibilities include conducting and/or overseeing PRP searches; working with the Office of Regional Counsel and Department of Justice on Cost Recovery complaints; making determinations associated with corporate veil piercing, corporate successor liability; ability to pay and financial assurance. Mr. Mullin also assists in responding to questions concerning potential liability from the purchase of contaminated property. Mr. Mullin has testified as an expert witness on matters such as ability to pay, financial analysis and property valuation. He has also submitted testimony regarding issues such as corporate veil piercing, corporate successor liability, and the costs of site cleanups. From 1982 to 1989 Mr. Mullin was employed as a Revenue Officer by the Internal Revenue Service and prior to 1982, Mr. Mullin worked for an urban redevelopment consultant. Mr. Mullin received a B.A. in Politics from St. Joseph's University in 1982.

JOSEPH TIEGER

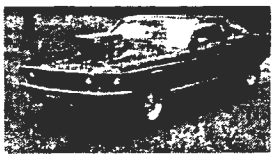
Joseph Tieger is a senior environmental protection specialist and team leader in the Office of Site Remediation Enforcement, Regional Support Division, U.S. Environmental Protection Agency, Washington, D.C. He began his career with the federal government as a biologist with the San Francisco District, Army Corps of Engineers, Regulatory Program. He then worked for the U.S. Fish and Wildlife Service in California, Missouri and Washington, D.C Joe has been with the EPA CERCLA program since 1989. He has focused on enforcement issues relating to the cleanup of hardrock mine sites and the associated processing and smelting facilities. Joe is considered to be the enforcement program's expert on mine sites, divided estates, and the application of CERCLA liability at public/private sites. Joe has a B.A. and M.A. in Biology, from San Francisco State University, an M.A. Public Administration, and a Juris Doctor, from George Washington University. He is a member of the Maryland Bar.

Corp Wars

A series of case examples
that discusses
common business practices

EPISODE 1
Car Wars

FORD



DODGE

Henry Ford v. John F. Dodge

In 1916, the Ford Motor Company earned surpluses in excess of $100,000,000.

The company's president and majority stockholder, Henry Ford, sought to stop declaring dividends for investors,

and cut prices below the price for which they could actually sell cars,

while at the same time increasing the number of persons employed by his company.

Ford said that he wanted to increase the number of people who could afford to buy his cars.

Henry Ford

John Dodge

"My ambition is to employ still more men, to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes. To do this we are putting the greatest share of our profits back in the business."

Henry Ford

John F. Dodge and others filed an action to compel the declaration of dividends.

Show me the money!!!

(not attributable to) John F. Dodge

DODGE v. FORD MOTOR CO.

SUPREME COURT OF MICHIGAN
204 Mich. 459; 170 N.W. 668; 1919 Mich. LEXIS 720; 3 A.L.R. 413

The Court held that a business corporation is organized primarily for the profit of the stockholders.

The discretion of the directors is to be exercised in the choice of means to attain that end,

and does not extend to the reduction of profits

or the nondistribution of profits among stockholders in order to benefit the public,

The court upheld the order of the trial court requiring that directors declare an extra dividend of $19 million.

DODGE v. FORD MOTOR CO.

Lessons Learned

Corporations exist for Profit

Other benefits by the company are incidental.

This is nothing personal it is just business.

Episode 2 - ASARCO

American Smelting and Refining Company

a New Jersey corporation organized in 1899

one of the world's leading producers of nonferrous metals, principally copper, lead, zinc, silver and molybdenum,

from its own mines

and through its 54.0% interest in Southern Peru Copper Corporation (SPCC).
(Source 1995 SEC Filing)

ASARCO

Financial Statements 1995

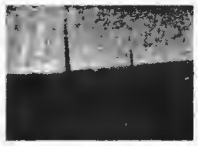
Assets	$4.3b
Liability	$2.6b
Equity	$1.7b

Earnings	
Revenue	$3.2b
Expenses	$2.7b
Net Income	$ 500m

Current Assets	$1.2b
Plant Property & Equipment	$2.1b
Other	$1b
Total Assets	$4.3

1995 Copper prices averaged a record $1.35 per pound

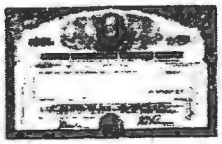
ASARCO ASSETS

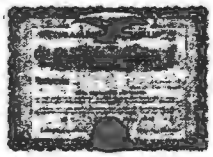


Assets?
Or
Liabilities?

ASARCO ASSETS

Also included investments in other companies





Investment Assets: usually creates a concern in terms of value of the asset and in the ability to sell the asset.

ASARCO ASSETS

Why are investments easier to move?

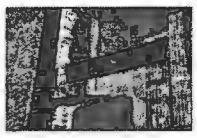
Selling the Plant

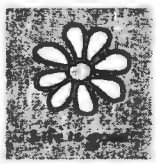
Moving the stock.

ASARCO

What happened?

In 1995
when copper was $1.35



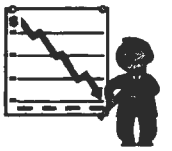


ASARCO 1999

In 1999 Copper sold for $0.67

ASARCO

Shareholder Response



Response from some investors

Grupo Mexico, a non-US Entity acquires ASARCO's stock

SELL!!!

Grupo as the parent of ASARCO Proposes to buy the stock in ASARCO's subsidiary Southern Peru Copper Co. (SPCC)

NOW!!!

Buy!!!

ASARCO

Why should I care if they sell to the parent?

High level of existing Environmental Liabilities!!!

US based assets have minimal value

Investment in subsidiary is recorded at costs, not fair market value.

Asset was being sold at less than fair market value to an insider.

Federal debt collection procedures Act
Federal Priorities Act

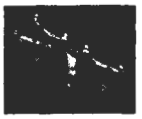
SPCC was the buried Treasure

ASARCO

What did we do?

US Intervenes

2003 Settlement
$100m in 8 promissory notes
3 year enforcement hiatus



ASARCO

Lessons Learned

- Make sure the Financial Assurance is, and remains, valid
(Quick and dirty - large PRPs have bond ratings)

- If we have outstanding costs - file liens.

-Promptly enforce the terms of the CD, AOC, UAO including the FA

- Watch out for asset sales, mergers, and reorganizations.

- Communicate! Many PRPs are multi-regional PRPs.

The Monsanto Solution

Episode 3

Monsanto

Monsanto Company

In 1901 incorporated in Missouri as Monsanto Chemical Works

In 1933 incorporated in Delaware as the Monsanto Company

Monsanto Company identified itself in SEC Filings as the successor to Monsanto Chemical Works.

The Monsanto Solution

By 1996 Monsanto listed its businesses as Agricultural, Pharmaceutical and Chemical

Agricultural	1996	1995	1994
Sales	$3b	$2.4b	$2.2b
Net Income	$540m	$516m	$477m

Pharmaceuticals	1995	1994	1993
Sales	$2b	$1.7b	$1.5b
Net Income	$76m	$131m	$54m

Chemicals	1995	1994	1993
Sales	$3b	$3.7b	$3.65b
Net Income	$67m	$286m	$282m

The Monsanto Solution

Earning Trends

Agricultural

Pharmaceutical

Chemical

The Monsanto Solution

Status Quo: One Profit Maker
One up and coming star
One has been

Options

Stay the Course

Shut it down

Sell

The Monsanto Solution

The Solution was???

Solutia

Incorporated in April 1997
in Delaware for the purpose of holding
the Monsanto Chemical Business

Solutia became an Independent Company
in September 1997

The Monsanto Solution

The Price of Freedom

Dividend issued to all Monsanto Shareholder
Of 1 common share of Solutia and
1 preferred share purchase right for Solutia
For every five shares of Monsanto

Solutia acquires the Chemicals Business

Solutia agrees to indemnify Monsanto
For ALL liabilities associated with the
Chemicals Business

The Monsanto Solution

After the Sale

Monsanto took steps to make its worldwide operations more focused, productive and cost-effective. The effect of these actions benefited EBIT (Earnings Before Income Tax) by more than $400 million in 1998 (SEC Filings)

1999 Absent the Chemicals Business
Monsanto merges with Pharmacia & Upjohn, Inc.,
The Survivor to the merger is known as Pharmacia

The Monsanto Solution

After the merger

Pharmacia creates a new subsidiary that is now known as

Monsanto Company

The Board of Directors of Pharmacia then issue a dividend to Pharmacia shareholders for stock in Monsanto Company. Monsanto is then

Before the new Monsanto is spun off it agrees to indemnify Pharmacia for the liabilities of the Chemicals Business

The Monsanto Solution

Subsequent to the Monsanto spin-off Pharmacia is acquired by Pfixer

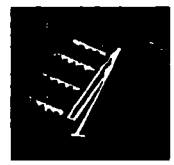
Pharmacia currently remains as a subsidiary of Pfizer

The Monsanto Solution

But what happened to Solutia?

Sales ⇩

Earnings ⇩



December 13, 2003 Solutia files for Chapter 11 Bankruptcy Protection

The Monsanto Solution

Why is this important?

Basic Liability Theory

A person is liable

A person can minimize its liability
by having another person,
indemnify the liability.

As long as Solutia paid the bills,
EPA was not hurt by the Solutia spinoff

The Monsanto Solution

Without Solutia what happens?

The current Monsanto did not create the liability
but it has agreed to indemnify the liable party.

Like Solutia, the new Monsanto may also
not have the money for the cleanup.

Letting the new Monsanto step in may like be
switching one bankrupt PRP for another.

Pharmacia is the entity that created the liability.
In order to minimize its liability, Pharmacia obtained
two indemnification agreements.

This minimizes Pharmacia's liability.
It does not eliminate it

The Monsanto Solution

EPA must not forget the Past!!!

Indemnifications are useful business tools.

Indemnification can minimize liability

Indemnifications do not eliminate liability
107(e) (1) CERCLA

It is okay to allow an indemnifying party
take over the work

The Monsanto Solution

Remember!!!
Jedi mind tricks
Work only
On weak minds!!!

But never lose the true identity of the liable party.

Do not accept the answer that the old company does not exist without verifying this yourself.

For Help

Read about this issue by going to

PRP Search Manual Section 3.6
http://www.epa.gov/compliance/cleanup/superfund/prpmanual.html

Or Contact

Joe Tieger
202 564-4276
tieger.joe@epa.gov

Leo Mullin
215 814-3172
Mullin.leo@epa.gov

Conclusion

It is the nature
of a corporation
to earn profit

Do not expect the corporation to be your friend.

Learn the corporate games.

Become aware of the tools that we have
to address the actions of a business.

NOTES

Title Searches

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Mr. Hess is an attorney-advisor in the Finance and Operations Law Office, Office of General Counsel, U.S. EPA, Washington, DC. He is the Office of General Counsel contact for real estate issues, including property acquisitions, institutional controls, relocations under the Uniform Relocation Act and takings issues.

Previously, he was an attorney at the firm of McGuire, Woods, Battle and Boothe in Richmond, Virginia, where he represented developers, lenders, businesses and local governments in a variety of real estate and corporate transactions.

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LANCE VLCEK

Mr. Vlcek is a senior investigator in Region 5's Enforcement Investigations and Search Section, Superfund Division. Mr. Vlcek has ten years with the EPA. Prior to joining EPA, Mr. Vlcek worked as a Contract Auditor and Criminal and Civil Investigator. He has worked for the US Department of Energy, Defense Contract Audit Agency, Immigration and Naturalization Service, and the US Consumer Product Safety Commission. Mr. Vlcek also has some 30 years with the U.S. Army (Active and Reserve Duty) as a Criminal Investigator and Intelligence Officer. He has worked on numerous groundwater sites in Region V.

House in Middle of Road

Title Search

By:
Lance Vicek, Investigator
Region 5

Topic Overview

- What is a Title Search
- Why do we do a title search
- Who conducts the title search

Topics Overview

- What is a title examiner
- Title abstraction
- Title searcher
- How to start your title search

Introduction

Purpose of the title search

- Identify, present and past site owners
- Construct a chain of title
- AND

INTRODUCTION

- Develop PRP Leads
- Develop a Potential Site History
- Can lead way to why other Contaminants where found on the site

Introduction

Purpose of the title search

- **Identify present and past operators**
- **Identify abutters**
- **Indicate knowledgeable persons**

The Title Search

- **A title search is a process whereby someone "searches" the public records of the county in which records of real property are located.**
- **The searcher will look through the *GRANTOR* (seller of the property) and *GRANTEE* (buyer of the property) indexes and examine each document recorded concerning that particular parcel of land.**

Why Do We Do A Title Search

A full title search involves mapping a chain of title by examining all of the recorded deeds concerning the property. ***Deeds*** are used to transfer property from owner to owner. A ***Chain of Title*** is established by determining that the present owner received valid title from the prior owner, and that prior owner received valid title from that prior owner, etc. The passing from one owner directly to the next is called a ***link***, and each link forms the ***Chain of Title***.

Who Conducts A Title Search

- Attorneys
- Paralegals
- Real Estate Title Abstractors
- Title Examiners
- Title Searchers

What Is A Title Abstractor

- Abstractors summarize pertinent legal or insurance details, sections of statutes or case law from reference books for examination, proof of ready reference. They also search out titles to determine if the title deed is correct.

What Is A Title Examiner

- Title examiners search public records and examine titles to determine a property title's legal condition. They usually copy or summarize recorded documents affecting title to property, such as mortgages, trust deeds and contract. They may also prepare and issue policies that guarantee title's legality.

What Is A Title Searcher

- Searchers investigate real estate records, examine titles or summarize pertinent legal or insurance details for a variety of purposes. They may also compile lists of mortgages, contracts and other title related documents by searching public and private records on behalf of law firms, real estate agencies, or title insurance companies.

Starting Your Title Search

- If you decide to have a contractor to do the search you should consider getting assistance in locating a firm affiliated with a national or state affiliated "Land Title Association."

Starting Your Title Search

- To locate a national list of organizations log onto

  http://www.alta.org

- Currently 33 sates have land title associations which can provide assistance in locating a firm and special issues unique to that state.

Scoping A Title Search

- Now that you found a firm to do your title search you need to scope it. Here are a few examples:

- Ownership and Encumbrances Report
  A report identifying the current owner of the subject property. The report includes vesting deed, lien, mortgage and judgment information, as well as assessed value, tax file number and tax payment status.

Deed Search

- A report that identifies the present and previous owner(s). It provides recording information, legal description of the property and a copy of the actual vesting deed.

Mortgage And Assignment Search

- A report that identifies any outstanding mortgages, deed of trust secured by the subject property. This report provides all assignment information related to any open mortgages.

Tax Search

- A report identifying the subject property by a tax identification number. The report usually includes the assessed value of the subject property, exemptions (homestead and/or widow or any other exemptions) and tax payment status.

Length And Breadth Of The Search

Time frames: from when____to when____

New EPA Initiative

"Deeds/Development Restrictions"

Better Known As:

INSTITUTIONAL CONTROLS

Examples of Title Search Terms

Warranty Deeds	Foreclosures	Partition Proceedings	Security Deed
Plat Maps	Property Tax Records	Trusts	Aerial Photographs
Quick Claim Deed	Bankruptcies	Condemnations	"Sanborn Maps"
Mortgages	Judgments	Security Agreements	Notices of Pending Action
Decedents	Mineral Leases	Certifications	Deeds
Easements	Liens	Real Estate Contracts	Deeds of Trust

Land Survey

What Is A Land Survey

A Land Survey is conducted to locate and mark property corners and to determine the location of monuments which mark a property line, boundary or corner of a parcel of land.

When Is A Surveyor Needed

- When a line or corner location is in dispute
- Before conveying a lot from a longer tract and the lot has not been surveyed
- Determine site boundaries
- Determine operable units within a site

How Much Will My Survey Cost

Factors to Consider:

- Purpose of the Survey
- Existence of Fences
- Terrain & Vegetations
- Season

How Much Will My Survey Cost

Factors to Consider:

- Deed Research
- Number of Acres
- Liability

What Can The Survey Do For Me

- Examine deeds and adjoiners
- Search for evidence on the ground
- See if there are any problems

What Can The Survey Do For Me

- Find and mark corner property
- Make contour maps and show the elevations

What Can The Survey Do For Me

- Locate: oil/gas wells, buildings, and fences
- Determine right-of-way, encroachments, other possession evidence
- Appear (Surveyor) in hearings as an expert witness

What Does The Surveyor Need From Me

- The purpose of the survey
- Copies of any deeds on the books
- Copies of any plats
- Information on property corners and lines

What Does The Surveyor Need From Me

- Brief history of ownership
- Name and address of adjoiners
- Information on property disputes

What Does The Surveyor Need From Me

- The purpose of the survey
- Copies of any deeds on the books
- Copies of any plats
- Information on property corners and lines

What Should I Receive From The Surveyors

- Work done in accordance with state laws
- Plat(s) showing all necessary information for recording
- A survey description that can be used in a deed
- Certified survey map

How Can I Obtain The Service Of A Licensed Land Surveyor

- Ask the registry/recorder of deeds
- American Society of Civil Engineers
- National Society of Professional Surveyors

Property Evaluations And Assessments

The Nature of Appraisal, the act of estimating the values of property

Property Evaluations and Assessments

<u>Key Appraisal Definitions and Concepts.</u>

Appraisal theory depends on certain key principle and definitions

Property Evaluations and Assessments

Key Concepts:

- Market Value
- Market Price
- Highest and Best Use
- Use Value

Property Evaluations and Assessments

Market Value:

- Market Value is not the same as price but, if the market is reasonably competitive, prices and be strong evidence of Market Value
- The purpose of most appraisals is to determine Market Values

Property Evaluations and Assessments

Market Price:

Market Price is determined by the intersection of supply and demand curves

Property Evaluations and Assessments

Highest and Best Use:

Demand for property depends on potential utility rather than utility in current use. In a well functioning market, buyers and sellers are aware of the various uses to which a property could be put, and the market value is based on its most profitable legal use.

Property Evaluations and Assessments

Use Value:

Use Value is the value of a property for a specific use

- Sales Comparison Approach
- The Cost Approach
- The Income Approach

Property Evaluations and Assessments

Who Conducts the Appraisal/Evaluation?
A state certified Appraiser/Assessor

To find one for your state contact:
The International Association of Assessing Officers, 130 East Randolph Street, Chicago, Illinois 60601

Property Evaluations and Assessments

Who Conducts the Appraisal/Evaluation?
A state certified Appraiser/Assessor

- **The International Appraisers Guild**
  2655 West 39th Avenue
  Denver, Co. 80211
- **American Society of Appraisers**
  555 Herndon Parkway, Suite 125
  Herndon, VA 20170

Property Evaluations and Assessments

Single Property Appraisal:

Single property appraisal is the valuation of a particular property as of a given date

Property Evaluations and Assessments

Mass Appraisal

Mass appraisal is the valuation of many properties as of a given date

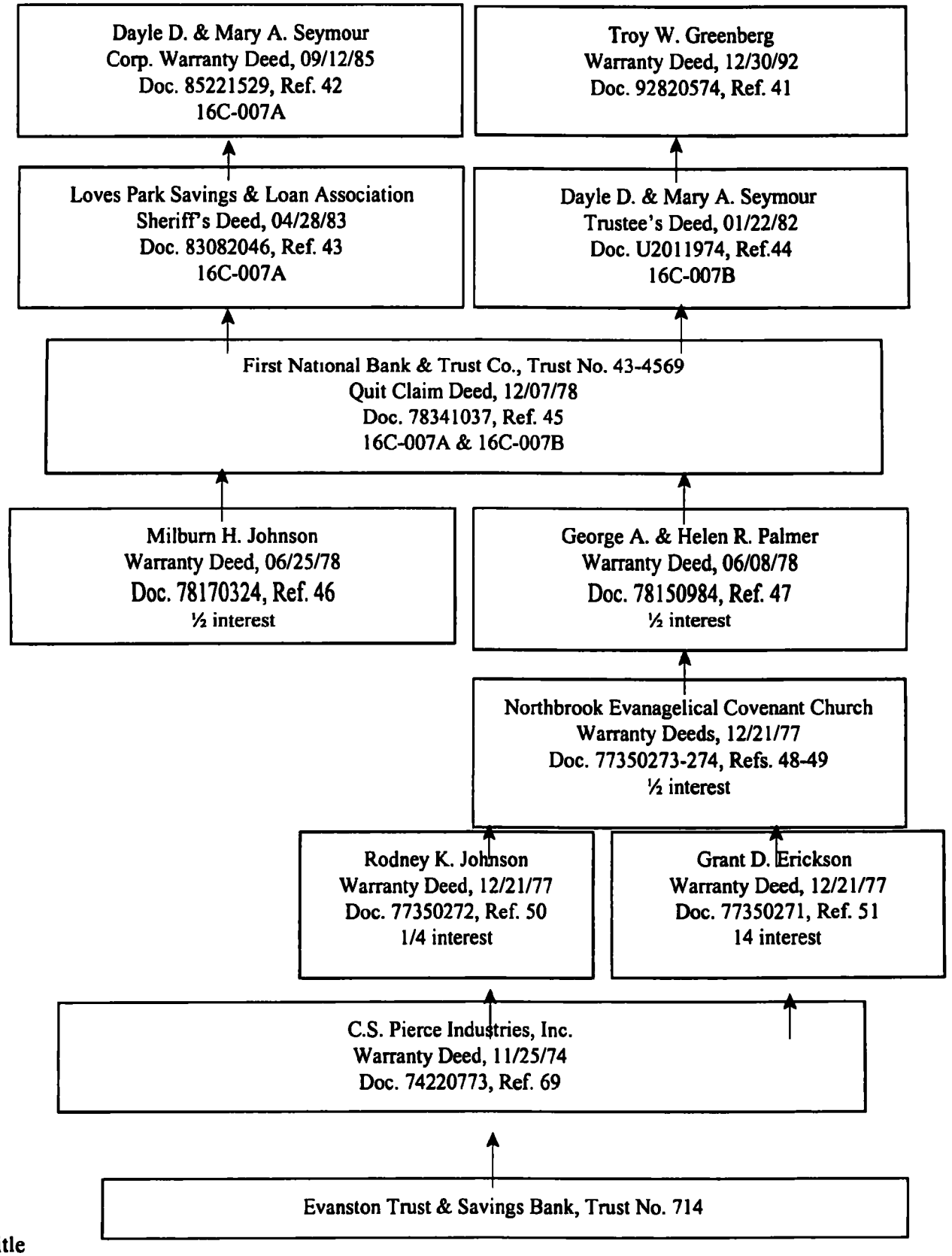
TABLE 1
RECENT DOCUMENTS RELATED TO TARGET PROPERTY
C.J. RECYCLING SITE
DES PLAINES, ILLINOIS

DOCUMENT TYPE	PARTIES	DATE RECORDED	DOCUMENT NUMBER	REFERENCE NUMBER
Claim for Lien	Claimant: Advance Thermal Corp. Owner: Rockland Mineral Processing Inc.	04/20/92	92254051	1
Notice of Foreclosure	Plaintiff: Midwest Bank and Trust Company Defendants: Rockland Mineral Processing, Inc. CJR Processing, Inc., and others.	10/19/90	90512452	2
Notice of Lease and Option	Lessor: Rockland Mineral Processing, Inc. CJR Processing, Inc.	02/08/90	90066429	3
Trustee's Deed	Grantor: Midwest Bank and Trust Company Grantee: Rockland Mineral Processig, Inc.	10/02/87	87537160	4

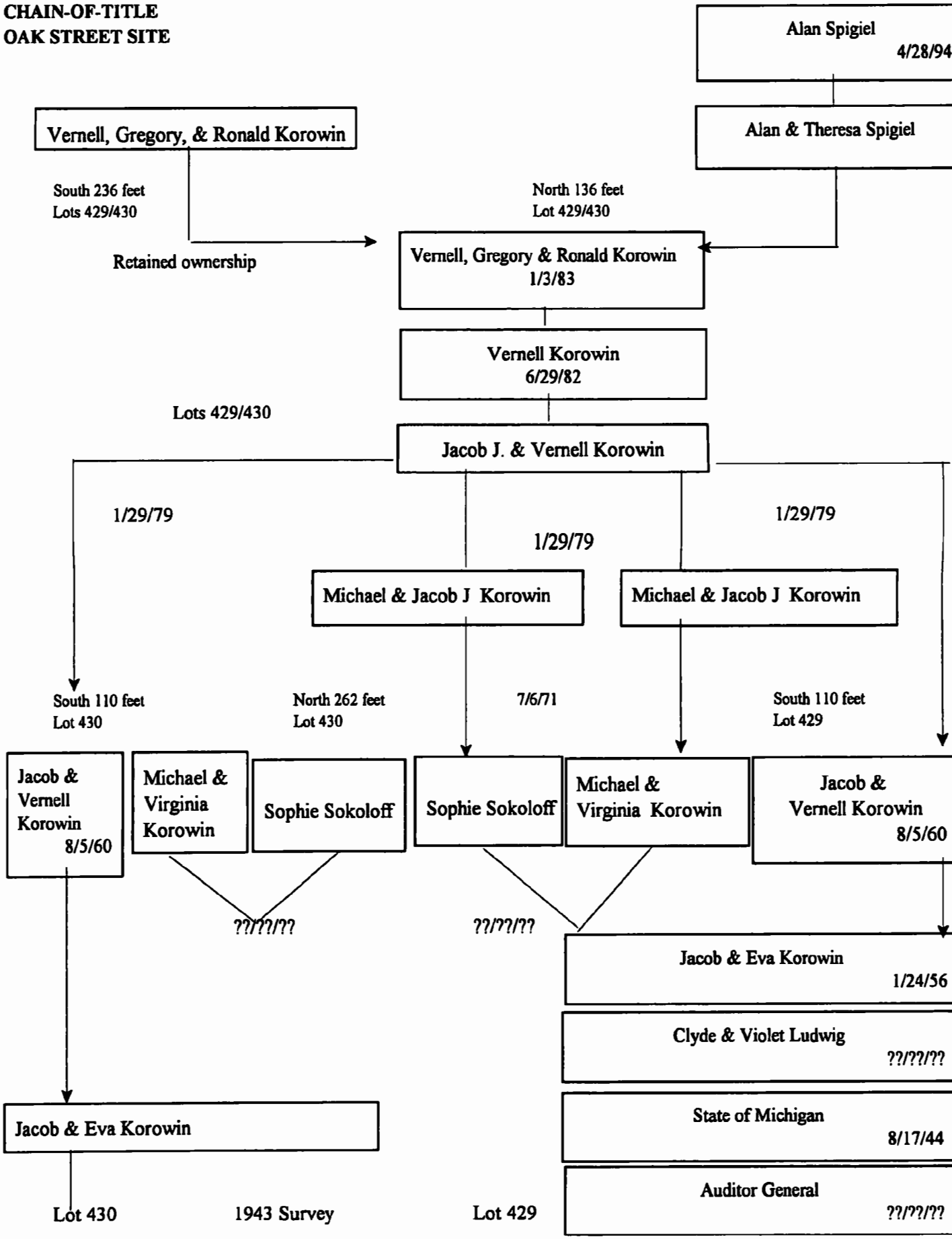
Table 4
Deed Records Summary

Instrument Type	Grantor	Grantee	Execution Date	Transferred Date	Recording Date	Book/Page	Parcel No.	Comments
Deed	Oswald Cammann, Jr.	Paul D. Lammers and John F. O'Brien	10/29/1961	11/13/1961	11/13/1961	Book 2063 page 637	79416	Part of a resurveyed 28.051 acre tract
Warranty Deed	Paul D. Lammers and John F. O'Brien	Frank Hill Smith, Inc., a New York Corporation	11/19/1962	12/12/1962	2/12/1962	Book 2119 page 606	79416	A 0.194-acre portion
Warranty Deed	Frank Hill Smith, Inc.	Paul D. Lammers and John F. O'Brien	11/30/1962	12/04/1962	12/04/1962	Book 2119 page 609	79416	Frank Hill Smith, President and F.M. Leiter, Secretary
Warranty Deed	Paul D. Lammers and John F. O'Brien	Lammers Barrel Corp.	05/28/1963	06/03/1963	06/03/1963	Book 2143 page 727	79416	Entire 5.235-acre parcel
Warranty Deed	Lammers Barrel Corp.	Paul D. Lammers and Virginia R. Lammers	01/103/1966	01/28/1966	01/28/1966	Book 2294 page 365	79416	Paul D. Lammers, President, and Hugh E. Wall, Jr., Secretary

FIGURE 12
CHAIN-OF-TITLE
PARCEL 16C-007A, 16C-007B
EVERGREEN MANOR, ROSCOE, ILLINOIS



CHAIN-OF-TITLE
OAK STREET SITE



Conduct Title Searches

The Contractor shall conduct title searches and analyze title and other related documents. The Contractor shall identify and obtain copies of relevant title documents from federal, state, township, county, and city offices, or other recognized sources. Title searches shall identify the current and past owners of properties identified as hazardous waste sites or properties located near and or adjacent to hazardous waste sites which fall within the jurisdiction of the EPA. Title searches must cover the entire time period in which hazardous substances were disposed of at the site from the initiation of commercial activity, if known, to the present. This time frame may be modified and established by the EPA TOM at the initiation of the work order. After receiving from EPA a description of the property(s) for which a title search is requested, as well as the time frame the search will cover, the contractor shall:

(a) Review and obtain all relevant title documents pertinent to the hazardous waste site. Relevant documents include transfer, sale, lease(s), liens (satisfied or unsatisfied), deeds, mortgages (satisfied and unsatisfied) , right-of-way easements, property tax records, filed affidavits, decedents, foreclosures, bankruptcies, judgements, trusts, transfers, special assessments, mineral leases, certificates of sale, deed restrictions, restrictive covenants, real estate contracts, partition proceedings, condemnations , and any other documents which establish an ownership interest in the property or show any changes in the property boundaries. If requested by the EPA TOM the contractor shall locate and obtain tax records for inclusion and summarization in the title search report. The contractor shall locate hazardous waste sites on county parcel maps, aerials or plat maps as well as reviewing land and mortgage surveys to determine whether a parcel is part of a site. Negative reporting is also required. The contractor shall develop a check list for inclusion in each title search report which shall list all public offices visited, the record searched for and the results of the search.

(b) Analyze the documents located for information which will aid the EPA in identifying and issuing notice to present and former owners and operators, as defined in CERCLA Section 107(a);

(c) Provide copies of relevant title documents, either certified true copies or regular photocopies, as requested by the EPA TOM;

(d) Analyze title records and develop a chain of title, as directed by the EPA TOM;

(e) Develop a graphic, for use in presenting the chain of title;

(f) Provide preliminary title reports establishing current ownership within the period specified by the EPA TOM;

(g) If requested by the EPA TOM, locate and obtain copies of aerial photographs pertaining to the site and prepare site parcel overlays and other information as designated by the EPA TOM on the aerial photography(s).

(h) If requested by the EPA TOM, locate and obtain copies of Sanborn Insurance maps pertaining to the site.

(i) Conduct lessee/operator searches and obtain all relevant documents. Negative reporting is also required.

(j) If requested by the EPA TOM, develop updated plat maps or other graphic representation(s) of the site which will include the true north symbol and the land (parcel(s) in question measured out in either metes or bounds; in feet; or by GIS or GPS measurements.

(k) If requested by the EPA TOM the contractor shall plot hazardous waste sites on County parcel maps, as well review various surveys (and other maps as available) to determine whether a parcel is part of a site.

(l) If requested by th EPA Tom the contractor shall obtain the latest aerial photograph of the site and overlay it with the most recent plat map, or other information as directed by the EPA TOM.

(m) If requested by the EPA TOM the contractor shall conduct a Secretary of State Search for all companies identified on Deeds or other documents obtained. This search will be conducted using free and fee based research services. A copy of the Secretary of State Record shall be incorporated into the final title search report and a Summary of the Secretary of State report shall be made and a reference will be made as to which document generated the Secretary of State search.

(n) If requested by the EPA TOM the contractor shall SECURE a Dun and Bradstreet Financial or other Designated report (example "Moody's) for each firm located in the Title search. This report shall be included with the title search report, be summarized and Identified with the document(s) that generated it.

(o) If requested by the EPA TOM the contractor shall conduct a search of city, county, and township records for building permits, blueprints, construction permits, demolition permits, reports of inspections (health &, safety) for all structures located on the site area identified and time frames set by the EPA TOM.

(p) If requested by the EPA TOM the Contractor shall conduct a Land Survey on property(s) identified by the TOM. The survey at a minimum shall have new plat maps developed showing the properties surveyed, its boundaries, and their relationship to surrounding tracts of land.

(q) If requested by the EPA TOM the contractor shall consolidate previously completed title search reports; merge previously conducted title search reports; compile additional information to complete or enhance previously completed title search reports and marge/consolidate previously conducted title search reports with newly conducted title search reports. The contractor shall also identify any inconsistencies, gaps of information, or other issues found in conducting the title search.

GENERAL REAL ESTATE TERMS

Preface

Hopefully you will find this Vocabulary helpful for understanding words and terms used in Real Estate Transactions. There are, however, some factors that may affect these definitions. Terms are defined as they are commonly understood in the mortgage and real estate industry. These terms may have different meanings in other contexts. The definitions are intentionally general and non-technical.

They do not encompass all possible meanings and nuances that a term may acquire in legal use.

State laws, as well as custom and use in various States or Regions of the Country, may modify or completely change the meanings of certain terms defined.

A

Agreement of Sale
Known by various names, such as contract of purchase agreement, or sales agreement according to location and jurisdiction. A contract in which the seller agrees to sell and a buyer agrees to buy, under specific terms and conditions spelled out in writing and signed by both parties.

Appraisal
Appraisal, the act of estimating the value of property. Modern appraisal theory views market value (probable sales price) as determined by the interaction of the forces of supply and demand. Prices determined in actual market transactions can provide sound evidence of the market value of similar property.

Assumption of Mortgage
An "Assumption of Mortgage" is often confused with "purchasing subject to a mortgage." When one purchases subject to a mortgage, the purchaser agrees to make the monthly mortgage payments on an existing mortgage, but the original mortgagor remains personally liable if the purchaser fails to make the monthly payments. Since the original mortgagor remains liable in the event of default, the mortgagee's consent is not required to a sale subject to a mortgage.

Both "Assumption of Mortgage" and "Purchasing Subject to a Mortgage" are used to finance the sale of property. They may also be used when a mortgagor is in financial difficulty and desires to sell the property to avoid foreclosure.

B

Binder or "Offer to Purchase"
A preliminary agreement, secured by the payment of earnest money, between a buyer and seller as an offer to purchase real estate. A binder secures the right to purchase real estate upon agreed terms for a

limited period of time. If the buyer changes his mind or is unable to purchase, the earnest money is forfeited unless the binder expressly provides that it is to be refunded. (See real estate broker)

Broker
A person that represents another for a fee in real estate transactions. Real Estate brokers help consumers locate suitable real estate and are paid a fee for their services.

Building Line or Setback
Distances from the ends and! or sides of the lot beyond which construction may not extend. The building line may be established by a filed plat of subdivision, by restrictive covenants in deeds or leases, by building codes, or by zoning ordinances.

C

Certificate of Title
A certificate issued by a title company or a written opinion rendered by an attorney that the seller has good marketable and insurable title to the property which he is offering for sale. A certificate of title offers no protection against any hidden defects in the title which an examination of the records could not reveal. The issuer of a certificate of title is liable only for damages due to negligence. The protection offered a homeowner under a certificate of title is not as great as that offered in a title insurance policy.

Closing Costs
The numerous expenses which buyers and sellers normally incur to complete a transaction in the transfer of ownership of real estate. These costs are in addition to price of the property and are items prepaid at the closing day.

Closing Day
The day on which the formalities of a real estate sale are concluded. The certificate of title, abstract, and deed are generally prepared for the closing by an attorney and this cost charged to the buyer. The buyer signs the mortgage, and closing costs are paid. The final closing merely confirms the original agreement reached in the agreement of sale.

Cloud on Title
An outstanding claim or encumbrance which adversely affects the marketability of title.

Commercial Property
Property intended for use by all types of retail and wholesale stores, office buildings, hotels and service establishments.

Commission
Money paid to a real estate agent or broker by the seller as compensation for finding a buyer and completing the sale. Usually it is a percentage of the sale price. Six to seven percent on houses, 10 percent on land.

Condemnation
The taking of private property for public use by a government unit, against the will of the owner, but with payment of just compensation under the government's power of eminent domain. Condemnation may also be a determination by a governmental agency that a particular building is unsafe or unfit for use.

Condominium
A structure of two or more units, the interior space of which are individually owned.

Contract of Purchase
An agreement between parties for the sale of real estate. In some states it is synonymous with Purchase Agreement. (See *agreement of sale*)

Contractor
In the construction industry, a contractor is one who contracts to erect buildings or portions of them. There are also contractors for each phase of construction: heating, electrical, plumbing, air conditioning, road building, bridge and dam erection, and others.

Construction
In the construction industry, a contractor is one who contracts to erect buildings or portions of them. There are also contractors for each phase of construction: heating, electrical, plumbing, air conditioning, road building, bridge and dam erection, and others.

Conventional Mortgage
A mortgage loan not insured by HUD or guaranteed by the Veterans' Administration. It is subject to conditions established by the lending institution and State statutes. The mortgage rates may vary with different institutions and between States. (States have various interest limits.)

D

Deed
A formal written instrument by which title to real property is transferred from one owner to another. The deed should contain an accurate description of the property being conveyed, should be signed and witnessed according to the laws of the State where the property is located, and should be delivered to the purchaser at closing day. There are two parties to a deed: the grantor and the grantee. (See also deed of trust, general warranty deed, quitclaim deed, and special warranty deed.)

Deed of Trust
Like a mortgage, a security instrument whereby real property is given as security for a debt. However, in a deed of trust there are three parties to the instrument: the borrower, the trustee, and the lender, (or beneficiary). In such a transaction, the borrower transfers the legal title for the property to the trustee who holds the property in trust as security for the payment of the debt to the lender or beneficiary. If the borrower pays the debt as agreed, the deed of trust becomes void. If, however, he defaults in the payment of the debt, the trustee may sell the property at a public sale, under the terms of the deed of trust. In most jurisdictions where the deed of trust is in force, the borrower is subject to having his

property sold without benefit of legal proceedings. A few States have begun in recent years to treat the deed of trust like a mortgage.

Deed of Trust Rider
The document required by the lender to be recorded along with the security instrument for an ARM.

Defective Title
Title to real property which lacks some of the elements necessary to transfer good title. Title to a negotiable instrument obtained by fraud.

Default
Failure to make mortgage payments as agreed to in a commitment based on the terms and at the designated time set forth in the mortgage or deed of trust. It is the mortgagor's responsibility to remember the due date and send the payment prior to the due date, not after. Generally, thirty days after the due date if payment is not received, the mortgage is in default. In the event of default, the mortgage may give the lender the right to accelerate payments, take possession and receive rents, and start foreclosure. Defaults may also come about by the failure to observe other conditions in the mortgage or deed of trust.

E

Easement Rights
A right-of-way granted to a person or company authorizing access to or over the owner's land. An electric company obtaining a right-of-way across private property is a common example.

Encroachment
An obstruction, building, or part of a building that intrudes beyond a legal boundary onto neighboring private or public land, or a building extending beyond the building line.

Encumbrance
A legal right or interest in land that affects a good or clear title, and diminishes the land's value. It can take numerous forms such as zoning ordinances, easement rights, claims, mortgages, liens, charges, a pending legal action, unpaid taxes, or restrictive covenants. An encumbrance does not legally prevent transfer of the property to another. A title search is all that is usually done to reveal the existence of such encumbrances, and it is up to the buyer to determine whether he wants to purchase with the encumbrance, or what can be done to remove it.

F

Foreclosure
A legal term applied to any of the various methods of enforcing payment of the debt secured by a mortgage, or deed of trust, by taking and selling the mortgaged property, and depriving the mortgagor of possession.

G

General Lien
A lien such as a tax lien or judgment lien, which attaches to all property of the debtor rather the lien of, for example, a trust deed, which attaches only to a specific property.

General Warranty Deed
A deed which conveys not only all the grantor's interests in and title to the property to the grantee, but also warrants that if the title is defective or has a "cloud" on it (such as mortgage claims, tax liens, title claims, judgments, or mechanic's liens against it) the grantee may hold the grantor liable.

Grantee
That party in the deed who is the buyer or recipient.

Grantor
That party in the deed who is the seller or giver.

L

Land
In a legal sense, the solid part of the surface of the earth, as distinguished from water; any ground, soil or earth whatsoever regarded a the subject of ownership and everything annexed to it, whether by nature, e.g., trees and everything in or on it, such as minerals and running water, or annexed to it by man; e.g., buildings, fences, etc. In an economic sense, land consists of all those elements in the wealth of a nation which is supposed to be furnished by nature as distinguished from those improvements which owe their value to the labor and organizing power of man.

Lien
A claim by one person on the property of another as security for money owed. Such claims may include obligations not met or satisfied, judgments, unpaid taxes, materials, or labor. (See also special lien.)

M

Marketable Title
A title that is free and clear of objectionable liens, clouds, or other title defects. A title which enables an owner to sell his property freely to others and which others will accept without objection.

Mortgage
A lien or claim against real property given by the buyer to the lender as security for money borrowed.

Mortgage Note
A written agreement to repay a loan. The agreement is secured by a mortgage, serves as proof of an indebtedness, and states the manner in which it shall be paid. The note states the actual amount of the debt that the mortgage secures and renders the mortgagor personally responsible for repayment.

Mortgage (Open-End)
A mortgage with a provision that permits borrowing additional money in the future without refinancing the loan or paying additional financing charges. Open- end provisions often limit such borrowing to no more than would raise the balance to the original loan figure.

Mortgagee
The lender in a mortgage agreement.

Mortgage
The borrower in a mortgage agreement.

P

Plat
A map or chart of a lot, subdivision or community drawn by a surveyor showing boundary lines, buildings, improvements on the land, and easements.

Purchase Agreement
See agreement of sale.

Q

Quitclaim
A deed which transfers whatever interest the maker of the deed may have in the particular parcel of land. A quitclaim deed is often given to clear the title when the grantor's interest in a property is questionable. By accepting such a deed the buyer assumes all the risks. Such a deed makes no warranties as to the title, but simply transfers to the buyer whatever interest the grantor has. (See deed.)

S

Survey
A map or plat made by a licensed surveyor showing the results of measuring the land with its elevations, improvements, boundaries, and its relationship to surrounding tracts of land. A survey is often required by the lender to assure him that a building is actually sited on the land according to its legal description.

T

Tax
As applied to real estate, an enforced charge imposed on persons, property or income, to be used to support the State. The governing body in turn utilizes the funds in the best interest of the general public.

Title
As generally used, the rights of ownership and possession of particular property. In real estate usage, title may refer to the instruments or documents by which a right of ownership is established (title documents), or it may refer to the ownership interest one has in the real estate.

Title Insurance
A title opinion is a legal examination of the abstract. The opinion outlines the necessary requirements in order to obtain a clear title. Further, it cautions the buyer/refinancer of all current restrictions to the property.

Title Search or Examination
A check of the title records, generally at the local courthouse, to make sure the buyer is purchasing a house from the legal owner and there are no liens, overdue special assessments, or other claims or outstanding restrictive covenants filed in the record, which would adversely affect the marketability or value of title.

The title search may include: examination of county records for the property's title history by a title company, an abstractor, attorney or escrow officer to determine the "Chain of Title" and the current status of title, including owner, legal description, easements, property taxes due, encumbrances (mortgages or deeds of trust), long term leases.

Trust
A party who is given legal responsibility to hold property in the best interest of or "for the benefit of' another. The trustee is one placed in a position of responsibility for another, a responsibility enforceable in a court of law. (See deed of trust.)

Z

Zoning Ordinances
The acts of an authorized local government establishing building codes, and setting forth regulations for property land usage.

NOTES

Superfund Liens & Windfall Liens

KATHLEEN (KAT) WEST

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Ms. West has been a speaker at numerous conferences on the topic of PPAs and the Brownfields Amendments. She is the recipient of the 2002 Region 4 Superfund Attorney of the Year award for her enforcement case success and her policy work on the Brownfields Amendments.

She earned her J.D. and Certificate in Environmental and Natural Resources Law in 1997 from Lewis and Clark Law School in Portland, OR, and her B.A. from the University of Florida. Ms. West is admitted to the Florida Bar.

WILLIAM KEENER

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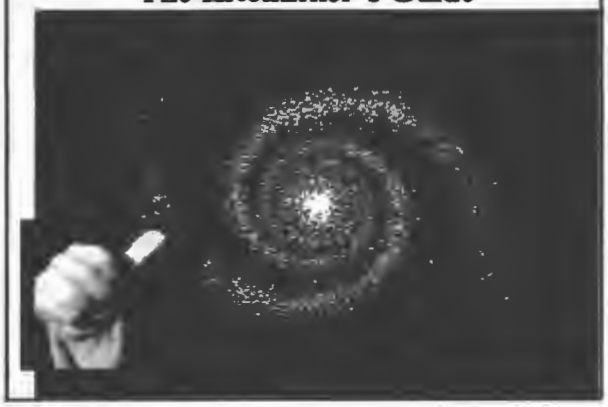
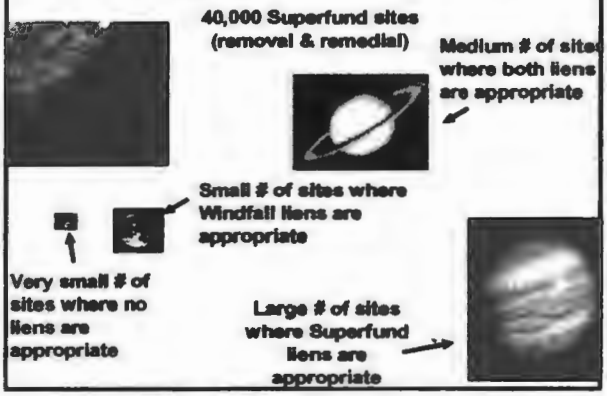
For the past 19 years, Mr. Keener has provided legal counsel to the EPA for federal environmental laws, particularly Superfund, the Resource Conservation & Recovery Act and the Oil Pollution Act. He has handled a wide variety of environmental enforcement cases, ranging from the emergency removal of hazardous materials to multi-party settlements at complex area-wide groundwater sites His areas of expertise include brownfields and the liability of purchasers of contaminated real property.

Mr. Keener graduated with distinction from the University of California at Berkeley, and received his J.D. from Hastings College of the Law.

The Hitchhiker's Guide

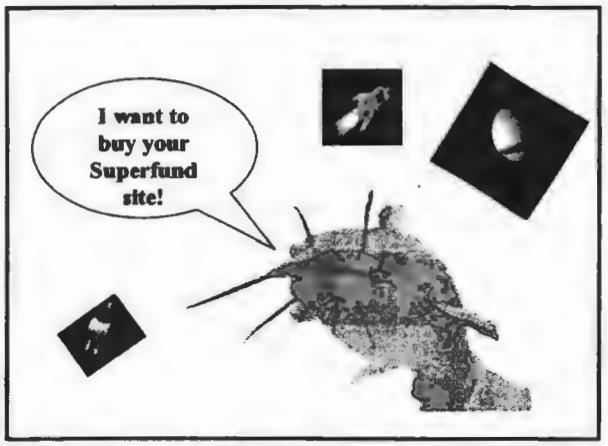


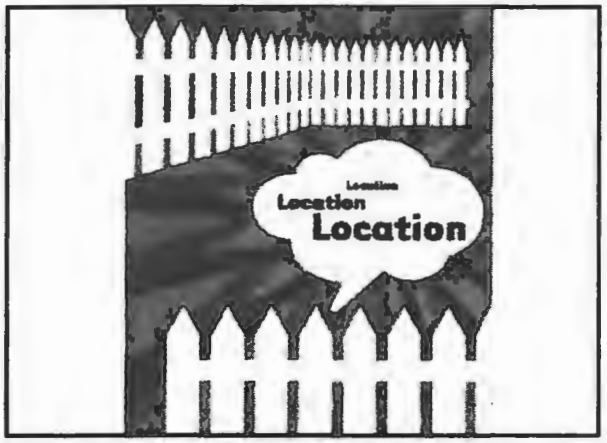
Solar System of Lien Possibilities



Why File a Lien?

- Liens serve as notice that the property is part of a Superfund site
- Liens give EPA a heads up when the property is being sold
- Liens give EPA valuable leverage with the PRP owner
- Liens serve an important cost recovery tool
- Liens can prevent unfair profit from accruing to a PRP or a bona fide prospective purchaser


I want to buy your Superfund site!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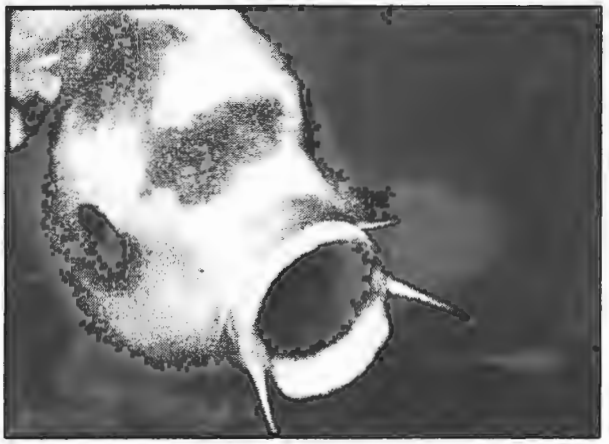

Superfund Liens – 107(l)

- Authorized in 1980 by Superfund statute
- Lien for all costs for which a person is liable shall be upon (1) property the liable person owns *and* (2) is subject to the removal or remedial action
- Duration - SOL for cost recovery actions apply to (l) lien (removal 3 years, remedial 6 years)

Superfund Lien Guidance

- Supplemental Guidance on Superfund Liens -- July 29, 1993
  Supplemental to guidance originally issued in 1987
  http://www.epa.gov/compliance/resources/policies/cleanup/superfund/guide-liens-rpt.pdf
- Guidance on Federal Superfund Liens -- Sept 22, 1987
  The use of federal liens to enhance Superfund cost recovery under CERCLA section 107(l)
  http://www.epa.gov/compliance/resources/policies/cleanup/superfund/fed-sflien-mem.pdf

Windfall Liens – 107(r)

- If a BFPP, then not liable under CERCLA 107, however EPA has authority to perfect a lien
- Windfall Lien – CERCLA 107(r)
  - For increase in FMV attributable to response action
  - Up to amount of EPA's unrecovered costs

Windfall Liens

- 107 (l)(3)'s notice / validity requirements apply
- No SOL – EPA to wait until BFPP sells or disposes of the property

Windfall Liens

Windfall lien settlements (resolutions) are now being negotiated:

- Half a dozen have been finalized (in Regions 4, 7, 8, 9)
- Some in exchange for $, others for cleanup work

Windfall Liens

Windfall liens are being filed, but sparingly:

- Liens have been filed in Regions 2 & 8
- EPA can issue comfort letters stating whether EPA does or does not intend to file a windfall lien

- BFPP's non-liability means that filing 107(l) liens is more important than ever!

Windfall Lien Guidance

- Windfall Lien Guidance issued July 16, 2003 by EPA and DOJ
  - includes model Lien Resolution document
  - includes model comfort/discomfort letter
- Available on OECA webpage: http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-windfall-lien.pdf

Windfall Lien Guidance

- This "Enforcement Discretion Policy" covers:
  - Factors for & against perfecting a lien
  - Agency's approach to lien valuation
- It does not cover:
  - Windfall Lien filing procedures / hearings
  - Timing of when EPA can enforce the lien

Windfall Lien Guidance

To Perfect, or Not to Perfect

6 Situations Where EPA Generally Won't:

1. Post-Cleanup Acquisitions
2. Previous Full Resolution of Potential Windfall
3. Specific Types of EPA Expenditures (PA/SI)
4. Specific Property Uses (homes, parks)
5. Full Cost Recovery from PRPs
6. Applicability of Enforcement Discretion Policie

Calculating the Windfall

- Amount = the lesser of unrecovered response costs or increase in FMV attributable to response action
- Default calculation: FMV of property after cleanup minus purchase price
- In order to perform calculation you need to know: (1) what BFPP paid for or will pay for property, and (2) appraisal of property "as if clean"

Example

(1) BFPP purchase Site for $500k (as is)
(2) Appraisal "as clean" is $1 million
(3) EPA spends $2,000,000 cleaning Site which increases FMV of Site to $1,000,000

Default Calculation: FMV of property after cleanup (as clean) minus purchase price
$1,000,000 - $500,000 = $500,000 windfall amt

Negotiate based on factors in 1/10/01 PPA guidance – compromise for approp. incentive

Mechanics of Filing for both Liens

- Proper Notice & Opportunity to Be Heard
  1) Evaluate perfection value to EPA
  2) Create & maintain a Record of Decision to File (lien file)
  3) provide PRP written notice of intent to file & offer opportunity for lien hearing, or in exceptional circumstances, perfect lien and then provide PRP with post-perfection written notice of filing & offer opportunity for lien hearing
  4) Perfect lien in proper venue

Lien Hearings

- Neutral EPA official
- Scope of hearing
  - reasonable basis that statutory elements satisfied
    - (Notice of Intent & Opportunity to be Heard)
    - Property owned by PRP or BFPP*
    - Property is or was subject to cleanup action
    - US has incurred outstanding costs
    - For windfall liens -- Increase in FMV attributable to EPA cleanup

Foreclosing on Liens

- Superfund liens 107(l) – US must first file an action in rem on the property and then can foreclose according to state law
- Windfall lien 107(r) – Unclear, US can probably foreclose according to state law

Practitioner Tips

Superfund liens 107(l)

- file ASAP on every Superfund site where appropriate

Windfall liens 107(r)

- offer certainty and a chance to clear title – BFPP can pay sum certain before purchase (using default calculation in guidance)
- compromise lien amount in settlement as an incentive to satisfy lien up front
- otherwise, file lien

Question & Answer Discussion

Extra Credit:
A BFPP's Literary Perspective

The Windfall Lien

I think that I have never seen
A thing as lovely as a lien

A lien that cannot take my gold
As long as I retain my hold

On property which sits atop
A dirty plume that will not stop

And if decrees and AOCs
force payoffs by the PRPs,

Let EPA recoup its costs
The rest is gravy, and my sauce

Fifth National Conference on PRP Search Enhancement
St. Louis, MO
May 2006

EPA Lien Authorities under Superfund: Tools for Enforcement and Reuse

Kat West, Associate Regional Counsel
EPA Region 4

EPA has two lien authorities under the Superfund statute, the CERCLA 107(l) Superfund lien and the CERCLA 107(r) windfall lien. Used appropriately, these liens are important tools. If a proper balance is struck, they can accomplish both enforcement and encourage revitalization of a Superfund site (removal and remedial sites).

Purpose: The purpose of any lien is to secure property as collateral for a debt. EPA's liens, once properly perfected or filed in the county records, place a claim on the *available* equity in the real property affected by a removal or remedial action.

Priority: Under state law all liens are subject to a priority scheme[1]. This means, according to state law, that liens perfected (actually recorded in the chain of title) upon real property will get satisfied (paid) or extinguished in a foreclosure action according to their relative status[2]. Technically, the lien exists in favor of the United States prior to the filing of the notice of the lien, but to establish priority, EPA must file the lien to give "notice to the world", and so the lien will appear in a title report. When a lien is filed it "encumbers," or "puts a cloud" on the title of the subject property. In a foreclosure action, tax liens normally receive a super-priority which means that they get satisfied or paid off first. Any other liens normally get paid off according to the order in which they were legally recorded on the property - - first perfected, first paid out of auction proceeds.

> For example, on the Acme Superfund Site there is a mortgage for $50,000 which was filed in 1980, unpaid tax liens for $10,000 filed in1990, an EPA Superfund lien (to recoup $1 million in Agency costs) filed in 2000, and a mechanic's lien for $500 filed in 2002. If the bank forecloses on the property and the property sells for $200,000 at auction - the tax liens would be paid in full first, the bank would get paid in full second, EPA would receive $140,000 as third in line and the mechanic would receive nothing. All the liens would be extinguished and the property would transfer to the highest bidder freely, unencumbered by any liens.

Differences Between the Two Liens: One way to conceptualize the difference between the two

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[1] The issue of whether state law can extinguish a federal Superfund lien is under research.

[2] Lien priority has no legal bearing in a voluntary sale, but may be taken into account by EPA when negotiating a lien settlement because a lien's practical value is only as good as the available equity in a property.

liens is imagine the sale of a Superfund site from a potentially responsible party ("PRP") to a bona fide prospective purchaser ("BFPP"). The traditional Superfund lien (or (l) lien) generally is used to recover cleanup costs from a liable party and applies to the time before the sale. The windfall lien (or (r) lien) is generally used to recover unfair profits, attributable to EPA's cleanup expenditures, from a non-liable party who has achieved BFPP status, and therefore usually applies to the time after the sale. In a nutshell, the Superfund lien looks backwards to recoup past response costs and the windfall lien looks forward to recoup future windfall costs.

Superfund Liens - Section 107(l): Superfund liens were authorized in 1980 when CERCLA was enacted. The purpose of the Superfund lien is to secure equity in property that is subject to a removal or remedial action (*not* other land or property owned by the PRP) for EPA's unrecovered *past* costs up to the time of satisfaction or foreclosure. Therefore, if a property owner has a defense to Superfund liability, then EPA does not have the authority to perfect a Superfund lien on the owner's property. Superfund (l) liens are subject to the statute of limitations ("SOL") expiration date of the unrecovered response costs (3 years for a removal; 6 years for remedial actions). The Superfund lien is unenforceable for unrecovered costs once the SOL runs on those costs. If appropriate, EPA may enforce the Superfund lien before the SOL has run, by filing an "in rem" action in federal court – essentially suing the PRP to force a sale or foreclosure of the property.

Advantages of Perfecting a Superfund lien: (1) aids EPA in recovering response costs from PRPs, (2) gives notice to prospective purchasers that the property is a Superfund site, and (3) gives notice to EPA that a Superfund site is being sold when the lien is satisfied.

Superfund liens are designed to recover costs during a voluntary sale or foreclosure and prevent a liable party from selling the property and unfairly pocketing the profit without settling with EPA. It is important to note that ability to pay (ATP) settlements should include the available equity of site property. The Superfund lien is often used as a bargaining chip to encourage settlement by the PRP owner. Frequently, the Superfund lien value greatly exceeds the value of the facility property; therefore, Region 4 takes into account the practical value of its lien, and in an effort to facilitate revitalization, will compromise the face value of the Superfund lien and release it for a reduced amount (available equity minus sale costs or incentive to sell) when appropriate.

Windfall Liens - Section 107(r): Windfall liens were authorized in the 2002 Brownfield Amendments to CERCLA. The purpose of the windfall lien is to recover any unfair windfall (increase in the fair market value of the property that is attributable solely to EPA's response action) that may accrue to a BFPP during the BFPP's ownership. Windfall liens may recoup the lesser of: (1) EPA's unrecovered response costs or (2) the increase in fair market value of the property that is attributable to EPA's response action.

Generally, EPA only files windfall liens on property owned by a BFPP. Unlike a Superfund lien, the windfall lien is not subject to an SOL expiration date and EPA's enforcement authorities are different. Unlike the 107(l) lien, EPA may have to wait until the BFPP-owner sells or otherwise "disposes" of the property to recoup the windfall amount, unless the BFPP chooses to settle the windfall lien up front. For that reason, it is a good idea to encourage BFPPs to settle the windfall

either before or immediately after they acquire the property. Most prospective purchasers will want to know their total acquisition costs before purchasing the site property. This means that prospective purchasers will want to know the total value of the windfall amount and the settlement amount offered by the Region so they can make a timely business decision whether to purchase the property and whether to settle the windfall lien up front or not. By entering into a "windfall lien settlement agreement" with EPA, the BFPP can avoid having the title encumbered by a lien.

The default calculation for valuing the windfall is:

appraised "as clean" value
- purchaser price
= full windfall lien value

Region 4 will offer to appropriately compromise the windfall lien value (according to the January 10, 2001 PPA guidance factors) if the BFPP will settle the lien up front. Otherwise Region 4 will perfect the lien on the title and will only release the lien upon payment of the full lien amount, plus some type of interest/present value of money calculation, prior to a subsequent sale. Many BFPPs buy sites that either have ongoing cleanups or have contamination left in place under an institutional control -- compromising the windfall lien up front adds an incentive to encourage the purchase of the site property by the BFPP rather than having the BFPP develop a greenfield.

Relevant Guidance:

Interim Enforcement Discretion Policy Concerning Windfall Liens Under Section 107(r) of CERCLA - (7/16/03)
This memorandum discusses EPA and DOJ interim policy implementation of the new CERCLA 107(r) windfall lien provision contained in the 2002 Brownfields Amendments.
www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-windfall-lien.pdf

Windfall Lien Guidance: Frequently Asked Questions - (7/16/03)
FAQs sheet containing questions and answers to the interim windfall liens guidance
www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-windfall-lien-faq.pdf

Support of Regional Efforts to Negotiate Prospective Purchaser Agreements (PPAs) at Superfund Sites and Clarification of PPA Guidance - (1/10/01)
Memorandum addresses settlements at Superfund sites that can be returned to productive reuse.
www.epa.gov/compliance/resources/policies/cleanup/superfund/neg-ppasuper-mem.pdf

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(18)

United States Environmental Protection Agency

Office of Solid Waste and Emergency Response

EPA

DIRECTIVE NUMBER: 9832.12-c

TITLE: Guidance on Federal Superfund Liens

APPROVAL DATE: September 22, 1987

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☐ **FINAL**

☒ **DRAFT**

LEVEL OF DRAFT

- ☒ A — Signed by AA or DAA
- ☐ B — Signed by Office Director
- ☐ C — Review & Comment

REFERENCE (other documents):

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

SEP 22 1987

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Guidance on Federal Superfund Liens

FROM: Thomas L. Adams, Jr.
Assistant Administrator

TO: Regional Administrators, Regions I-X
Regional Counsels, Regions I-X
Directors, Waste Management Division,
Regions I-X

The purpose of this memorandum is to establish guidance on the use of federal liens to enhance Superfund cost recovery. Section 107(f) of the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), adds a new Section 107(l) to CERCLA, which provides for the establishment of a federal lien in favor of the United States upon property which is the subject of a removal or remedial action.

This guidance provides: (1) analysis of statutory issues regarding the nature and scope of the lien, (2) policy on filing a federal lien to support a cost recovery action, and (3) procedures for filing a notice of lien and taking an in rem action to recover the costs of a lien. Attached to the guidance is an example of a notice of a Superfund lien.

I. STATUTORY BACKGROUND AND ISSUES

A. Property Covered by Lien

Section 107(l) of CERCLA provides that all costs and damages for which a person is liable to the United States in a cost recovery action shall constitute a lien in favor of the United States upon all real property and rights to such property which (1) belong to such person and (2) are subject to or affected by a removal or remedial action. The lien applies to all property owned by the PRP upon which response action has been taken, not just the portion of the property directly affected by cleanup activities. The House Judiciary Committee Report on the lien

provision in H.R. 2817 (p. 18), which was enacted as part of SARA, states that "the lien should apply to the title to the entire property on which the response action was taken." At the same time, the Report notes that "it is not intended to extend the lien to the title of other property held by the responsible party." Id.

The lien provision is designed to facilitate the United States' recovery of response costs and prevent windfalls. "A statutory lien would allow the Federal Government to recover the enhanced value of the property and thus prevent the owner from realizing a windfall from fund cleanup and restoration activities." 131 Cong. Rec. S11580 (Statement of Sen. Stafford) (September 17, 1985). See also House Energy and Commerce Report on H.R. 2817, p. 140, indicating that one of Congress' primary purposes in enacting the lien provision was to prevent unjust enrichment.

B. Duration and Effect of Lien

The federal lien arises "at the later of the following: (A) the time costs are first incurred by the United States with respect to a response action under [SARA, or] (B) the time that the person is provided (by certified or registered mail) written notice of potential liability." (Emphasis added) (§107(1)(2)). EPA may send out two different types of notice letters to PRPs. The first, a general notice letter, will be sent early in the process notifying the recipient that he or she has been identified as a party who may be responsible for cleanup of the site or for the costs of cleanup. In addition, the Agency may send a subsequent "special" notice which will invoke and commence the settlement procedures in Section 122 of SARA. The first of those letters will satisfy the notice of potential liability required for the federal lien to arise, assuming that it does give the PRP notice of potential liability for cleanup of costs, and is forwarded by certified or registered mail.

It is EPA's position that the lien provision applies to costs incurred prior to and after passage of SARA. The lien also applies to all future costs incurred at the site. The lien continues "until the liability for the costs (or a judgment against the person arising out of such liability) is satisfied or becomes unenforceable through operation of the statute of limitations provided in section 113." (§107(1)(2))

C. Priority of Federal Lien In Relation to Other Property Liens

The federal lien is "subject to the rights of any purchaser, holder of a security interest, or judgment lien creditor whose interest is perfected under applicable State law before notice of

the federal lien has been filed [by EPA]." ($107(l)(3)) Thus, the unfiled federal lien is subordinate to rights that are perfected under applicable State law before EPA files notice of its federal Superfund lien. After EPA files notice of the federal lien, the United States establishes its priority ahead of known and potential purchasers, holders of security interests, and judgment lien creditors whose interests have not been perfected.

During deliberation on the Superfund amendments, Congress considered a provision in H.R. 2005 [S. 51] which provided for constructive notice of an EPA lien. Under that provision, if EPA failed to file its notice of lien in a timely fashion, the EPA lien would nonetheless have had priority over a third party lien which was filed prior in time if the third party had or reasonably should have had actual knowledge that EPA had incurred costs which would have given rise to a lien. See Environment and Public Works Report on S. 51, p. 45. Thus, since this provision was ultimately deleted from the Act, EPA must file its lien in order to achieve priority over any other secured parties, and cannot rely on constructive notice.

D. State Superfund Liens

Most States have passed "Superfund" statutes similar to the federal law. However, a State Superfund lien only applies to response work paid for by a State. Some of the State statutes, such as those in Massachusetts, New Hampshire, New Jersey, Arkansas and Tennessee, contain "superlien" provisions which provide that any expenditures made pursuant to the statute constitute a first priority lien upon the real property of a hazardous waste discharger. Several other States provide that expenditures from the hazardous waste fund will constitute a lien in favor of the State, although not a first-priority lien.

II. POLICY ON FILING FEDERAL LIENS IN COST-RECOVERY ACTIONS

EPA has the authority to file notice of a lien on any real property where Superfund expenditures have been made. Regional offices should carefully evaluate the value of filing notice of a lien whenever the Agency has identified a landowner as a potentially liable party under Section 107. Filing of notice of the federal lien will be particularly beneficial to the government's efforts to recover costs in a subsequent Section 107 action in the following situations:

(1) the property is the chief or the substantial asset of the PRP;

(2) the property has substantial monetary value;

(3) there is a likelihood that the defendant owner may file for bankruptcy. See Revised Hazardous Waste Bankruptcy Guidance, Office of Enforcement and Compliance Monitoring, May 23, 1986;

(4) the value of the property will increase significantly as a result of the removal or remedial work; or

(5) the PRP plans to sell the property.

Regional offices should not file notice where it appears that the defendant satisfies the elements of the innocent landowner defense pursuant to Section 107(b)(3).

Where existing perfected non-Superfund liens on the property equal or exceed the value of the property as enhanced by the Superfund expenditures, it may not be worthwhile to file notice of the federal lien. However, in some cases, a foreclosing party, such as a bank, may take over the property, and EPA may believe that the foreclosing party is liable under Section 107. See United States v. Maryland Bank and Trust Co., 632 F. Supp. 573 (D. Md. 1986). In such cases, EPA should file a lien as to the foreclosing party after foreclosure and after other acts creating liability have taken place.

Pursuant to Section 545(2) of the Bankruptcy Code, a lien unperfected as of the time of filing of the bankruptcy petition will be invalidated by the bankruptcy trustee. Thus, where there is a likelihood of a bankruptcy filing, notice of the Superfund lien should be filed as early as possible. Finally, note that filing notice of the lien is not subject to pre-enforcement review of the liability of the landowner for the response costs.1/

III. PROCEDURES FOR FILING LIENS

Notice of the federal lien should be filed at the time that the owner is provided notice of potential liability. By this time, the lien will have arisen since EPA will have incurred costs, e.g.,

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1/ Courts have rejected claims that owners are entitled to notice and hearing prior to filing of the lien. In Spielman Fond, Inc. v. Hanson's Inc., 379 F. Supp. 997 (D. Ariz.) (3 judge court), summarily aff'd, 417 U.S. 901 (1974), the court held that filing of a mechanic's lien did not amount to a taking of significant property without due process, since it did not prohibit the transfer of title. Subsequent court decisions have followed this holding. See, e.g., B & P Development v. Walker, 420 F. Supp. 704 (W.D. Pa. 1976).

in conducting a PRP search. The government's priority will relate back to the date that the notice of the lien was filed. See Uniform Commercial Code, §9-312(5)(a). Unlike some State Superfund lien provisions, Section 107 does not establish a deadline by which notice must be filed.

A. Preparing the Notice

Regional enforcement personnel should refer to State requirements for filing notice of the lien. We encourage the Regions to work with State Attorney General Offices to assure that the Regions accurately interpret State law, and to consult with OECM and DOJ in determining whether to file notice of the lien.

Notice should generally include: (1) the name of the property owner, (2) a precise legal description of the property on which the lien will arise, (3) an explanation by the Regional official of the basis for the lien, (4) the address of the Regional Administrator or other Regional official delegated authority to sign notices of liens, and (5) a provision that the lien shall remain until all liability is satisfied. The notice should cite CERCLA Section 107(l) and be notarized with the Agency seal.

Notice may also include such information as: (1) the amount of fund expenditures upon which the lien is claimed and (2) a description of labor performed and materials supplied, including dates. However, since the statute does not require specification of costs, the notice should clarify that, where response work is ongoing, the amount of the lien will increase as the costs incurred increase. The property description to be included in the notice of the lien should be the legal description (i.e., metes and bounds, or lot, block and subdivision) rather than a general post office or street address. We have attached an example of a notice of a federal lien.

Under the recent SARA delegation, the Regional Administrator has been delegated authority to sign the notice of filed lien. The Regional Administrator may redelegate this authority at his/her discretion.

B. Where to File

To establish its priority among other secured parties and creditors, EPA must file notice of the lien "in the appropriate office within the State (or county or other governmental subdivision), as designated by State law, in which the real property subject to the lien is located." (§107(l)(3))

Where the State has designated an office, such as a County recording office, the lien should be filed in that office. This will likely be the same office where State Superfund liens are filed or where general real property liens, e.g. mechanic's liens, are filed. "If the State has not by law designated one office for the receipt of such notices of liens, the notice shall be filed in the office of the clerk of the United States district court for the district in which the real property is located." (§107(1)(3))

Where there is any doubt as to the designated State office, the lien should be filed both in the office of the clerk of the United States district court for the district in which the real property is located and in the most appropriate local office for recording property interests. Filing in the appropriate local office is important, since parties with an interest in the property are more likely to review liens in the local office than in federal district court.

IV. IN REM ACTIONS FOR RECOVERING COSTS CONSTITUTING THE LIEN

Under Section 107(1)(4), "[t]he costs constituting the lien may be recovered in an action in rem in the United States district court for the district in which the removal or remedial action is occurring or has occurred." An in rem action is an action against the property of the PRP. In order to institute a proceeding in rem, the property must "be actually or constructively within the reach of the court." 36 Am. Jur. 2d Forfeitures and Penalties §28 (1968). By contrast, the typical cost recovery action is an in personam action against the PRP.

In rem actions should be considered where the litigation team believes that an action to recover costs covered by the lien will enhance its efforts to recover all costs incurred in a response action. Such actions will be particularly useful where the property constitutes a significant asset of the PRP, and where the government is having difficulty reaching an expeditious cost recovery settlement. The in rem action, which will seek an order directing sale of the property,[2/] should generally be combined with an in personam action for costs. Before bringing an in rem action, the regional office should consider the amount of the claim, the

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2/ An in rem action may be delayed by an automatic stay, obtained in a bankruptcy proceeding, which serves to stay "any act to create, perfect, or enforce any lien against property of the estate." (Emphasis added) 11 U.S.C. §362(a)(4). The automatic stay also prohibits perfection of a lien, through filing notice of the lien, against a bankruptcy debtor.

condition of the site after the response action and the likely marketability of the site. Note that an in rem action will require the same elements of proof as any cost recovery action.

Section 107(l)(4) further states that "[n]othing in this subsection shall affect the right of the United States to bring an action against any person to recover all costs and damages for which such person is liable under subsection (a) of this section." Thus, where the government seeks to enforce the federal lien, it is not precluded from recovering the balance of its response costs directly from the landowner or any other liable party.3/

DISCLAIMER

This memorandum and any internal procedures adopted for its implementation are intended solely as guidance for employees of the U.S. Environmental Protection Agency. They do not constitute rulemaking by the Agency and may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take action at variance with this memorandum or its internal implementing procedures.

Attachment

3/ Moreover, after EPA obtains a judgment, it should consider using state judgment lien provisions, which may cover all real property of the debtor.

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NOTICE OF FEDERAL LIEN

NOTICE IS HEREBY GIVEN by the United States of America that it holds a lien on the lands and premises described below situated in the State of Washington, as provided by Section 107(f) of the Superfund Amendments and Reauthorization Act of 1986 (SARA), Public Law No. 99-499, amending the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §9601 et seq., to secure the payment to the United States of all costs and damages covered by that Section for which Western Processing Company, Inc. and Garmt J. Nieuwenhuis (and the marital community composed of himself and his wife) are liable to the United States under Section 107(a) of CERCLA as amended. The lien for which this instrument gives notice exists in favor of the United States upon all real property and rights to such property which belong to said persons and are, have been, or will be, subject to, or affected by, removal and remedial actions as defined by federal law, at or near 7215 South 196th in the City of Kent, County of King, State of Washington, including the following described land:

> That portion of the Southeast Quarter (S.E. 1/4) of the Northwest Quarter (N.W. 1/4) of Section One (1), Township Twenty-Two (22) North, Range Four (4) East, Willamette Meridian, lying Westerly of the Puget Sound Electric right-of-way less than North Thirty (30) feet of Drainage Ditch No. One (1), containing 12.9 acres more or less.

This statutory lien exists and continues until the liability for such costs and damages (or for any decree or judgement against such persons arising out of such liability) is satisfied or becomes unenforceable through the operation of the statute of limitations as provided by Section 113 of Public Law 99-499.

IN WITNESS WHEREOF, the United States has caused this instrument to be executed through the United States Environmental Protection Agency, and its attorney, in his official capacity as Regional Counsel of the United States Environmental Protection Agency, Region 10.

Dated at Seattle, Washington, this 23d day of January, 1987.

UNITED STATES OF AMERICA and
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

By: John T. Hamill, Acting
for James R. Moore
Regional Counsel
U.S. EPA, Region 10

United States Of America)
State of Washington)ss
County of King)

On this 23d day of JANUARY, 1987, there appeared personally before me the undersigned Notary, James R. Moore, known to me to be the Regional Counsel of the United States Environmental Protection Agency, Region 10, and he acknowledged that he signed the foregoing NOTICE OF FEDERAL LIEN in a representative capacity as the free and voluntary act and deed of the United States and its said Agency for the uses and purposes therein mentioned. GIVEN under my hand and official seal the day and year first stated above.

Valerie D. Bridges
NOTARY PUBLIC in and for the State
of Washington residing at Seattle

My Commission Expires: 12/7/90

EC-G-1998-94

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

JUL 29 1993

MEMORANDUM

SUBJECT: Supplemental Guidance on Federal Superfund Liens

FROM: William A. White
Enforcement Counsel
Office of Enforcement/Superfund

Bruce M. Diamond
Director
Office of Waste Programs Enforcement

TO: Regional Counsels, Regions I-X
Directors, Waste Management Divisions,
Regions I-X

The purpose of this guidance document is to supplement the "Guidance on Federal Superfund Liens" issued on September 22, 1987, by memorandum signed by Thomas L. Adams, Jr., Assistant Administrator of the Office of Enforcement and Compliance Monitoring (now Office of Enforcement). This Supplement is in addition to, and does not supersede the 1987 document, which provided criteria for the decision to file liens under Section 107(l) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9607(l). This Supplement outlines procedures for Regional staff to follow to provide notice and opportunity to be heard to potentially responsible parties on whose property liens are to be perfected.

I. SUMMARY

The Agency should provide notice to property owners who are potentially responsible parties ("PRPs") under CERCLA that the Agency intends to perfect a lien on their property prior to filing papers to perfect. The Agency will give such property owners[1] the opportunity to be heard through their submission of documentation or through appearing before a neutral EPA official, or both. In exceptional circumstances, EPA may perfect a lien

[1] For purposes of this guidance, owner means persons possessing title to real property or rights to such real property, as set forth in Section 107(l)(1) of CERCLA, 42 U.S.C. § 9607(l).

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prior to giving notice to a property owner of EPA's intention to perfect the lien, but the Agency should concurrently notify the owner and offer an opportunity to be heard at the earliest practicable time.

The Agency should send a letter by certified mail notifying property owners of the Agency's intention to perfect a lien, or, if appropriate, immediately upon perfection. The letter should summarize the factual basis for EPA's reason to believe that the statutory criteria for perfecting a lien are satisfied. The letter should inform the recipient property owner of his or her opportunity to be heard, either by submitting documentation or by obtaining a meeting conducted by a neutral official. The meeting will consist of an informal proceeding in which the property owner may provide EPA with information as to why EPA's assumptions require reconsideration.

II. PROCEDURES

Record of Decision to File

After consulting the 1987 Guidance on Federal Superfund Liens to determine whether the perfection of a Superfund lien is of value, staff designated by the Region should assemble a Lien Filing Record, bringing together in one place all the documents relating to the decision to perfect.

Provisions for maintenance of the Lien Filing Record are at the discretion of the Region, and it may choose to maintain the record in the same manner that it maintains other Superfund records. At a minimum, however, the Region should ensure that certain personnel are designated to add relevant documents, maintain the integrity of the record, and make the record reasonably available, upon request, to the property owner. The Region may wish to have the Regional Hearing Clerk maintain the Lien Filing Record once a property owner requests a meeting.

The following categories of documents should be assembled:

1. Documentation that the potentially responsible party is the owner of the property, e.g., the file contains a deed, legal description from a survey or tax record, a title search, etc.

2. Documents showing that EPA has actually incurred costs at the site (a summary report of costs is sufficient for this purpose; underlying documentation is not necessary).

3. Documents showing that the property owner was provided (by certified mail) written notice of potential liability, pursuant to CERCLA Section 107(l).

4. Documents describing the property showing that the property or that part of a property is contaminated and showing that the property has been subject to or affected by a removal or remedial action. Examples include action memoranda, removal response reports, Preliminary Assessment or Site Inspection forms, or National Priorities List listing documents. (The Region may choose to include a declaration by the On-Scene Coordinator or Remedial Project Manager ("RPM") incorporating these elements.)

5. Where applicable, any documents describing exceptional circumstances which support EPA's decision to perfect a lien prior to offering an opportunity to be heard. Such circumstances include instances in which the property owner is about to take some action that would render the property unavailable to satisfy a judgment for clean-up costs or where EPA's interest in the property would be impaired. Examples include, but are not limited to, imminent bankruptcy of the property owner, imminent transfer of all or part of the property, or imminent perfection of a secured interest which would have priority under applicable state law, or indications that these events are about to take place. Where the Regional staff are depending on factual information that is not a matter of public record, they should include in the file a supporting statement (a) from someone with first hand knowledge of the facts, or (b) indicating the factual basis on which the Agency proposes to act, and the source of the Agency's information.

The Region should continue to add relevant documents to the Lien Filing Record, such as the following:

1. EPA's notice of intent to file a lien (see below) sent to the property owner, with proof of receipt (or proof of mailing to the last known address).

2. Any documentation submitted by the property owner to show that EPA did not satisfy the statutory criteria for perfection of a lien or that EPA was in error when it concluded that the criteria were satisfied. This documentation may include correspondence, or documents submitted at or after any meeting request by the property owner.

3. Any responses by the Region to the property owner's submissions.

4. Any correspondence between the Region and the property owner relating to the filing of a lien.

5. Any form of record of a meeting held regarding the perfection of the lien.

The Region should maintain the Lien Filing Record and, upon request made to the Regional Attorney, make it reasonably available to the property owner.

The Notice of Intent to Perfect a Superfund Lien

This guidance includes a model notice letter (See Attachment 1) to inform the property owner of the Region's intention to file and perfect a notice of lien. A notice letter should be mailed to the owner by certified mail, return receipt requested. The letter should state that EPA intends to perfect its lien after a set number of calendar days, e.g., 14 days, from mailing. In the letter, the Region should also notify the property owner of the location and availability for review and copying of the Lien Filing Record.

The notice of intent to perfect should contain the following elements:

1. A statement that land records of the appropriate state or county indicate that the recipient is the owner of the subject property, with a citation to those records.

2. A precise identification of the property, using the street address and a deed, or reference to a deed or other legal description in land records.

3. Statements that: EPA has a reasonable basis to perfect its lien; the property is a facility as defined in CERCLA Section 101(9); the Agency has reason to believe that the owner "owns" the facility and that the owner is a liable person pursuant to CERCLA Section 107(a); the property is subject to or affected by a removal or remedial action; and costs have been incurred by the United States with respect to a response action at the property.

4. In satisfaction of CERCLA Section 107(l)(2)(B), reference to previous written notice of potential liability furnished to the property owner, or notice via this letter, if notice has not already been furnished.

5. Notice that the lien shall remain in effect until liability for the costs is satisfied or the lien becomes unenforceable through operation of the statute of limitations in CERCLA Section 113.

6. A statement that the property owner may submit any documents or information relevant to the issues raised by the lien in writing to the Regional attorney assigned to the site prior to the expiration of the time period stated in the notice.

7. An invitation for the recipient to request, prior to the expiration of the time period stated in the notice, an opportunity to be heard before a neutral EPA official. This request should be in writing and addressed to the named Regional attorney.

8. A statement that the subject of any requested meeting shall be whether EPA has [or had] a reasonable basis to perfect a lien upon the property based upon the statutory elements.

9. A statement that neither EPA nor the property owner waives or is prohibited from asserting any claims or defenses by the submission of information, a request for and participation in a meeting, or a recommended decision by the neutral official whether or not EPA has a reasonable basis to perfect a lien.

10. Where EPA has perfected its lien prior to sending this notice of intent, a statement describing the circumstances that led the Agency to perfect the lien in order to protect EPA's interest in the property and how those interests were about to be impaired. The statement should further indicate that the property owner may still make a timely request for a meeting to demonstrate that the EPA had no reasonable basis to perfect its lien.

Perfection of a Lien Prior to a Meeting

The Agency may, in exceptional circumstances, perfect a lien prior to offering or providing a property owner with a meeting. Thus, even where the Region has notified a property owner that he or she has an opportunity to request a meeting, under certain exceptional circumstances, the Region may perfect a lien prior to providing that meeting. The Region shall send notice to the property owner, return receipt requested, immediately upon perfection. A model letter for post-perfection notification is included as Attachment 2. Exceptional circumstances for this course of action include, but are not limited to, instances in which EPA's interest in the property could be impaired, such as imminent bankruptcy of the property owner, imminent transfer of all or a portion of the property, imminent perfection of a secured interest which would have priority under applicable state

law, or indications that these events are about to take place. As noted in the section on the Lien Filing Record, Regional staff should document any such circumstances in the Lien Filing Record.

While the procedures and standards to be followed for a post-perfection meeting are similar to those for a pre-perfection meeting, the Region should expedite to the extent possible the holding of a post-perfection meeting, if one is requested.

Property Owner's Response

- Failure of Property Owner To Timely Respond

If a property owner does not respond within the period set for response, the Region may proceed to perfect the lien. At the time of perfection, the Region should send a letter notifying the owner of the date the lien was perfected.

- Timely response: Written Response and No Request for Meeting

If a property owner presents written documentation in a timely manner purporting to show that the lien should not be perfected, but does not request a meeting, the Regional site attorney should review the documentation furnished. If the Region agrees that the property owner has produced facts to alter EPA's determination that it has a reasonable basis to file the lien, EPA should so notify the property owner.

If the Regional attorney determines that EPA still has a reasonable basis to perfect its lien, the Region should select a neutral official in accordance with the process described below to review the documentation furnished. At the conclusion of the neutral official's review, he or she should provide the property owner and Regional staff with a brief written recommended decision on whether EPA has a reasonable basis to perfect a lien. The document should set out the informational basis upon which the recommended decision is made, and should be placed in the Lien Filing Record, with a copy forwarded to the official in the Region delegated with the authority to sign liens for action.

- Timely Response: Request for Meeting

If a property owner requests a meeting, the Region shall select a neutral official in accordance with the process described below to conduct the meeting. The neutral official shall set up the time and location of the meeting, or offer the property owner a meeting via teleconference.

Meeting Procedures

- Selection of Neutral Official

The neutral official selected by the Region should be an attorney who is a permanent or temporary employee of the Agency and who may perform other duties within the Agency. The person selected should not have performed any prosecutorial, investigative, or supervisory functions in connection with the case or site involved.

Regions may have judicial or presiding officers already appointed pursuant to other EPA programs who possess the qualifications outlined above. Where the Regions do not wish to select separate neutral officials to hear lien matters on a case-by-case basis, they may allow these hearing officers to conduct lien meetings.

Upon selection of the neutral official, the designated keeper of the Lien Filing Record should provide the official with a copy of the Lien Filing Record, which includes any written response by the property owner and any subsequent supporting documentation submitted by the property owner.

- Factors to Review

The neutral EPA official should consider all facts relating to whether EPA has a reasonable basis to believe that the statutory elements have been satisfied for the perfection of a lien. In particular, the neutral official should consider whether:

- The property owner was sent notice of potential liability by certified mail.
- The property is owned by a person who is potentially liable under CERCLA.
- The property is subject to or affected by a removal or remedial action.
- The United States has incurred costs with respect to a response action under CERCLA.
- The record contains any other information which is sufficient to show that the lien notice should not be filed.

The property owner may present information or submit documents purporting to establish that EPA has erred in believing that it has a reasonable basis to perfect a lien based on the above factors, or has made a material error with respect to the

above factors. In making his or her decision, the neutral EPA official should consider all facts in the Lien Filing Record established for the perfection of a lien and all presentations made at the meeting, which will be made part of the Lien Filing Record.

- Nature of the Meeting

The persons at the meeting normally should include the property owner (and/or an attorney, at the property owner's option); Regional enforcement staff (RPM and Regional attorney and any other appropriate Region officials); and the neutral official.

The meeting ordinarily should be held at the EPA Regional office. As stated above, the neutral official may offer to conduct the meeting by telephone for the convenience of the property owner. The neutral official should also ensure that a record of the meeting is made. If a summary of the meeting is prepared as a record, it should indicate who was in attendance, what information was presented, and what issues were discussed. Any such summary should be provided to the property owner. The record of the meeting, and any comments submitted by the property owner on the summary should be included as part of the Lien Filing Record.

The neutral official should conduct the meeting as an informal exchange of information, not bound by judicial or administrative rules of evidence. Because of the informal nature of these proceedings, EPA will not apply the Administrative Procedure Act provisions for formal adjudication.

The neutral official should begin the meeting by making an opening statement, containing the following elements:

1. The proceeding is informal, and not bound by rules of evidence nor provisions of the Administrative Procedure Act.

2. Neither EPA nor the property owner waives any claims or defenses by the conduct of the meeting or the outcome.

3. The sole issue at the meeting is whether EPA has (or had, in the case of a post-filing meeting) a reasonable basis to believe that the statutory elements for perfecting a lien were satisfied. The meeting will not be concerned with issues not relating to the proposed perfection of the lien, including, but not limited to, EPA's selection of a remedy or contents of remedy selection documents, such as records of decision or action memoranda.

4. The neutral official will make a recommended decision, based on the Lien Filing Record and any new information presented at the meeting, whether EPA has (or had) a reasonable basis to perfect the lien.

5. The recommended decision is not admissible as evidence in any future proceeding.

The neutral official should conduct an orderly and fair meeting. Regional staff may present EPA's reason to believe that a lien may be perfected upon the property. The property owner or his or her counsel shall have a reasonable opportunity to address relevant issues and present his or her views. The neutral official may also allow discussions and interchanges between the parties, including responses to questions to the extent deemed appropriate. It is not the Agency's intent to provide EPA or the property owner an opportunity to engage in direct examination or cross-examination of witnesses. The neutral official may address questions to the property owner or his or her counsel or to EPA's representatives during the meeting.

While the neutral official should place no limitations other than reasonableness on the type or volume of information presented or issues discussed, he or she may caution that only information and issues which are relevant or material to EPA's decision as to whether it has a reasonable basis to perfect the lien will be ultimately considered.

Recommended Decision

In a timely manner, the neutral official should issue a written recommended decision. The recommended decision should state whether the property owner has established any issue of fact or law to alter EPA's decision to file a notice of lien and the informational basis upon which the decision is based. The recommended decision should contain a statement that neither EPA nor the property owner is barred from any claims or defenses by the recommended decision. The recommended decision should be placed in the Lien Filing Record, with a copy forwarded to the official in the Region delegated with the authority to sign liens for action, and a copy sent to the property owner.

Because of the preliminary and informal nature of the proceedings under this guidance, and the fact that the neutral officer's recommended decision is limited to whether EPA has a reasonable basis to perfect the lien, the neutral official's recommended decision is not a binding determination of ultimate liability or non-liability. No preclusive effect attaches to any decisions made in the course of any proceeding pursuant to the guidance, nor shall any such decisions be given deference or otherwise constitute evidence in any subsequent proceeding.

The Agency may subsequently provide notice of intent to perfect a lien with an opportunity to be heard with respect to the same property under these procedures if new information indicates that a previous decision not to file is in error.

Except as provided by CERCLA Section 113(h), property owners may not obtain judicial review or reconsideration of the Agency's decision that it has a reasonable basis to perfect a lien.

III. DISCLAIMER

This memorandum and any internal procedures adopted for its implementation are intended solely as guidance for employees of the U.S. Environmental Protection Agency. They do not constitute a rulemaking by the Agency and may not be relied upon to create a specific right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take action at variance with this memorandum or its internal implementing procedures.

IV. FURTHER INFORMATION

For further information concerning this policy, please contact Patricia Mott in the Office of Enforcement at (202) 260-3733 or Gary Worthman in the Office of Waste Programs Enforcement at (703) 603-8951.

Attachments (2)

Attachments (2)

---------- ATTACHMENT ----------

ATTACHMENT 1

MODEL: PRE-PERFECTION NOTICE

[REGIONAL LETTERHEAD]
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION [ ]
[ADDRESS]

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

[Date]

[Name and address of owner of property]

RE: [Name and location of the site]

Dear [Name of property owner]:

This letter informs you that the United States Environmental Protection Agency ("EPA") intends to perfect a lien upon property located at [street address], the exact legal description of which is contained in Attachment 1 to this letter. The Property is part of the [ ] Superfund Site. EPA has determined that you are the owner of this property (the "Property"). The lien which EPA intends to perfect against the Property arises under Section 107(l) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), commonly known as the "Superfund," 42 U.S.C. Section 9607(l). The lien is intended to secure payment to the United States of costs and damages for which you, as the owner of the Property, would be liable to the United States under Section 107(a) of CERCLA, 42 U.S.C. Section 9607(a).

Under CERCLA Sections 107(a) and 101(9), 42 U.S.C. Sections 9607(a) and 9701(9), liable persons include persons who own any "facility," including a site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located. EPA has determined that a release or threat of release of hazardous substances pursuant to CERCLA Section 101(22) has occurred at or from the Property. The Property is part of the [ ] Superfund Site, at which [hazardous substances] came to be located, and is subject to or affected by a removal or remedial action. As the owner of a facility, you are a person liable for all costs of removal or remedial action at the site. Costs and damages include the costs incurred by the United States in responding to a release or threat of release at the [ ] Superfund Site.

The lien arising in favor of the United States on the Property continues until the liability for the costs is satisfied or until the liability for the costs becomes unenforceable through operation of the statute of limitations in CERCLA Section 113.

On [date], EPA notified you by certified or registered mail of your potential liability under CERCLA [or EPA hereby furnishes notice, if notice has not already been furnished.] You may avoid the perfection of a lien upon your property by paying all costs and damages for which you are liable.

EPA has assembled a Lien Filing Record consisting of . documents relating to its decision to perfect the lien. This record is kept at the following address, and may be reviewed and copied at reasonable times by arrangement with:

[Regional Attorney]
[Address and Telephone Number]

EPA has reviewed the information in the Lien Filing Record and believes that the Agency has a reasonable basis to believe that the statutory elements for perfecting a lien are satisfied. After [14 calendar days or other period, set by the Region] from the date of this letter, EPA intends to transmit a notice of lien to [the appropriate office within the state (or county or other governmental subdivision), as designated by State law, where the real property is located, or with the District Court of the United States for the district in which the real property is located]. The effect of this filing is to perfect the lien upon your property.

You may notify EPA within [14 calendar days or other period, set by the Region] from the date of mailing of this letter in writing if you believe EPA's information or determination is in error. You may also request to appear before a neutral EPA official to present any information that you have indicating that EPA does not have a reasonable basis to perfect a lien. You should describe in your letter or written request your reasons for believing that EPA does not have a reasonable basis to perfect its lien, because EPA may, as described below, agree with your reasons and reconsider its intention to perfect a lien without further review or a meeting. Any written submissions or requests for a meeting should reference the Superfund Site, be addressed to the above referenced Regional Attorney, and may include documents or information which support your contentions.

If EPA receives a written submission or a request for a meeting from you within [14 calendar days or other period, set by the Region] from the date of mailing of this letter, Agency staff will review your submission or request for a meeting. If, after review and consultation, EPA agrees that the Agency does not have a reasonable basis upon which to perfect a lien, EPA will not perfect its lien, and will so notify you. If EPA disagrees, the written submission or request will be referred to a neutral EPA official selected for the purpose of reviewing the submission or for conducting the meeting, along with the Lien Filing Record.

If you have requested an opportunity to appear, a meeting will be scheduled. You may choose to attend this meeting via teleconference. The Agency will be represented by its enforcement staff, including a representative from the Office of Regional Counsel. You may be represented by counsel at this meeting.

The meeting will be an informal hearing in which you may provide EPA with information as to why the Agency's assumptions require reconsideration. The meeting will not be conducted using rules of evidence or formal administrative or judicial procedures. The sole issue at the meeting would be whether EPA has a reasonable basis to perfect a lien based upon CERCLA Section 107(l).

After reviewing your written submissions, or conducting a meeting, if one is requested, the neutral EPA official will issue a recommended decision based on the Lien Filing Record. The recommended decision will state whether EPA has a reasonable

basis to perfect the lien and will be forwarded to the Agency official delegated to execute liens for action. You will be notified of the Agency's action (whether perfection or the decision not to perfect) and furnished a copy of the recommended decision.

Neither you nor EPA waives or is prohibited from asserting any claims or defenses in any subsequent legal or administrative proceeding by the submission of information, a request for and participation at a meeting, or recommended decision by the neutral EPA official that EPA has a reasonable basis to perfect a lien.

If you have any questions pertaining to this letter, please contact [ORC attorney] at [ ].

Sincerely,

Waste Management Division Director/Regional Counsel/Regional Administrator

---------- ATTACHMENT ----------

ATTACHMENT 2

MODEL: POST-PERFECTION NOTICE

[REGIONAL LETTERHEAD]
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION [ ]
[ADDRESS]

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

[Date]

[Name and address of owner of property]

RE: [Name and location of the site]

Dear [Name of property owner]:

This letter informs you that the United States Environmental Protection Agency ("EPA") has perfected a lien upon property located at [street address], the exact legal description of which is contained in Attachment 1 to this letter. The Property is part of the [ ] Superfund Site. EPA has determined that you are the owner of this property (the "Property"). The lien which EPA has perfected against the Property arises under Section 107(l) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), commonly known as the "Superfund," 42 U.S.C. Section 9607(l). The lien is intended to secure payment to the United States of costs and damages for which you, as the owner of the Property, would be liable to the United States under Section 107(a) of CERCLA, 42 U.S.C. Section 9607(a).

Under CERCLA Sections 107(a) and 101(9), 42 U.S.C. Sections 9607(a) and 9701(9), liable persons include persons who own any "facility," including a site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located. EPA has determined that a release or threat of release of hazardous substances pursuant to CERCLA Section

101(22) has occurred at or from the Property. The Property is part of the [ ] Superfund Site, at which [hazardous substances] came to be located, and is subject to or affected by a removal or remedial action. As the owner of a facility, you are a person liable for all costs of removal or remedial action at the site. Costs and damages include the costs incurred by the United States in responding to a release or threat of release at the [ ] Superfund Site.

The lien arising in favor of the United States on the Property continues until the liability for the costs is satisfied or until the liability for the costs becomes unenforceable through operation of the statute of limitations in CERCLA Section 113.

On [date], EPA notified you by certified mail of your potential liability under CERCLA. You may satisfy the lien placed upon your property by paying all costs and damages for which you are liable.

EPA has assembled a Lien Filing Record consisting of documents relating to its decision to perfect the lien. This record is kept at the following address, and may be reviewed and copied at reasonable times by arrangement with:

[Regional Attorney]
[Address and Telephone Number]

EPA has reviewed the information in the Lien Filing Record and believes that the Agency has a reasonable basis to believe that the statutory elements for perfecting a lien are satisfied. EPA has perfected its lien by filing a notice of lien with [the appropriate office within the state (or county or other governmental subdivision), as designated by State law, where the real property is located, or with the District Court of the United States for the district in which the real property is located]. EPA perfected its lien prior to notifying you of its intention because [ ].

You may notify EPA within [14 calendar days or other period, set by the Region] from the date of mailing of this letter in writing if you believe EPA's information or determination is in error. You may also request to appear before a neutral EPA official to present any information that you have indicating that EPA did not have a reasonable basis to perfect a lien. You should describe in your letter or written request your reasons for believing that EPA did not have a reasonable basis to perfect its lien, because EPA may, as described below, agree with your reasons and release its lien without further review or a meeting. Any written submissions or requests for a meeting should reference the Superfund Site, be addressed to the above referenced Regional Attorney, and may include documents or information which support your contentions.

If EPA receives a written submission or a request for a meeting from you within [14 calendar days or other period, set by the Region] from the date of mailing of this letter, Agency staff will review your submission or request for a meeting. If, after review and consultation, EPA agrees that the Agency did not have a reasonable basis upon which to perfect a lien, EPA will release its lien, and will so notify you. If EPA disagrees, the written submission or request will be referred to a neutral EPA official selected for the purpose of reviewing the submission or for conducting the meeting, along with the Lien Filing Record.

If you have requested an opportunity to appear, a meeting will be scheduled. You may choose to attend this meeting via teleconference. The Agency will be represented by its enforcement staff, including a representative from the Office of Regional Counsel. You may be represented by counsel at this meeting.

The meeting will be an informal hearing in which you may provide EPA with information as to why the Agency's assumptions require reconsideration. The meeting will not be conducted using rules of evidence or formal administrative or judicial procedures. The sole issue at the meeting would be whether EPA had a reasonable basis to perfect its lien based upon CERCLA Section 107(l).

After reviewing your written submissions, or conducting a meeting, if one is requested, the neutral EPA official will issue a recommended decision based on the Lien Filing Record. The recommended decision will state whether EPA had a reasonable basis to perfect the lien and will be forwarded to the Agency official delegated to execute liens for action. You will be notified of the Agency's action (whether the lien will stay in place or be released) and furnished a copy of the recommended decision.

Neither you nor EPA waives or is prohibited from asserting any claims or defenses in any subsequent legal or administrative proceeding by the submission of information, a request for and participation at a meeting, or recommended decision by the neutral EPA official that EPA has a reasonable basis to file a lien.

If you have any questions pertaining to this letter, please contact [ORC attorney] at [ ].

Sincerely,

Waste Management Division Director/Regional Counsel/Regional Administrator

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

January 10, 2001

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: **Support of Regional Efforts to Negotiate Prospective Purchaser Agreements (PPAs) at Superfund Sites and Clarification of PPA Guidance**

FROM: **Barry Breen, Director /s/**
Office of Site Remediation Enforcement

Bruce Gelber, Chief /s/
Environmental Enforcement Section
Environment and Natural Resources Division
United States Department of Justice

TO: **Superfund Senior Policy Managers (Regions I-X)**
Regional Counsels (Regions I-X)
Assistant Chiefs, Environmental Enforcement Section, United States Department of Justice

Introduction

The Office of Site Remediation Enforcement (OSRE) and the United States Department of Justice (DOJ) strongly encourage and support ongoing regional efforts to clean up and resolve liability at Superfund sites that can then, in appropriate circumstances, be available for productive reuse. After completion of a federal cleanup under the EPA Superfund program, many Superfund sites have been returned to beneficial use. Historically, sites often remained underutilized or abandoned due to concerns of lenders, developers, and the general public about potential liability or residual contamination. As part of its overall effort to reform the Superfund program, the Agency has made a concerted effort to address this issue. Additionally, EPA works with other federal agencies and state and local governments that have made "Brownfields" redevelopment a major goal.[1]

The safe redevelopment of sites often occurs in the wake of a cleanup under EPA's

[1] EPA defines "Brownfields" as abandoned, idled, or under-used industrial or commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination.

Superfund program. Redevelopment benefits communities by ensuring a protective future property use and by replacing empty lots and abandoned facilities with new businesses, often bringing jobs and an increased tax base. Additionally, redevelopment efforts may provide other public benefits like parks, nature preserves, or playing fields for a community. Reutilization of formerly contaminated sites also furthers the Agency's commitment to "Brownfields" by encouraging property reuse, potentially preserving new undeveloped "Greenfields".

This document is part of a continuing EPA Region, OSRE, and DOJ effort to support and build on EPA's current successes in cleaning up contaminated sites so they can be returned to productive uses. One vehicle for facilitating the safe reuse of sites is Prospective Purchaser Agreements (PPAs). This Memorandum is intended primarily for regional attorneys and program staff involved in evaluating and negotiating PPAs, and for DOJ staff involved. It should also serve to expedite settlements by providing a common framework of analysis for EPA, DOJ, and prospective purchasers.[2] It must be read in conjunction with EPA's "Guidance on Agreements with Prospective Purchasers of Contaminated Property", dated May 24, 1995, (the "1995 PPA Guidance") and the October 1, 1999, memorandum from OSRE titled "Expediting Requests for Prospective Purchaser Agreements", both of which remain in effect.[3]

Background

In an effort to promote the negotiation of PPAs, EPA issued the 1995 PPA Guidance, which partially superceded the previous 1989 policy titled "Guidance on Landowner Liability under Section 107(a)(1) of CERCLA, De Minimis Settlements under Section 122(g)(1)(B) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property". The 1995 PPA Guidance expanded the circumstances in which EPA will enter into a PPA and has proven to be successful. Prior to its publication, EPA had entered into only 20 PPAs; between 1995 and December of 2000, EPA entered into more than 120 additional agreements.

In October 1999, OSRE issued a memorandum building on the success of the 1995 PPA Guidance by providing the Regions with a revised model PPA agreement and a sample cover letter and information request. The memo also announced the incorporation of a new PPA tracking system into the CERCLIS/WasteLAN database to ensure the Agency could evaluate its responsiveness to PPA requests. Additionally, it established a PPA expediter at both EPA and

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[2] PPAs are entered into under the authority of the Attorney General of the United States to compromise and settle claims of the United States. Thus, PPAs can only be entered with the express concurrence of the Assistant Attorney General.

[3] The 1995 PPA Guidance, and the 1999 memorandum can be found on OSRE's Web page at http://es.epa.gov/oeca/osre/ppa.html.

DOJ to ensure PPA issues are identified and resolved quickly.[4]

In the five years since the 1995 PPA Guidance, the Agency has gained considerable experience in developing new approaches to resolving common issues that affect PPAs. Recently, the Agency established a workgroup of experienced staff, who in consultation with DOJ, developed this Memorandum to address these common issues by clarifying the 1995 PPA Guidance in two significant ways.

I. Clarification of Threshold Criteria For Entering Into PPAs

Section III of the 1995 PPA Guidance identified five fundamental criteria for evaluating whether EPA should enter into negotiations for a PPA with a prospective purchaser. These five criteria are threshold issues that must be analyzed in order to determine if the Agency should expend its resources negotiating a PPA. Based on EPA's greater level of experience with PPAs, this document clarifies the first two of these threshold criteria and explains how they should be used in making the initial determination of whether EPA will enter into PPA negotiations.

Clarification of Criterion 1 - Federal Involvement or EPA Action at the Facility

The first threshold criterion discussed in Section III of the 1995 PPA Guidance states that "[t]he Agency may consider entering into a PPA at sites listed or proposed for listing on the NPL, or sites where EPA has undertaken, is undertaking, or plans to conduct a response action." In most instances, a PPA is not necessary for sites that do not require significant federal involvement. For example, at many Brownfields sites a PPA is not necessary because concerns of prospective buyers regarding contamination or liability can be successfully addressed through other mechanisms, such as environmental audits, private insurance, an indemnification agreement, an EPA Comfort/Status Letter,[5] or available state protections. However, in limited circumstances, the level of federal involvement at certain Brownfields sites may warrant the negotiation of a PPA. These sites may include those where assessments have been done pursuant to EPA's "Targeted Brownfields Assessment" grants program, EPA's "Brownfields Pilot Assessment" program, as well as sites where an assessment has been performed and the site is participating in EPA's Brownfields Cleanup Revolving Loan Fund.[6] Generally, Regions should consider PPA requests for these types of sites only if other devices such as Comfort/Status

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[4] Presently, EPA's PPA expediter is Jack Winder at (202) 564-4292, and DOJ's expediter is Alan Tenenbaum at (202) 514-5409.

[5] EPA's Superfund Comfort/Status Letter Policy can be found at http://es.epa.gov/oeca/osre by clicking on Policy and Guidance Documents and then on Liability under CERCLA enforcement documents.

[6] Documents describing these programs and assessments can be found at the Brownfields Web site address at http://www.epa.gov/swerosps/bf/html-doc.

Letters will not suffice and if sufficient information is known about the site to allow EPA to apply the 1995 PPA Guidance and this Memorandum. It is in the Region's discretion to determine if EPA's actions at these sites constitute "federal involvement" sufficient to warrant negotiating a PPA.

Clarification of Criterion 2 - "Direct and Indirect Benefits"

The second threshold criterion in Section III of the 1995 PPA Guidance states that "[t]he Agency should receive a substantial benefit either in the form of a direct benefit for cleanup, or as an indirect public benefit in combination with a reduced direct benefit to EPA." However, the definition and use of the terms "direct and indirect benefits" in the 1995 PPA Guidance is potentially confusing on two points involving the application of this threshold criterion.

First, the definition of the term "indirect benefits" in the 1995 PPA Guidance included examples of benefits that should be considered "direct benefits" to EPA. Thus, this Memorandum includes the following new definitions of the two terms. The new definitions should be substituted wherever the terms are used in the 1995 PPA Guidance.

"Direct Benefits"

In using the term "direct benefits" EPA refers to all the ways a PPA will further CERCLA's mandate of protecting human health and the environment. "Direct benefits" obviously include cleanup work and cost recovery payments. However, they also include any other activities that advance EPA's CERCLA objectives. Actions such as guaranteed site access for regulatory personnel and cleanup contractors, controlling or limiting public access and exposure to the site, institutional controls, and any actions that help facilitate or maintain a remedy, such as demolishing unsafe structures, may be considered "direct benefits". Additional examples include actions that may streamline the cleanup or reduce the cost of the remedy, restore, preserve, or mitigate damages to natural resources, or in any way further reduce the current or future risks posed by the site.

"Indirect Benefits"

In using the term "indirect benefits" EPA means additional ways a PPA may benefit the public or a community that are outside EPA's statutory CERCLA mandate to protect human health and the environment by responding to a release, or a substantial threat of a release, into the environment. Examples are the creation or retention of jobs, increasing the tax base, or the building of a park, library, or a community center.[7]

[7] However, if the park, library, or community center was constructed in a manner that actually reduced future risks at a site, for example a parking lot substituted for part of a remedy as an effective soil cap, the activity should be considered a "direct benefit" to the extent it reduces the cost of the remedy.

Second, the 1995 PPA Guidance may be read to suggest that an analysis of a potential PPA's "indirect benefits" is applied to both the threshold question of whether EPA should expend its resources to negotiate a PPA, and also to the determination of what is adequate consideration for entering into a PPA. This Memorandum clarifies that "indirect benefits", as redefined above, should be evaluated only as part of the initial threshold analysis under the second criterion of Section III of the 1995 PPA Guidance regarding whether the Agency should expend resources negotiating a PPA and not as part of the consideration analysis for PPAs.[8]

II. Clarification of the Consideration Analysis

In evaluating adequate consideration for entering into a PPA, EPA recognizes that a prospective purchaser of a Superfund site is not a liable party under CERCLA except as a result of its purchasing the property. However, the Agency also recognizes that entering into a PPA affects EPA's ability to enforce its CERCLA Section 107(l) lien and may impair its ability to recover its response costs.[9] This part of the Memorandum is intended to assist Regions in balancing these points. The goal is to structure the PPA so that neither the buyer or seller of the property receives an unfair windfall at taxpayer expense.[10]

Section IV of the 1995 PPA Guidance included a brief discussion of some factors that may be analyzed in determining appropriate consideration. Based on the Agency's experience in implementing that Guidance, this Memorandum provides a new expanded list of factors below and provides the following general framework for assessing them.

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[8] "Indirect benefits", as redefined above, are not taken into account when analyzing the amount of consideration EPA requires for a PPA because such benefits may not accrue to the Agency.

[9] The lien provision is designed to facilitate the United States' recovery of response costs and prevent windfall. The legislative history states that the lien provision was added to "enable the United States to recover its response costs through an in rem action against the real property that is the subject of the response action. Such protection for the United States will also enable it to recover the increase in land value resulting from the response action, thus preventing unjust enrichment of the owner." S. Rep. No. 99-11, at 45 (1985); see also H.R. Rep. No. 99-253, at 17 (1985) ("Response actions may cause substantial increases in the value of the land on which these actions are taken. Thus, the purpose of these liens is to ensure that the owners of the property where a cleanup has occurred will not receive a windfall profit as a result of the cleanup.")

[10] The case team should generally ensure that the seller does not receive significant proceeds from the sale which it could disburse or shelter, preventing the Agency from recovering the funds. Likewise, as set forth in this Memorandum, the case team should also ensure that the consideration received by EPA for the PPA prevents the buyer from receiving an unfair windfall.

First, obtain a reliable estimate of what the market value of the property would be if the cleanup were complete. In most cases this estimate should be based on a real estate appraisal by a trained professional. However, there may be circumstances where other mechanisms such as a tax appraisal or sufficient information from professional real estate brokers involved in an "arms-length" transaction may suffice. The appraisal should take into account the costs a purchaser will incur to maintain the protectiveness of the remedy or to bring the property into compliance with federal, state or local health and safety requirements. Whether the property will have a limited future use or reduced productivity as a result of the anticipated final cleanup should also be factored into the appraisal.

Second, determine whether the property is encumbered with liens that have a superior status to EPA's CERCLA Section 107(l) lien. Care should be taken to ensure that previously filed private party liens are legally valid. For the purposes of determining consideration, EPA's final fair market estimate of what the property is worth should generally take into account the amount necessary to pay off validly held superior liens.

Finally, using the estimated value of the property derived above as a starting point, analyze the other consideration factors listed below that may be appropriate to the site. [11] As every site and every potential PPA is unique, not every listed factor may warrant consideration. In explicit recognition of the flexibility necessary to ensure that each PPA is fairly negotiated, the factors are not weighted in any prescribed manner. It is left to the assigned case team to determine how best to balance the various factors to determine what is fair and appropriate consideration for a PPA. It is anticipated that the basic framework set forth above will provide structure for an analysis of these factors. Consideration factors may include:

Market Conditions

- what is the nature of the property and the local market;
- is there likely to be more than one prospective future buyer;
- if EPA does not enter into the PPA what is the likelihood there will be another buyer that will make a substantially better offer before EPA's lien is extinguished;
- is there sufficient incentive for the parties to go forward with the transaction given EPA's consideration request;
- if the consideration offer for the PPA is accepted by EPA, will either the seller or buyer

[11] Section IV of the 1995 Guidance specifically mentioned "coupling" an analysis of the consideration factors with "an examination of any indirect benefits that the Agency may receive". Also, Section V of the 1995 Guidance starts with the clause "In light of EPA's new policy of accepting indirect benefits as partial consideration...". As discussed above "indirect benefits" may not accrue to EPA and should be considered as a threshold criterion and not as a consideration factor.

receive a significant unfair windfall at taxpayers expense[12];

- does the continuing cleanup or remedy impede the use of the property in the short term so that its current value is likely to be less than its final clean value;
- are there greater transaction costs or burdens facing the buyer that it would not have if it purchased another property such as a "Greenfield";

Cost Analysis and Consideration of Enforcement Options

- the amount of past and anticipated future costs in cleaning the site;
- whether there are other viable responsible parties whose anticipated contribution to the cleanup work or response costs should be taken into account;
- the legal risks, if any, associated with enforcing the CERCLA Section 107(l) lien in an "in rem" legal action;
- the EPA resources necessary to enforce the lien or to reach a different PPA settlement with another buyer;

Reduced Risks to Public Health and the Environment

- the benefit of any "direct benefits" (as redefined above) associated with the PPA;
- any benefits associated with ensuring the safe reuse of the property where the threat to human health or the environment could be aggravated by its abandonment.

Again, not every listed factor is relevant to a particular consideration analysis, and the list, while based on EPA's experience with PPAs over the years, is also not necessarily comprehensive. Regions may consider other site specific factors as appropriate.

In addition, because the overall benefits of a PPA to EPA and a local community can be substantial, Regions should ensure that analysis of the consideration factors is done in a timely fashion and that PPAs do not become delayed over minor amounts or issues[13].

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[12] There may be limited instances where a buyer intends to use the property for less than its highest possible use. For example, where a non-profit organization or municipality purchases the property for permanent preservation purposes the buyer may not be receiving a significant unfair windfall. However, even though EPA should therefore not determine consideration based on an unfair windfall in such circumstances, EPA must still consider other relevant factors set forth in the Memorandum in determining appropriate consideration. Thus, EPA still needs to consider, among other things, the market value of the property and the likelihood of being able to recover that value from another buyer.

[13] There is a Government Performance Results Act (GPRA) requirement that Regions evaluate PPA requests and complete negotiations in a timely fashion.

III. EPA's new PPA Web Page

Finally, OSRE is pleased to announce the completion of a new Web page that includes examples of finalized PPAs. The site can be found at http//es.epa.gov/oeca/osre/ppa.html. The page provides regional staff and the public with ready access to examples of recent PPAs.

* This Memorandum and any internal procedures adopted as a result of its implementation are intended solely as guidance for employees of the EPA and creates no substantive rights for any persons. Case specific inquires should be directed to Helen Keplinger in OSRE's Regional Support Division at (202) 564-4221. General questions regarding the policy should be directed to Greg Madden in the Policy and Guidance Branch at (202) 564-4229.

cc: Susan Bromm (OSRE)
Paul Connor (OSRE/PPED)
Sandra Connors (OSRE/RSD)
Lori Boughton (OSRE/PPED)
Jack Winder (OSRE/RSD)
Bruce Kulpan (OSRE/RSD)
Earl Salo (OGC)
Steve Luftig (OSWER)
Elaine Davies (OSWER)
Larry Reed (OSWER)
Linda Garczynski (OSWER/OSPS)
Alan Tenenbaum (EES/ENRD/DOJ)
PPA Workgroup

NOTES

Enforcement of Access Orders & the PRP Search

STEPHEN B. HESS

Mr. Hess is an attorney-advisor in the Finance and Operations Law Office, Office of General Counsel, U.S. EPA, Washington, DC. He is the Office of General Counsel contact for real estate issues, including property acquisitions, institutional controls, relocations under the Uniform Relocation Act and takings issues.

Previously, he was an attorney at the firm of McGuire, Woods, Battle and Boothe in Richmond, Virginia, where he represented developers, lenders, businesses and local governments in a variety of real estate and corporate transactions.

He received his J.D. from George Mason University School of Law and his B.B.A. from James Madison University.

Access to Real Property

Andrew S Goldman, EPA Region III
As amended by

Stephen Heare
Office of General Counsel
Fordham Property Law Panel, May 18, 2006
Conference on PRP Search Enhancement

Sources of and Limitations on Authority

- United States Constitution
- CERCLA
- Delegations
- NCP
- Site Specific Documents

CERCLA § 104(e)

1. Entry (§ 104(e)(3))
2. Inspections and Sampling (§ 104(e)(4))
3. Access to Information (§ 104(e)(2))
4. Compliance Orders and Actions (§ 104(e)(5))

Entry Under CERCLA § 104(e)(3)

For What Purposes?

Solely for purposes of

a Determining the need for response,

b Choosing a response,

c Taking a response,

d Otherwise enforcing CERCLA

Entry Under CERCLA § 104(e)(3)

Enter Where?

Any vessel, facility, establishment or other place or property

a Where any ha/p/c may be or has been generated, stored, treated disposed of, or transported from

b From which or to which a ha/p/c has been or may have been released

c Where such a release is or may be threatened

d Where entry is needed to determine the need for response or the appropriate response or to effectuate a response

e Adjacent to (a) - (d)

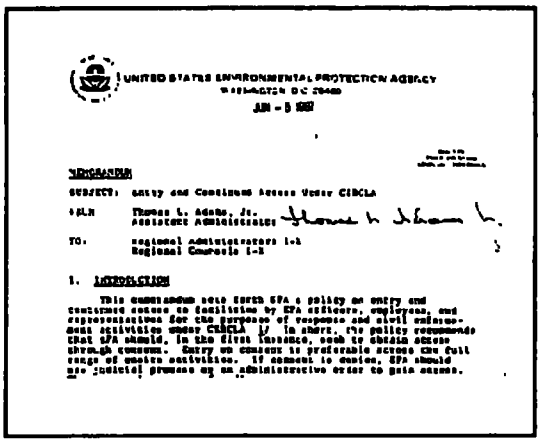
NCP § 300.400(d)

- Entry by EPA, other federal agencies, and states or political subdivisions operating under contracts or cooperative agreements once "reasonable basis" determination has been made
- Designations by lead agency solely for purposes of access
- Conditions on access as good as denials for purposes of issuing access orders
- Contents of unilateral access orders
- Service of unilateral access orders
- Prohibition on issuing access orders for criminal investigations

(d) *Entry and access.* (1) For purposes of determining the need for response or choosing or taking a response action or otherwise enforcing the provisions of CERCLA, EPA, or the appropriate federal agency and a state or political subdivision operating pursuant to a contract or cooperative agreement under CERCLA section 104(d)(1), has the authority to enter any vessel, facility, establishment or other place, property or location described in paragraph (d)(2) of this section and conduct, complete, operate, and maintain any response actions authorized by CERCLA or these regulations.

(2)(i) Under the authorities described in paragraph (d)(1) of this section, EPA or the appropriate federal agency, and a state or political subdivision operating pursuant to a contract or cooperative agreement under CERCLA section 104(d)(1), may enter:

(A) Any vessel, facility, establishment, or other place or property where any hazardous substance or pollutant or contaminant may be or has been



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

MEMORANDUM

SUBJECT: Entry and Continued Access Under CERCLA

FROM: Thomas L. Adams, Jr.
Assistant Administrator

TO: Regional Administrators I-X
Regional Counsels I-X

1. INTRODUCTION

This memorandum sets forth EPA's policy on entry and continued access to facilities by EPA officers, employees, and representatives for the purposes of response and civil enforcement activities under CERCLA. In short, the policy recommends that EPA should, in the first instance, seek to obtain access through consent. Entry on consent is preferable across the full range of onsite activities. If consent is denied, EPA should use judicial process or an administrative order to gain access.

EPA's 1987 Access Guidance Document

"Consent is the preferred means of gaining access for all activities because it is consistent with EPA policy of seeking voluntary cooperation from responsible parties and the public."

"If consent is denied [EPA] should attempt to determine the grounds for denial. EPA personnel, however, should not threaten the siteowner with penalties or other monetary liability or make other remarks which could be construed as threatening."

"EPA personnel should not agree to conditions which restrict or impede the manner or extent of an inspection or response action, impose indemnity or compensatory obligations on EPA, or operate as a release of liability."

Before Getting Access

- Identify status of parties involved – PRP landowner, adjoining landowners, EPA, contractors, performing PRPs
- Make sure purposes of entry are permitted by CERCLA § 104(e)(1)(A)
- Make sure property where access is sought is described in CERCLA § 104(e)(1)(A)

Identify persons with authority to consent to entry – Owner & Tenants

- Identify time/duration for which entry is sought
- Identify persons for whom entry will be sought
- Identify areas for which entry will be sought – Accurate site and Property Descriptions
- Identify activities to be performed - Including equipment to be used and potential alterations to the property

Getting Access - Issues

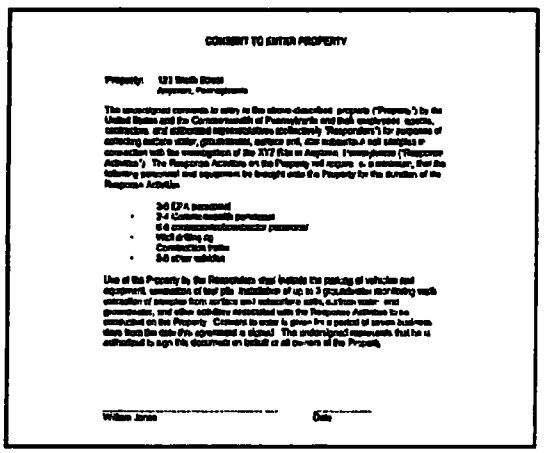
1 License v Easement
Contact v Interest in Real Estate

2 Prevent Constitutional "Takings" Claims

3 Compare to an acquisition under Section 104(j) of CERCLA

Written Consent

- Contact person authorized to consent
- Provide written document that advises of time, duration, personnel, locations, etc
- Collect authorized person's signature



CONSENT TO ENTER PROPERTY

Property: 121 Sixth Street
Anytown, Pennsylvania

The undersigned consents to entry to the above-described property ("Property") by the United States and the Commonwealth of Pennsylvania and their contractors, agents, consultants, and authorized representatives (collectively "Respondents") for purposes of collecting surface water, groundwater, surface soil, and subsurface soil samples in connection with the investigation of the XYZ Site in Anytown, Pennsylvania ("Response Activities"). The Response Activities on the Property will require a maximum, that the following personnel and equipment be brought onto the Property for the duration of the Response Activities:

- 3-5 EPA personnel
- 3-4 Commonwealth personnel
- 6-8 contractor/subcontractor personnel
- Well drilling rig
- Construction trailer
- 3-5 other vehicles

Use of the Property by the Respondents shall include the parking of vehicles and equipment, excavation of test pits, installation of up to 3 groundwater monitoring wells, extraction of samples from surface and subsurface soils, surface water and groundwater, and other activities associated with the Response Activities to be conducted on the Property. Consent to enter is given for a period of seven business days from the date this agreement is signed. The undersigned represents that he is authorized to sign this document on behalf of all owners of the Property.

William Jones — Date

PRPs Obtaining Access

- EPA enforcement documents typically require PRPs to use "best efforts" (which may include payment of compensation) to secure access from property owners
- EPA enforcement documents typically provide that EPA will use its authorities to secure access if PRPs' best efforts are unsuccessful and that PRPs shall reimburse EPA's costs
- NCP § 300.400(d)(3). EPA may designate PRPs (including their representatives, employees, agents, and contractors) as EPA's representatives solely for purposes of access where the PRP has agreed to conduct work

United States Constitution: Amendment IV

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause . . and particularly describing the place to be searched, and the persons or things to be seized."

Unilateral Administrative Order

Advantages/Disadvantages

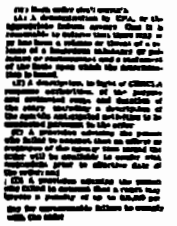
- Terms will be memorialized
- Civil penalties discourage violation
- Terms may be readily modified
- May be very fast
- Enforceable in court
- EPA HQ consultation necessary
- May compromise future dealings with owner

How To Secure

- Document denial of consent
- Consult with OECA, Regional Support Division.
- Draft order that advises of time duration, personnel locations etc. (models are available)
- Make sure order contains NCP § 300.400(d)(4)(iv) provisions
- Affix EPA signature
- Await end of conference period (precedes effective date)

Unilateral Administrative Order:

NCP § 300.400(d)(4)(iv) Requirements



Issuing Compliance Orders Under CERCLA § 104(e)(5)(A)

Who May Issue?	The President
When May Orders Be Issued?	If consent is not granted (NCP adds "or conditioned in any manner") regarding any request for information entry, or inspections/sampling
Additional Requirements?	Notice and opportunity for consultation as is reasonably appropriate under the circumstances (NCP requires certain order provisions requires service upon person who failed to consent, and provides that force shall not be used to compel compliance).

Compliance Actions Under CERCLA § 104(e)(5)(B)

- President may ask Attorney General to commence civil action to compel compliance with request for, or order requiring, entry, information, or inspection/sampling
- For entry/inspection cases, where Court finds reasonable basis to believe there may be a release or threat of release of a hs/p/c, the Court shall enjoin interference or direct compliance with orders to prohibit interference with entry/inspection unless the demand for entry/inspection is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law
- Court may assess civil penalty of up to $25,000/day for each day of non-compliance with request/order

(Article III) Court Order

Advantages/Disadvantages

+ Terms will be memorialized
+ Potentially significant penalties (including criminal contempt) for violation
- Process very slow and beyond our control (DOJ, Court)
- Terms not readily modified
- May compromise future dealings with owner

How To Secure

- Document denial of consent
- Refer to Department of Justice
- Complaint filed
- Motions practice (e g Motion to Dismiss).
- Discovery
- Motions practice (e g , Summary Judgment)
- Trial
- Verdict
- Post trial (motions for reconsideration appeal etc.)

Warrant

Advantages/Disadvantages

+ May be secured relatively quickly
+ Terms will be memorialized
+ "Force of Court" (including stiff penalties for violation) without trappings of litigation
- Delays possible, process beyond our exclusive control (DOJ Magistrate)
- Modification of terms requires visit to Magistrate
- May not issue for long-term intrusive work.
- May compromise future dealings with owner

How To Secure

- Document denial of consent
- Refer to Department of Justice (including affidavits)
- U S Attorney applies for warrant
- Ex parte hearing with Magistrate
- Warrant signed
- Serve warrant
- Return of Warrant filed

NOTES

Institutional Controls, the Model Environmental Easement, and theNational IC Strategy

GREGORY SULLIVAN

Gregory Sullivan is an attorney in EPA's Office of Site Remediation Enforcement. His primary areas of responsibility include institutional controls, post-construction completion, and the reuse of contaminated properties. Prior to joining EPA, Gregory worked on cleanup and long-term stewardship issues in the Office of Environmental Management, U.S. Department of Energy. Gregory holds a B.A. from the Western Washington University, in Bellingham, Washington. He earned his law degree from the American University, Washington College of Law, in Washington, D.C.

SHERI BIANCHIN

Sheri Bianchin is a Remedial Project Manager and IC Coordinator for Region 5 Superfund. She has worked at U.S. EPA for 22 years in RCRA Enforcement, Air Compliance, And Safe Drinking Water Program.

Sheri received a B.S. in Environmental Engineering from the N.M. Institute of Mining and Technology. She received her J.D. from IIT- Chicago Kent College of Law in the Environment and Energy Law Program

EPA's National Institutional Control Strategy

National PRP Search Conference
St. Louis, MO
May 2006

Guess the Site?

Prior to the delivery of this instrument of conveyance, the ***grantee herein has been advised by the grantor that the premises above described have been filled, in whole or in part, to the present grade level thereof with waste products resulting from the manufacturing of chemicals by the grantor at its plant in the City of _____,*** … as a part of the consideration for this conveyance and as a condition thereof, no claim, suit, action or demand of any nature whatsoever shall ever be made by the grantee, its successors or assigns, against the grantor, its successors or assigns, for injury to a person or persons, including death resulting therefrom, or loss of or damage to property caused by, in connection with or by reason of the presence of said industrial wastes. **It is further agreed as a condition hereof that each subsequent conveyance of the aforesaid lands shall be made subject to the foregoing provisions and conditions.**

Love Canal

- Hooker used a good cap
- Tried to control future use with deed notice
- Cap breached within 4 months of sale by School Board, later by city sewer department
- Architect and contractor unaware of conditions
- Lesson: Institutional controls failed with respect to land use control

Institutional Controls (ICs) Defined

- Non-engineered administrative or legal controls that help to minimize the potential for human exposure to contamination and/or protect the integrity of a remedy
  - Limiting land or resource use
  - Providing information to modify behavior
- Four general categories of ICs
  - Governmental Controls
    - Zoning, Building Permits, GW Use Ordinance
  - Proprietary Controls
    - Easements, real covenants, statutory covenants
  - Enforcement and Permit Tools with IC Components
  - Informational Devices
    - Deed notice, government advisory

Key IC Challenges

- CERCLA Section 104(j) Authority
- State Assurances Requirement
- Real Property Common Law – UECA
- Real Property Practice – Recordation requirements, chain of title (priority issues), Mapping (parcels vs. contaminant/cap locations)
- Role of Local Governments – land use decisions, permit, zoning and ordinance systems, maintain key records (e.g., recorder of deeds, survey plats)
- Enforcement - ICs typically enforced by parties other than EPA

GAO Study on Institutional Controls

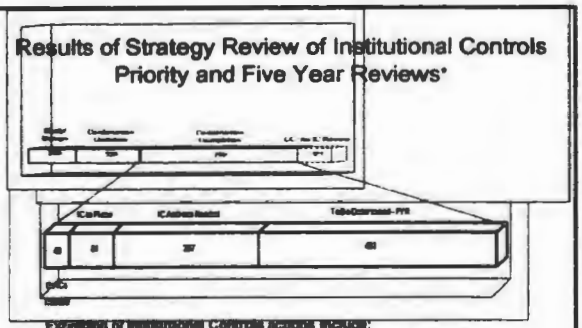
Improved Effectiveness of Controls at Sites Could Better Protect the Public (1/05)

- Charge: "study the effectiveness of land use restrictions and other institutional controls at contaminated sites that have been cleaned up under federal and state programs "
- Confirmed internal EPA studies
  - lack of IC information,
  - implementation, effectiveness and enforceability questions, and
  - ICs needed at deleted sites

EPA Strategy to Ensure Institutional Controls at Superfund Sites (Sept '04)

- Joint OSRE/OSRTI/Regional effort to evaluate IC implementation at construction complete sites over next 5 years
  - Over 70% of the 970 CC sites have remedies that include ICs
- Key aspects of the Strategy:
  - Capacity building (ICTS, training, MAGIC)
  - ICs at priority and five year review (FYR) sites
  - Priority sites include sites where: ICs were not required in remedy but needed, required by remedy but not implemented, likely problem with use of proprietary controls, or site with redevelopment interest.
    - Of 157 priority sites - 94 need action taken to implement ICs (e.g., proprietary controls, new decision documents)
    - Of FYR sites - Regions reviewed approx. 250 sites in FY05, most have an IC component

Results of Strategy Review of Institutional Controls Priority and Five Year Reviews*

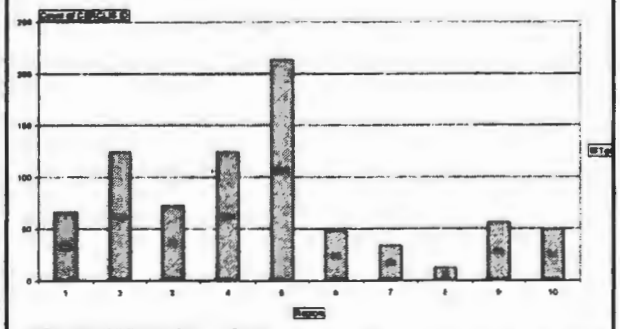


Examples of institutional controls actions include:

- negotiating proprietary controls, easements, covenants, etc.
- working with local governments (e.g., ordinances and laws)
- enforcing consent decrees/orders for ICs
- requesting PRPs provide information to evaluate IC effectiveness

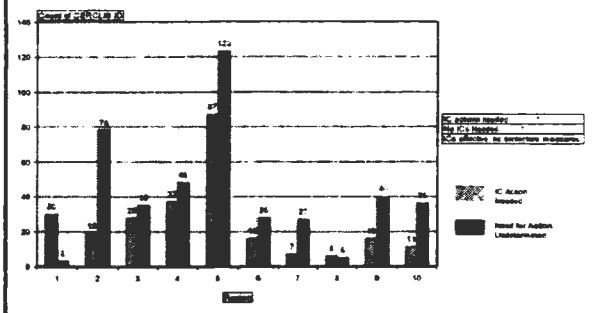
Results of Strategy Review of Institutional Controls Priority and Five Year Reviews*

All Sites by Region (799)



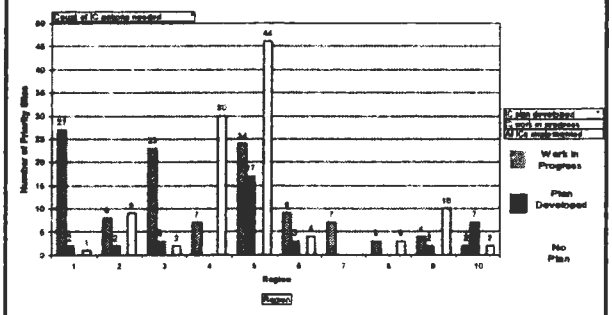
Results of Strategy Review of Institutional Controls Priority and Five Year Reviews*

Future and Potential Workload by Region (670 total sites)



Results of Strategy Review of Institutional Controls Priority and Five Year Reviews*

Status of All Sites w/ IC Action Needed by Region



Future Workload & Challenges: Regions

New Decision Documents:

- 3 already signed, 25-30 more needed for priority and FYR sites
- Potential for many more

Potential Issues Identified by Regional Reviews

- Role of Consent Decrees and Prospective Purchaser Agreements in regard to remedy selection
- ICs on non-source property not owned by PRP ("best efforts", land owner liability protections)
- Multi-parcel sites (title searches, governmental controls)

Resource Implications

- Prioritizing IC work can be difficult depending on remedial construction projects, esp. new starts and mega-sites, and management focus

Future Workload & Challenges: Nationally

- Developing Real Property Expertise (real property law and practice, use of title evidence, training, resources)
- Coordination and Outreach to EPA and Partners
  - Plans to increase training offerings and efforts
  - Possibly request an ASTSWMO subcommittee
  - Local government roles
  - Improving coordination within EPA (OSWER, FFEO, etc.)
- Working in concert with the PCC Strategy and the LTS Task Force (and OSRTI/OSWER "reuse measures")
- Information Management (ICTS update, integration)
- Refining MAGIC's role for the coming years

Additional IC Projects and Documents

- Key Final/Draft Policy/Guidance
  - EPA cross program guidance for IC lifecycle (evaluating, selecting, implementing, monitoring, and enforcing)
  - Enforcement First for ICs – March 2006
  - 3rd Party Beneficiary Rights in Proprietary Controls – April 2004
- Development of Policy/Guidance – In progress
  - Estimating Life Cycle Costs
  - Implementation and Assurance Plans
  - Ensuring Reliable and Effective ICs at RCRA Facilities
  - Modify enforcement documents to improve monitoring and oversight (e.g., the model RD/RA CD)
- Gathering Quantitative and Qualitative Data – ICTS and ICEM for documents at Enforcement-Lead Sites
- Communication/Education – IC Roundtable, BF Conferance, NARPM

Regional IC Effort

By Sheri Bianchin
Region 5 Superfund
IC Coordinator

ICs

- WHY DO WE CARE?

Institutional Controls that "run with the land"

- "Why, land is the only thing in the world worth workin' for, worth fightin' for, worth dyin' for, because it's the only thing that lasts."
- Gerald O'Hara in *Gone With The Wind* (1939)

IC Strategy

- Evaluation of Institutional Controls during the Five-Year Review
- Other Sites- As Required

A Few Key ICs Issues

- Are ICs in place?
- Are established ICs preventing exposure?
- Is land use consistent with that assumed by the selected remedy?
- If no ICs have been selected for the site, what ICs should be considered?
- Are additional ICs needed?

FYR s

- Approach
  - Collecting the Appropriate Information
  - Reviewing and Analyzing the Data
  - Assessing the Protectiveness of the Remedy and Making the Protectiveness Determination
  - Recommending Follow-Up Actions
- Protectiveness Determinations

IC Evaluations

- Approximately 9 – 12 months prior to due date initiate review process
- Review "Site", Required Remedy, Required ICs
- Evaluate Legal Documents (CD/UAO) for authority to require PRP work

Review and Analysis of the Data: General Questions About ICs

- Have problems with ICs resulted in any exposure?
- Are objectives for ICs clear and comprehensive and related to RAOs for the site?
- Have ICs been implemented for the site?
- Does the IC describe the area and restrictions in detail?
- How are the ICs monitored and enforced? Is EPA notified of monitoring results, breaches of ICs, and enforcement actions?
- Has the sale, lease, or subdivision of the property affected the ICs?
- Are parties made aware of the IC?
- [illegible] allow for

Collecting the Data: Documents Relevant to ICs

- IC Instruments: Enforcement documents
  - AOCs, UAOs, CDs
- IC Instruments: Governmental controls
  - Ordinances, permits
- IC Instruments: Proprietary controls
  - Easements, covenants
- IC Instruments: Informational Controls
  - Advisories, registries, deed notices(continued)

Review and Analysis of the Data: Legal Questions About ICs

- Have controls been executed in a legally enforceable manner?
- What steps can be taken to ensure that a proprietary control "runs with the land?"
- Is there a grantee or prior owner that "holds" the proprietary control?
- Are there prior-in-time encumbrances that may negatively impact a proprietary control?
- Is EPA a third-party beneficiary for the IC if allowable under state law?

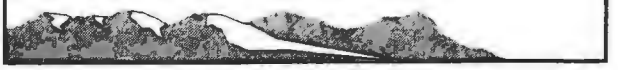
PRP Involvement – Monitoring of Institutional Controls

PRP letter requesting IC Investigation/Study

IC Data and Official Documents
Title Commitment
Evaluation of Title and Effectiveness
Recommendations

- Place the burden of collecting relevant documents on the PRPs
- EPA, not the PRPs, should determine the role of ICs in the protectiveness determination

- Send out PRP Letter requiring their participation in study/ implementation of ICs
- Follow-up ?



Enforcement Documents:
Authority to request IC Study from PRPs

- Site specific provisions of CD/UAO or Statement of Work
- "periodic review" provision
- additional work/modification of work
- **Operation and Maintenance Plan** - Maintain the effectiveness of the remedial action

Proprietary Controls

Proprietary Controls – What Are They?

- Proprietary Controls
  - EPA's generic term to collectively refer to institutional controls that are based in the law of real property
  - EPA's regulations refer to Deed Restrictions – this is not a property law term
- Property Law
  - Traditional Common Law
    - Easements
    - Covenants
      - Real covenants – enforceable at law
      - Equitable servitudes – enforceable in equity
  - Statutory Law
    - Indiana Restrictive Covenant
    - Deed Recording Statute

Bundle of Sticks Concept

- **Buyer takes property subject to superior rights** Buyer rarely starts with a full bundle of property rights sticks (e.g., mortgage, utility easements are superior)
- **Grantor-Grantee** An owner (grantor) can give "sticks" away to others (grantee); (e.g. owner may give the right to build or not build a daycare to an association – the daycare stick has been transferred to another)
- **Declaration by Owner may not run with the land** Sticks cannot simply evaporate just because the owner says so – owner cannot simply declare that "This property shall never be used for a daycare facility." Doctrine of merger
- **Reservation of right by Owner in Deed** Owner retains a stick

Review of Proprietary Controls - The Six Step Process

Review of Proprietary Controls

1. Identify Area that need restrictions (Parcel Map)
2. Obtain Title Commitment Report for Parcels that require proprietary controls
3. Final IC Map (Parcels, restricted areas, existing ICs, Site Features, property Interests)
4. Review Title Commitment Report
5. IC Evaluation
6. ID IC Action Needed

Title Insurance Title Commitments

Why? Because title commitments:

1. Replicate the title search performed during the typical land transaction.
2. Provide title review in a standard format.
3. Provide comprehensive and reliable title evidence.
   a. Conducted under underwriting guidelines.
   b. Tort liability for faulty searches.

Step 1

- Identify areas that require restrictions based on current information (maps)
  - Remedy Components
  - Areas with Limitations on Land Use

Step 1(cont.)

Identify and Obtain Best Available Information on Restricted Areas

- RODs
- Prior FYRs
- CDs, UAOs, AOCs
- Current Monitoring Information
- As Built Drawings
- Legal Description

Step 1 – Identify Restricted Area Example

RESTRICTED AREA	INSTITUTIONAL CONTROL OBJECTIVE/PERFORMANCE STANDARD
Soil area remediated to standards based on commercial industrial	Prohibit residential use of the area
RCRA landfill cap over former lagoon	Prohibit interference with surface and subsurface materials

Areas Where ICs are Required

White line show s actual boundary of landfill cap.

Area show sw here Soil has been cleaned up to levels that are protective of industrial use only. IC' sneeded in this area to prohibit N on-industrial uses

Legal Description – check map

Attached Document

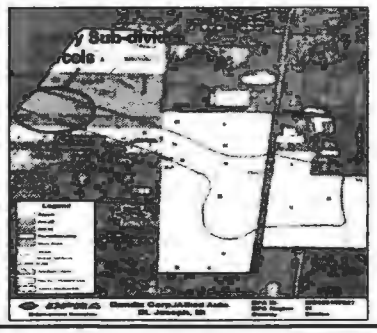
Step 1- Obtain Parcel Maps Overlay of Affected Properties

- In Order to Search Title, Title Firms Generally Require Two of the Following Four Items (in the following order of priority)
  - Assessor's Parcel Number (APN)
  - Address
  - Current Owner
  - Legal Description

Step 1 (cont.)

Identify IC-Affected Properties

Even When Prior Efforts Have Identified Site Parcels, the IC Title Search Should Verify Site Parcels

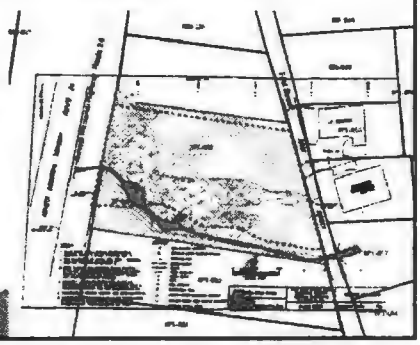


Step 1 (cont.)

Identify IC-Affected Properties

Using GIS

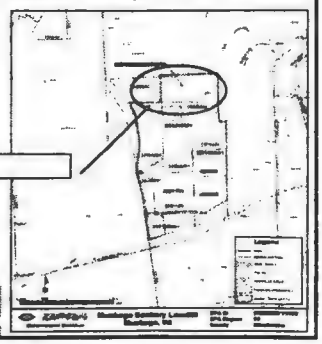
- Overlay Site Map & Parcel Map
- Rectify Site Map to Precisely Match Parcel



Step 1 (cont.)

Identify IC-Affected Properties

Verify Identified Parcels Prior to Ordering Title Sea



Step 2

Ordering Title Commitments

Whether to Order a Title Commitment?

Do Site Records Suggest there is a need for a proprietary control?

⇩

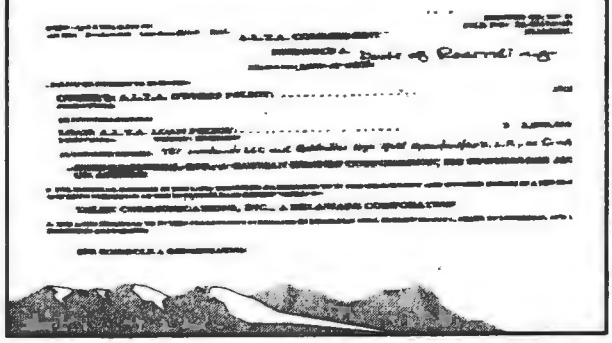
YES?

⇩

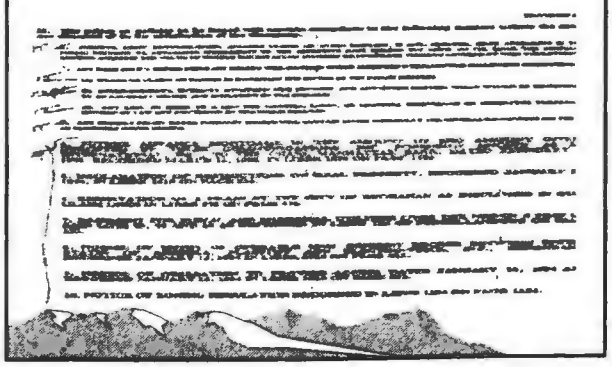
Order Title Commitment

Perform this Query for Each IC Affected Parcel

Title Commitment – Current Ownership

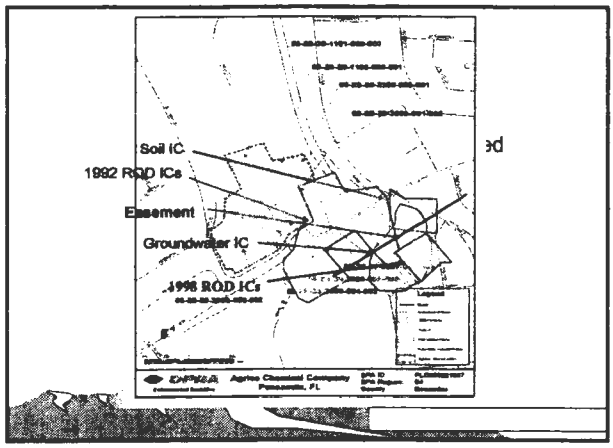


Schedule B – existing property interests



Step 3 – Final Map

- Area that needs to be restricted
- Area covered by existing proprietary controls
- Area impacted by other existing interests
- Site boundaries
- Assessors parcel numbers



Step 4 – Title Evaluation Information

Source: PRPs or Contractor

- Title Company provides Title Commitment Report for Each Site Parcel
- Copy of all documents referenced in the title commitment
- Final Map

Step 5
Evaluate IC Effectiveness

a. Do recorded ICs exist for every parcel on the site which should have recorded ICs?

- RPM (or similar staff) responsible of identifying each parcel which should have a recorded IC.
- ORC responsible for concluding whether IC actually exists in land records.

Step 5
Evaluate IC Effectiveness

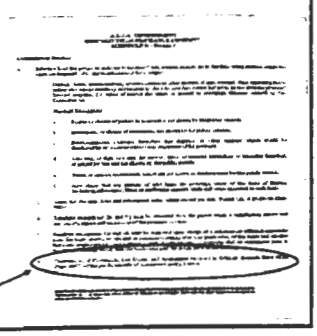
2. Does the existing IC implement the IC objectives and performance standards?

- Review of ROD and Risk Assessment to ensure that the objectives are accomplished by the proprietary control (e.g., no consumption of gw; no excavation of soils below 36")

Step 5 Evaluate IC Effectiveness

c. **Whether A Future Purchaser Would Receive Constructive Notice of the IC.**

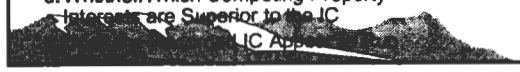
- If the title commitment lists the IC within Schedule B, then EPA may conclude that a future purchaser would



Step 5 Evaluate IC Effectiveness

d. Are ICs Enforceable
   a. Whether/Who is the Grantee/Covenantee or Otherwise Possesses the Authority to Enforce the IC
   b. Does the IC Operate as Notice Only.
   c. Whether/Who is the 3rd Party Beneficiary
      > Not necessary but an added layer of protection
   d. Whether/Which Competing Property Interests are Superior to the IC
      IC Appr...

ORC to Evaluate Each IC for a - e.



Step 5
Evaluate IC Effectiveness

4. Whether other property interests, especially affirmative easements, cover the same area as that covered by the IC.

- This is a mapping exercise (see step 4).

Step 5
Evaluate IC Effectiveness

5. Whether EPA's property interest (if applicable) has been properly transferred pursuant to CERCLA § 104(j).

- Subsequent document recorded in the land records demonstrating the transfer of the interest to another entity (e.g. the state)

Step 6 - IC Plan

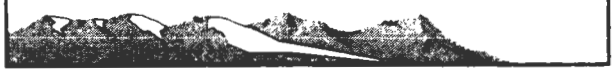
Deed Notice Only

Sent Request to Owner to reserve restrictive covenant when transfers the property – included sample deed in request (date)

Title Commitment

Prior In Time Encumbrances

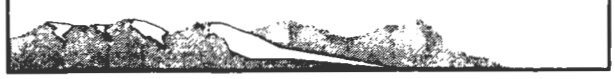
Sent Request to Owner for copies and map of encumbrances and subrogation agreements (date)



General Rule

- When land use restrictions are required, U.S. EPA prefers proprietary controls (e.g., restrictive covenants).
  - Proprietary Controls require that use restrictions "run with the land," thereby protecting the remedy subsequent to the sale of that land.

• Multiple Non-Source Contamination



Concern

- However, CERCLA sites (e.g., landfills) often produce hazardous substance plumes that contaminate the groundwater of multiple properties surrounding the source site.
- Often impractical to require every land owner to record proprietary controls.

Concern (Cont.)

- Also, when dealing with recalcitrant owners:
  - CERCLA does not permit injunctive relief.
  - Unilateral Administrative Orders (UAOs), requiring proprietary controls, may bring costly and time consuming claims (e.g., Fifth Amendment "takings" claims).

Governmental Controls (e.g., zoning and ordinances)

- Restrict land across a broad geographic area.
- Promote enforcement that is more balanced amongst Federal, State, Local authorities.
- Promotes efficient communication between government authorities.

Governmental Controls (Cont.)

- When dealing with recalcitrant owners:
  - UAOs requiring governmental controls are less susceptible to costly and time consuming claims (e.g., Fifth Amendment "takings" claims).

Questions to Ask

- Are there any pre-existing uses that are incompatible w/ restrictions needed for protectiveness of the off-property areas?
- Is there a comprehensive plan for land use and zoning that covers the area surrounding the site?

Questions to Ask

- Do existing governmental controls go "far enough" to address the Superfund Restrictions?
- Are other governmental agencies aware of the Superfund issues?

Questions to Ask

- How do existing governmental entities enforce the restrictions?
- Do issues such as lack of resources impact enforcement of restrictions?
- Do we need to enter into a memorandum of agreement or draft a communication plan between governmental agencies?

Questions to Ask

- Are there governmental controls available which are needed to protect the public?

- What are the terms?
- What is the process ?
- Who enforces ?

IC Options

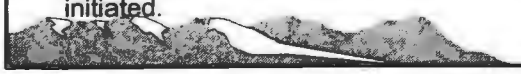
- For sites w/ a fluctuating plume or uncertainty in the extent of contamination, it is best to include areas of uncertainty and dates on maps and to consider these factors when selecting ICs
- Layering of various ICs or use of a number of property restrictions may be best when off-property contamination covers multiple properties.

IC Options

- Ordinances / Regulations can be used for the purpose of notifying the public about contaminated properties and the restricted uses. It is best when these are specific and well-written.
- Procedures are available and prescribed including enforcement.

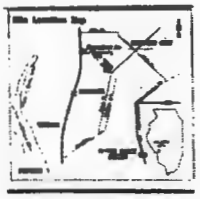
Other Considerations

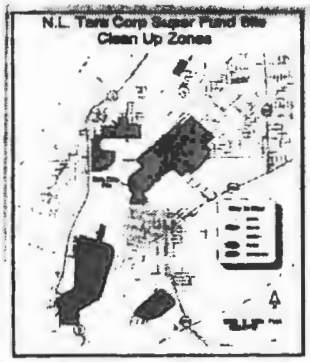
- As owners of land that has off-property contamination are unlikely to be PRPs, EPA (or the lead Federal Agency at Federal Facilities) should consider conducting a "takings" analysis.
- Notice of responsibilities regarding use restrictions should be given to off-property owners before any enforcement action is initiated.

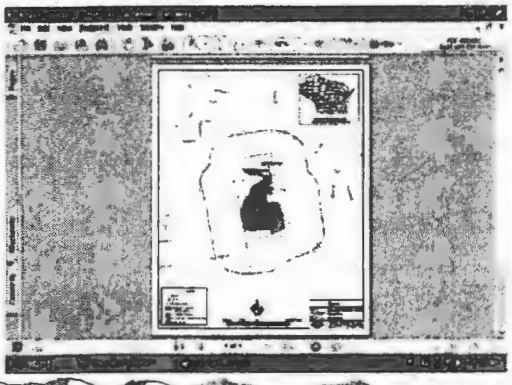


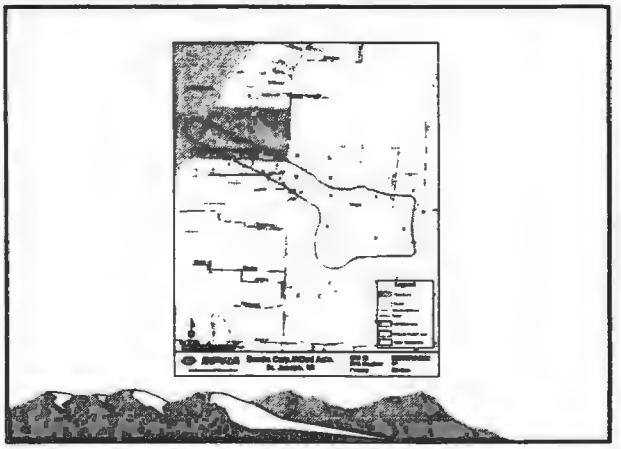
•EXAMPLES-

MAPPING IS CRITICAL TO UNDERSTAND LARGE AREAS OF CONTAMINATION

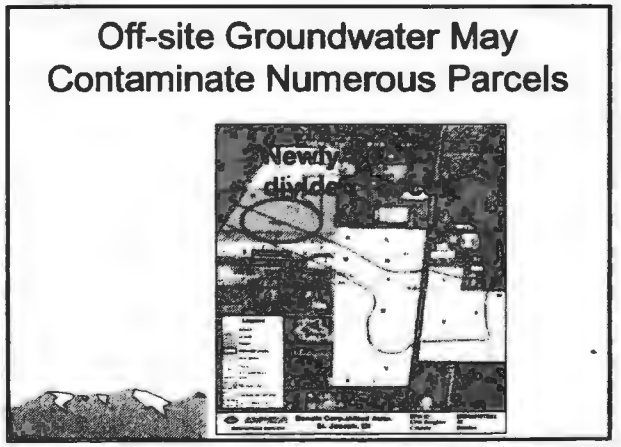


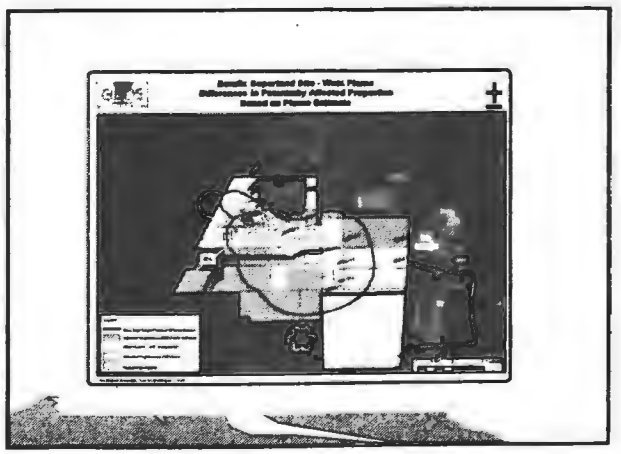


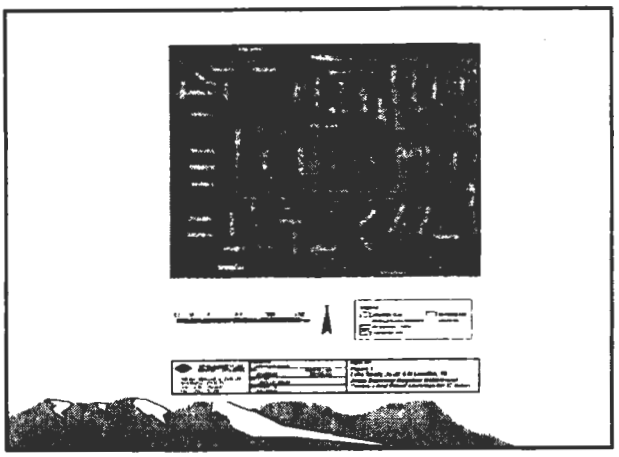




Off-site Groundwater May Contaminate Numerous Parcels







Model Documents ??

- There are no true "model" IC documents
- Documents for state programs and various versions of UECA documents have added to the need for careful analysis when reviewing or drafting IC documents.
- The title of the document can be misleading.
- All IC documents must be tailored to fit the cleanup site.
- Variables include: Property Description, Site-specific Restrictions, State Law, and the Parties to the Transaction.
- Drafting requires the input of technical and legal information.

Examples

- Environmental Protection Easement and Declaration of Restrictve Covenants: from 1998 IC provisions in Model Consent Decree.
- Deed Notice: One party document (the owner), which does not "run with the land " Includes notice to successors.
- S.C. Declaration of Restrictive Covenants: Based on state regulatory power, not traditional real estate rights.

ENVIRONMENTAL PROTECTION EASEMENT
AND
DECLARATION OF RESTRICTIVE COVENANTS

1. This Environmental Protection Easement and Declaration of Restrictive Covenants is made this ____ day of _____, 19___, by and between _____, ("Grantor"), having an address of _____, and, _____ _____("Grantee"), having an address of _____ _____.

WITNESSETH:

2. WHEREAS, Grantor is the owner of a parcel of land located in the county of _____, State of _____, more particularly described on **Exhibit A** attached hereto and made a part hereof (the "Property"); and

3. WHEREAS, the Property is part of the _____ Superfund Site ("Site"), which the U.S. Environmental Protection Agency ("EPA"), pursuant to Section 105 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9605, placed on the National Priorities List, set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register on _____, 19__; and

4. WHEREAS, in a Record of Decision dated _____, 19__ (the "ROD"), the EPA Region __ Regional Administrator selected a "remedial action" for the Site, which provides, in part, for the following actions:

5. WHEREAS, with the exception of_____ _____ ___, the remedial action has been implemented at the Site; and

6. WHEREAS, the parties hereto have agreed 1) to grant a permanent right of access over the Property to the Grantee for purposes of implementing, facilitating and monitoring the remedial action; and 2) to impose on the Property use restrictions as covenants that will run with the land for the purpose of protecting human health and the environment; and

7. WHEREAS, Grantor wishes to cooperate fully with the Grantee in the implementation of all response actions at the Site;

NOW, THEREFORE:

8. Grant: Grantor, on behalf of itself, its successors and assigns, in consideration of [the terms of the Consent Decree in the case of ____ v. ____, etc.], does hereby covenant and declare that the Property shall be subject to the restrictions on use set forth below, and does give, grant and convey to the Grantee, and its assigns, with general warranties of title, 1) the perpetual right to enforce said use restrictions, and 2) an environmental protection easement of the nature and character, and for the purposes hereinafter set forth, with respect to the Property.

9. Purpose: It is the purpose of this instrument to convey to the Grantee real property rights, which will run with the land, to facilitate the remediation of past environmental contamination and to protect human health and the environment by reducing the risk of exposure to contaminants.

10. Restrictions on use: The following covenants, conditions, and restrictions apply to the use of the Property, run with the land and are binding on the Grantor:

11. Modification of restrictions: The above restrictions may be modified, or terminated in whole or in part, in writing, by the Grantee. If requested by the Grantor, such writing will be executed by Grantee in recordable form.

12. Environmental Protection Easement: Grantor hereby grants to the Grantee an irrevocable, permanent and continuing right of access at all reasonable times to the Property for purposes of:

a) Implementing the response actions in the ROD, including but not limited to _____;

b) Verifying any data or information submitted to EPA.

c) Verifying that no action is being taken on the Property in violation of the terms of this instrument or of any federal or state environmental laws or regulations;

d) Monitoring response actions on the Site and conducting investigations relating to contamination on or near the Site, including, without limitation, sampling of air, water, sediments, soils, and specifically, without limitation, obtaining split or duplicate samples;

e) Conducting periodic reviews of the remedial action, including but not limited to, reviews required by applicable statutes and/or regulations; and

f) Implementing additional or new response actions if the Grantee, in its sole discretion, determines i) that such actions are necessary to protect the environment because either the original remedial action has proven to be ineffective or because new technology has been developed which will accomplish the purposes of the remedial action in a significantly more efficient or cost effective manner; and, ii) that the additional or new response actions will not impose any significantly greater burden on the Property or unduly interfere with the then existing uses of the Property.

13. Reserved rights of Grantor : Grantor hereby reserves unto itself, its successors, and assigns, all rights and privileges in and to the use of the Property which are not incompatible with the restrictions, rights and easements granted herein.

14. Nothing in this document shall limit or otherwise affect EPA's rights of entry and access or EPA's authority to take response actions under CERCLA, the NCP, or other federal law.

15. No Public Access and Use : No right of access or use by the general public to any portion of the Property is conveyed by this instrument.

16. Notice requirement : Grantor agrees to include in any instrument conveying any interest in any portion of the Property, including but not limited to deeds, leases and mortgages, a notice which is in substantially the following form:

NOTICE: THE INTEREST CONVEYED HEREBY IS SUBJECT TO AN ENVIRONMENTAL PROTECTION EASEMENT AND DECLARATION OF RESTRICTIVE COVENANTS, DATED _____, 19__, RECORDED IN THE PUBLIC LAND RECORDS ON _____, 19___, IN BOOK _____, PAGE _____, IN FAVOR OF, AND ENFORCEABLE BY, THE UNITED STATES OF AMERICA.

Within thirty (30) days of the date any such instrument of conveyance is executed, Grantor must provide Grantee with a certified true copy of said instrument and, if it has been recorded in the public land records, its recording reference.

17. Administrative jurisdiction: The federal agency having administrative jurisdiction over the interests acquired by the United States by this instrument is the EPA.

18. Enforcement: The Grantee shall be entitled to enforce the terms of this instrument by resort to specific performance or legal process. All remedies available hereunder shall be in addition to any and all other remedies at law or in equity, including CERCLA. Enforcement of the terms of this instrument shall be at the discretion of the Grantee, and any forbearance, delay or omission to exercise its rights under this instrument in the event of a breach of any term of this instrument shall not be deemed to be a waiver by the Grantee of such term or of any subsequent breach of the same or any other term, or of any of the rights of the Grantee under this instrument.

19. Damages: Grantee shall be entitled to recover damages for violations of the terms of this instrument, or for any injury to the remedial action, to the public or to the environment protected by this instrument.

20. Waiver of certain defenses: Grantor hereby waives any defense of laches, estoppel, or prescription.

21. Covenants: Grantor hereby covenants to and with the United States and its assigns, that the Grantor is lawfully seized in fee simple of the Property, that the Grantor has a good and lawful right and power to sell and convey it or any interest therein, that the Property is free and clear of encumbrances, except those noted on Exhibit D attached hereto, and that the Grantor will forever warrant and defend the title thereto and the quiet possession thereof.

22. Notices: Any notice, demand, request, consent, approval, or communication that either party desires or is required to give to the other shall be in writing and shall either be served personally or sent by first class mail, postage prepaid, addressed as follows:

23. General provisions:

a) Controlling law: The interpretation and performance of this instrument shall be governed by the laws of the United States or, if there are no applicable federal laws, by the law of the state where the Property is located.

b) Liberal construction: Any general rule of construction to the contrary notwithstanding, this instrument shall be liberally construed in favor of the grant to effect the purpose of this instrument and the policy and purpose of CERCLA. If any provision of this instrument is found to be ambiguous, an interpretation consistent with the purpose of this instrument that would render the provision valid shall be favored over any interpretation that would render it invalid.

c) Severability: If any provision of this instrument, or the application of it to any person or circumstance, is found to be invalid, the remainder of the provisions of this instrument, or the application of such provisions to persons or circumstances other than those to which it is found to be invalid, as the case may be, shall not be affected thereby.

d) Entire Agreement: This instrument sets forth the entire agreement of the parties with respect to rights and restrictions created hereby, and supersedes all prior discussions, negotiations, understandings, or agreements relating thereto, all of which are merged herein.

e) No Forfeiture: Nothing contained herein will result in a forfeiture or reversion of Grantor's title in any respect.

f) Joint Obligation: If there are two or more parties identified as Grantor herein, the obligations imposed by this instrument upon them shall be joint and several.

g) Successors: The covenants, terms, conditions, and restrictions of this instrument shall be binding upon, and inure to the benefit of, the parties hereto and their respective personal representatives, heirs, successors, and assigns and shall continue as a servitude running in perpetuity with the Property. The term "Grantor", wherever used herein, and any pronouns used in place thereof, shall include the persons and/or entities named at the beginning of this document, identified as "Grantor" and their personal representatives, heirs, successors, and assigns. The term "Grantee", wherever used herein, and any pronouns used in place thereof, shall include the persons and/or entities named at the beginning of this document, identified as "Grantee" and their personal representatives, heirs, successors, and assigns. The rights of the Grantee and Grantor under this instrument are freely assignable, subject to the notice provisions hereof.

h) Termination of Rights and Obligations: A party's rights and obligations under this instrument terminate upon transfer of the party's interest in the Easement or Property, except that liability for acts or omissions occurring prior to transfer shall survive transfer.

i) Captions: The captions in this instrument have been inserted solely for convenience of reference and are not a part of this instrument and shall have no effect upon construction or interpretation.

j) Counterparts: The parties may execute this instrument in two or more counterparts, which shall, in the aggregate, be signed by both parties; each counterpart shall be deemed an original instrument as against any party who has signed it. In the event of any disparity between the counterparts produced, the recorded counterpart shall be controlling.

TO HAVE AND TO HOLD unto the United States and its assigns forever.

IN WITNESS WHEREOF, Grantor has caused this Agreement to be signed in its name.

Executed this _____ day of _____, 19__.

_____

_____, duly commissioned and sworn, personally appeared _____, known to be the _____ of _____, the corporation that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they are authorized to execute said instrument.

Witness my hand and official seal hereto affixed the day and year written above.

By: _____

Its: _____

STATE OF _____)

) ss

COUNTY OF _____)

On this __ day of ____, 19__, before me, the undersigned, a Notary Public in and for the State of ___

_____

Notary Public in and for the
State of _____

My Commission Expires: _____.

This easement is accepted this ___ day of _____ , 19__.

UNITED STATES OF AMERICA

the persons and/or entities named at the beginning of this document, identified as "Grantor" and their personal representatives, heirs, successors, and assigns.

U.S. ENVIRONMENTAL PROTECTION AGENCY

By: _____

_____

Attachments:	Exhibit A	-	legal description of the Property
	Exhibit B	-	identification of proposed uses and construction plans, for the Property
	Exhibit C	-	identification of existing uses of the Property
	Exhibit D	-	list of permitted title encumbrances

DEED NOTICE

This Deed Notice is made this _____ day of _____ 19___, by TECNO, INC. ("Owners"), having an address of , Pennsylvania

I. RECITALS

WHEREAS, Owners are the owner and operator of the former property ("Property"), a parcel of land and buildings located at County, Pennsylvania, and legally described in Exhibit 1 to the Agreement and Covenant not to Sue ("Agreement"); and

WHEREAS, a portion of the Property is included in the Superfund Site ("Site"), which the United States Environmental Protection Agency placed on the National Priorities List, 40 C.F.R. Part 300, Appendix B, pursuant to Section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, ("CERCLA"), 42 U.S.C. § 9605. The Site is roughly depicted in Exhibit 2 to the Agreement; and

WHEREAS, the Environmental Protection Agency, Region III ("EPA") issued a Record of Decision, in which it selected a remedy of the Site; and

WHEREAS, on , EPA issued a for Remedial Design and Remedial Action, which requires to implement the remedy selected in the ROD by performing certain actions ("Response Actions"). A copy of the ROD may be obtained by contacting:

U.S. EPA, Region III
1650 Arch Street
Philadelphia, PA 19103
Attn: Docket Clerk (3RC00); and

WHEREAS, a purpose of the ROD is to protect the public health and welfare and the environment from any imminent and substantial endangerment at or from the Site and to remediate hazardous conditions at or from the Site which may be presented by any release or threatened release of hazardous substances at the Site; and

WHEREAS, the Response Actions have yet to be completed at the Site and under Section 121(c) of CERCLA periodic reviews will be conducted at the Site; and

WHEREAS, EPA and Owners have entered into an Agreement and Covenant not to Sue . and, which releases Owners from liability under Section 107(a) of CERCLA after certain conditions are fulfilled; and

WHEREAS, in the Agreement, Owners have agreed to (a) authorize access to the Site to EPA and its authorized officers, employees, representatives and all other persons performing Response Actions under EPA oversight, for all purposes associated with the Response Actions and CERCLA requirements and (b) to impose use restrictions on the Property; and

WHEREAS, Owners wish to cooperate fully with EPA

in the implementation of the Response Actions at the Site.

II. RESTRICTIONS AND RESERVATIONS

Tthe Owners file this notice that use of the Property is subject to the advisory set forth below.

1. Purpose: It is the purpose of this instrument to assure that the Property will be used only for purposes which are compatible with the Response Actions and to ensure that the Property will not be used in a manner that will pose a threat to human health or the environment.

2. Restrictions on use: The following advisory applies to the use of the Property:

> Ground water located at or beneath the Property should not be used until EPA determines in writing that this water is safe for use as drinking water.

In addition, see Section County Health Department Regulations.

3. Reserved Rights of Owners: Owners hereby reserve unto themselves, their successors, and assigns, all rights and privileges in and to the use of the Property which are not incompatible with the advisory and rights granted herein.

4. Right of Entry provided by Law or Regulation: Nothing in this document shall limit or otherwise affect EPA's rights of entry and access provided by law or regulation.

5. No Public Access and Use: This instrument does not grant any right of access or use to any portion of the Property to the general public.

6. Notice requirements: Owners agree to include in any instrument conveying any interest in any portion of the Site including, but not limited to, deeds, leases and mortgages, a Disclosure which is in substantially the following form:

> THE INTEREST CONVEYED HEREBY IS SUBJECT TO A DEED NOTICE AND THE TERMS, CONDITIONS AND RESTRICTIONS CONTAINED THEREIN, DATED _____. THE DEED NOTICE WAS RECORDED ON _____ IN THE OFFICE OF THE RECORDER OF DEEDS FOR COUNTY, PENNSYLVANIA IN BOOK ___, PAGE ___.

Within thirty (30) days of the date any such instrument of conveyance is executed, Owners shall provide EPA with a certified true copy of said instrument and, if it has been recorded in the public land records, its recording reference.

8. Notice to Parties: Any notice, demand, request, consent, approval, or communication that either EPA or Owners desires or is required to give to the other shall be in writing and shall either be served personally or sent by first class prepaid, addressed as follows:

IN WITNESS WHEREOF, Owner has caused this Notice to be signed in its name.

Executed this _____ day of _____, 19__.

_____

_____, duly commissioned and sworn, personally appeared _____, known to be the _____ of _____, the corporation that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they are authorized to execute said instrument.

Witness my hand and official seal hereto affixed the day and year written above.

By: _____

Its: _____

STATE OF _____)

) ss

COUNTY OF _____)

On this __ day of _____, 19__, before me, the undersigned, a Notary Public in and for the State of ___

_____
Notary Public in and for the
State of _____

My Commission Expires: _____.

This easement is accepted this ___ day of _____ , 19__.

EXAMPLE OF STATUTORY ENFORCEMENT AUTHORITY

[No Real Estate Rights Transferred]

STATE OF SOUTH CAROLINA	)	
	)	**DECLARATION OF COVENANTS**
COUNTY OF [NAME OF COUNTY]	)	**AND RESTRICTIONS**

THIS DECLARATION OF COVENANTS AND RESTRICTIONS (Declaration) is made and entered into this [_____] day of [Month] 20___, by [ABC Corp._____], [type of party, i.e., "a South Carolina corporation," etc.] (hereinafter referred to as "[**Owner]** Party").

RECITALS

WHEREAS, [Name of Party] is the **owner** of certain real property in [Name of County], South Carolina, more particularly described in Exhibit A attached hereto and incorporated herein by reference ("Property"); and

WHEREAS, contaminants in excess of allowable concentrations for unrestricted use remain at the Property; and

WHEREAS, the Property is the subject of **Voluntary Cleanup Contract** [VCC-number] (VCC) entered into to by the South Carolina Department of Health and Environmental Control and [Company name], pursuant to the Brownfields/Voluntary Cleanup Program, **S.C. Code Ann.** § 44-56-710, et seq. (2005), the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601, et seq., and the South Carolina Hazardous Waste Management Act (HWMA), **S.C. Code Ann.** § 44-56-200. [or other appropriate statutory authority]

WHEREAS, the Property may be used for certain purposes without further remediation in accordance with the conditions of the VCC and requires that certain restrictions are placed on development and use of the Property; and

WHEREAS, [Name of Party] has agreed to impose restrictions on the manner in which the Property may be developed (said restrictions to run with the land and inure to the benefit of and be enforceable by the Department and its successor agencies); and

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS that [Name of Party OWNER hereby **declares and covenants** on behalf of itself, its heirs, successors, and assigns that the Property described in Exhibit A shall be held, mortgaged, transferred, sold, conveyed, leased, occupied, and used subject to **VCC [VCC-number] dated, [date], to include the following restrictions, which shall touch and concern and run with the title to the Property.**

1. **[Name of Party] hereby covenants for itself, its heirs, successors and assigns that the Property shall not be used for the following purposes: residential, agricultural, recreational, child day care facilities, schools,** or elderly care facilities.

2. [Name of Party] covenants for itself, its heirs, successors and assigns that [groundwater beneath the Property may not be used for drinking or irrigation purposes] without prior approval from the Department or its successor agency.

3. [Name of Party] covenants for itself, its heirs, successors and assigns that [note any other necessary restrictions here] shall not be [used/disturbed] without prior approval from the Department or its successor agency. (List examples – such as disruption of the cap...)

4. [Name of Party] covenants for itself, its heirs, successors and assigns that the Department or its successor agency, and all other parties performing response actions under the Department's oversight shall be provided reasonable access to inspect the property, to oversee the activities conducted on the property, or to take samples as may be necessary to enforce this Declaration.

5. **The covenants and restrictions set forth herein shall run with the title to the Property and shall be binding upon [Name of Party], its heirs, successors and assigns. [Name of Party] and its heirs, successors, and assigns shall include the following notice on all deeds, mortgages, plats, or any legal instruments used to convey any interest in the Property (failure to comply with this paragraph does not impair the validity or enforceability of these covenants):**

   NOTICE: This Property Subject to Declaration of Covenants and Restrictions and any subsequent Amendments Recorded at _____

6. [[Name of Party], its heirs, successors and assigns shall submit to the Department a statement of maintenance of the covenants and restrictions as set forth above annually on May 31st of every year.

7. This Declaration shall remain in place until such time as the Department has made a written determination that the covenants and restrictions set forth herein are no longer necessary. This Declaration shall not be amended without the written consent of the Department or its successor agency.

NOTES

Alternative Sites

THOMAS C. MARKS

Mr. Thomas Marks served in a variety of positions in Region 5 of the U. S. Environmental Protection Agency. Currently, Mr. Marks is Chief of the Remedial Enforcement Services Section in the Superfund Division where his supervises a staff of investigators and enforcement specialists who support enforcement efforts including locating and determining the liability and viability of parties responsible for the hazardous materials at superfund sites. Mr. Marks has served in this position since 1991.

Mr. Marks served as the Enforcement Coordinator for the Region's Superfund Division. In this position he managed the remedial and removal enforcement programs for the Division.

He also was Chief of Remedial Response Section 5 of the Superfund Division. He supervised a staff of Remedial Project Managers (RPMs) and toxicologists. The RPMs managed remedial projects through the entire remedial process from site discovery through long term remedial actions. The toxicologists functioned as experts in risk assessments. They managed contractors in preparing risk assessments and reviewed PRP prepared risk assessments.

Prior to becoming Chief of the Remedial Enforcement Support Section, Mr. Marks was Chief of the Financial Systems Unit in the Water Division. In this position he supervised a staff of financial analysts and the Regional Economist engaged in the review and approval of municipal waste water treatment revenue systems, economic attainability determinations, assessment of the financial capability of grantees. The staff also evaluated the financial capability of municipalities and businesses in support of enforcement cases for Water Division programs. He also served as the Regional Coordinator for the Municipal Wastewater Treatment Facility Needs Survey.

Mr. Marks was also a financial analyst with the construction grant program in Region 5 of the U. S. Environmental Protection Agency. As a financial analyst, he reviewed and approved municipal waste water treatment revenue systems and assessed the financial capability of the grant applicants. He also served as the Region 5 Deputy Coordinator for the Municipal Wastewater Treatment Facility Needs Survey. He served in these last two positions for over ten years.

He has a Masters Degree in Public Administration from Illinois Institute of Technology and a Bachelor of Arts Decree in Economics from Benedictine University.

SUPERFUND ALTERNATIVE SITES

SUPERFUND ALTERANTIVE PROCESS

WHAT IS A SUPERFUND ALTERANTIVE SITE

SA SITE IS:

- NPL CALIBER
  (>28.5 HRS)
- LIABLE, VIALBE PRPs
  (WILL DO RESPONSE UNDER CD OR AOC)
- NEEDS LONG-TERM RESPONSE
  (REMEDIAL ACTION)

SA SITES COME THROUGH SITE ASSESSMENT

OBJECTIVE IS TO ENSURE SITES ARE ADDRESSED SOMEHOW

WORK WITH STATES TO FIND AND ADDRESS SITES LINGERING IN THE PROCESS

- PLACE THESE SITES SOMEWHERE IN THE PROCESS
- START THEM MOVING AGAIN

SITES ARE ADDRESSED BY:

- LISTING ON NPL
- SUPERFUND ALTERANTIVE PROCESS
- A REMOVAL ACTION
- NFRAP
- STATE VOLUNTARY PROGRAM

STATE INVOVLEMENT IS CRITICAL

STATE INVOLVEMENT

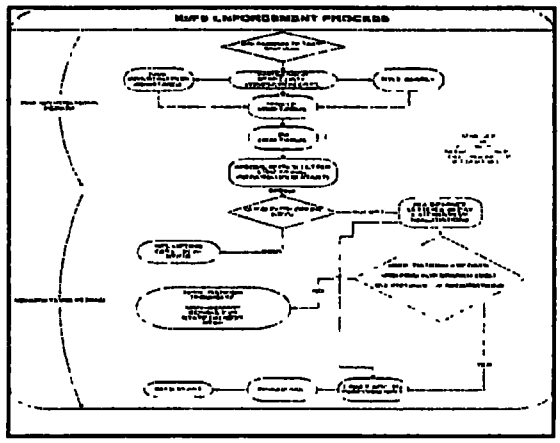
- WORK WITH STATES TO SELECT SA SITES
- OBTAIN GOVERNOR'S LETTER AUTHORIZING NPL LISTING
- SAME STATE PATICIPATION IN RI/FS PROCESS AS NPL SITE
- WHEN PROCEED AS SA SITE WITHOUT STATE ARGEEMENT MUST ADVISE HQ

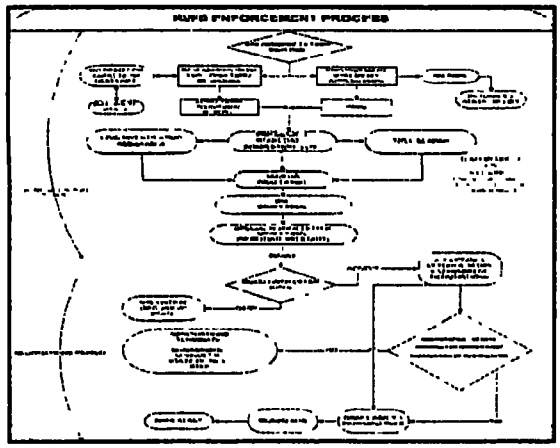
STATE AND REGION SELECT SITES WITH POTENTIAL TO MEET CRITERIA

- NPL CALIBER (>28 5 HRS)
- PRPs ARE LIABLE AND VIABLE
- RPM DETERMINES SITE NEEDS RA

REGION 5 PROCESS TO IDENTIFY SA SITES

- POTENTIAL TO MEET CRITERIA
- RPM REVIEW TO DETERMINE RA IS APROPRIATE
- ENFORCEMENT SPECIALIST LOOKS FOR PRPs





ENFORCEMENT SPECIALIST REVIEWS FILE TO ENSURE THE SITE HAS PRPs

- ENSURE SITE HAS PRPs
- PRELIMINARY CHECK ON LIABILITY AND VIABILITY
- IDENTILY THE NEEDED PRP SEARCH TASKS

RPM DETERMINES LONG-TERM RESPONSE IS NEEDED

RPM AND ENFORCEMENT SPECIALIST AGREE SITE IS SA

- ENFORCEMENT SPECIALIST STARTS PRP SEARCH
- RPM INITIATES WORK TO PREPARE FOR RI/FA

RPM WORK TO PREPARE FOR RI/FS

- PLAN ANY FUNDS NEEDED (OVERSIGHT AND CONTRACTOR)
- ARRANGE CONTRACTOR SUPPORT
- CONTACT STATE TO ADVISE OF SCHEDULE AND OPPORTUNITIES FOR REVIEW/ASSISTANCE.

RPM AND ENFORCEMENT SPECIALIST DECIDE SITE IS NOT SA

- NO PRPs, BUT LONG-TERM RESPONSE IS NEEDED – LIST ON NPL
- NO LONG-TERM RESPONSE NEEDED – REMOVAL/VOLUNTARY PROGRAM/ NFRAP
- NO PRPs OR LONG-TERM RESPONSE NEEDED – RETURN TO STATE

SA ENFORCEMENT = NPL ENFORCEMENT

- TITLE SEARCH
- IR LETTERS
- CI WORK
- TDB
- OTHER SEARCH TASKS

TRACKING = DRTS

DRTS = DEVELOP READY TO TARGET SITES

DRTS – CHARGE/PURPOSE

- SPONSOR – REMEDIAL BRANCH CHIEF RESPONSIBLE FOR REMEDY SELECTION
- MOST SITES TRACKED ARE SA
- ENSURE SITES ARE ADDRESSED

DRTS TASK FORCE

- MODELED AFTER COST RECOVERY TASK FORCE
- COST RECOVERY TASK FORCE IS A SUCCESSFUL MODEL

DRTS COMPOSITION

- REMEDIAL RESPONSE SECTION CHIEFS
- SITE ASSESSMENT STAFF
- ORC SECTION CHIEF
- REMEDIAL ENFORCEMENT SECTION CHIEF - CHAIRS

Site	ST	Site Assessment	Enforcement	Remedial	Issues	Recommendation
[illegible]	WI	PA/SI completed 1/7/2004, listing package in QA w/HQ. Governor's letter received.	All continues with PRP search work	Removal underway, could extend into Spring 2006. Fund financed RI/FS also underway.	Policy issues regarding application of contaminants. Region is trying to find a solution.	RPM proceeding work assignment for fund lead activities.
[illegible] Drum/Kingsman Landfill	IN	[illegible] is only a removal and needs a pre-score before movement on other sites is possible (State may do a PA/SI and a pre-score in 2006 or 2007) Kingsman ESI completed in 1996	PRP search and civil investigation work done. No viable, liable PRPs identified.	RPM has reviewed RECA and decided further work is needed (such as ecological and on-site workers.		Have State perform work needed to complete site assessment.
Oak Creek	WI	SI complete 1993. Due to bankruptcy, may list the Amcast portion of the site	PRP search done	Anticipate splitting the site into two operable units. RI/FS initiated however, stopped due to bankruptcy. We may fund sampling to keep RI/FS moving.	Two AOCs with different PRPS. One PRP is undergoing bankruptcy proceedings, which has delayed the RI/FS	Continue to proceed on present course. ROD for 1st OU anticipated 4Q.06, but bankruptcy may delay
[illegible] Recovery	IL	ESI complete 1997	PRP search ongoing. CI assisting attorney in conducting depositions. Other supporting enforcement work underway including preparation of notice letters	RI/FS underway		Continue to proceed on present course. RI/FS completion targeted for 12/31/06

TRACKING SA COSTS

- SAME AS OTHER SITES
- TRACKED IN IFMS

NEGOTIATIONS FAIL

- LIST ON NPL
- RETURN TO STATE FOR FURTHER ACTION

COST RECOVERY

- SAME AS NPL SITES
- ATTORNEYS SAY THEY EXPECT LITTLE DIFFERENCE

GUIDANCE

- REGIONAL – NOVEMBER 3, 2003
- NATIONAL – JUNE 24, 2002
- NATIONAL – DECEMBER 17, 2003

GUIDANCE ON RI/FS NEGOTIATIONS FOR ALTERNATIVE SITES

NOVEMBER 3, 2003

RESPONSE SELECTION AND ENFORCEMENT FOR SUPERFUND ALTERNATIVE SITES

JUNE 24, 2002

REVISED RESPONSE SELECTION AND ENFORCEMENT FOR SUPERFUND ALTERNATIVE SITES

DECEMBER 17, 2003

ALTERNATIVE SITES (END)

NOTES

Developing National Repositories for the Sharing of Corporate Information

SCOTT NIGHTINGALE

Mr. Nightingale is an environmental scientist with the Kansas Department of Health and Environment, Bureau of Environmental Remediation. He joined KDHE in 1989 and has served as a project manager at CERCLA, RCRA Subtitle C, UST, and solid waste sites. Mr. Nightingale presently coordinates and leads the efforts of KDHE to identify PRPs for contaminated sites.

Retaining and Sharing Company PRP Information

Presented by Scott Nightingale
Kansas Dept. of Health & Environment

St. Louis -- May 18, 2006

KDHE PRP Search Effort

- 1½ Positions
- Serves Multiple Programs
  - CERCLA
  - Natural Resource Damages
  - Bankruptcies
  - Leaking Underground Storage Tanks
- Research is performed internally, not by contractors.
- 20-30 Searches Completed Annually

Two Types of PRP Information

- Site-Specific Information
  - Facility Historical Operations
  - Facility Ownership
- Company Information
  - Current Corporate Status
  - Successor/Merger Information
  - Financial Viability

Saving Company PRP Information

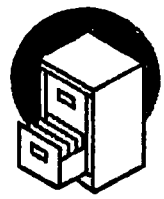
- What information do we save?
- Where do we keep the PRP information, and who does that?
- How do we keep track of the PRP information?

Company PRP Information Worth Saving

- Save All Factual Information
  - Annual Reports to Investors, Shipping Manifests, Government Documents, etc.
- Save All Anecdotal Information
  - Newspaper Articles, Neighbors' Complaints, etc.
- Save EVERYTHING!!

PRP Information Repository

- One Central Location for All PRP Information
  - Company Information
  - PRP Search Resources
  - Copies of PRP Search Memos
- One Person Responsible for the Repository



Managing Company PRP Information

- Organization Options
  - By Environmental Program
  - By Industry Group (Ex. – Metal Industry, Chemical Manufacturing)
  - By Type of Information (Ex - Books, Government Documents, Corporate Publications)
  - Other
- Index of Information
- Digitization of Records

EPA and States Sharing Company PRP Information

- Will the state environmental programs be allowed access to EPA's national repository of company information?
- Does EPA want state programs to add information to the EPA repository?

Questions??

Scott Nightingale
Environmental Scientist
KDHE
785.296.1666
snightin@kdhe.state.ks.us

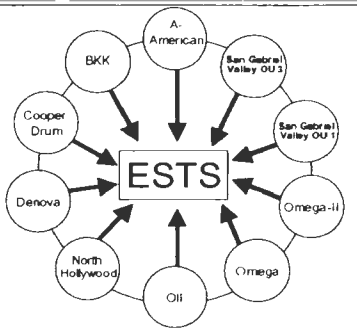
STEVEN ARBAUGH

Mr. Steven Arbaugh is currently employed at the EPA Region 9 office in San Francisco, CA, as a civil investigator in the Superfund Division. Mr. Arbaugh has performed civil investigator duties with the remedial case development team since April, 2001. Starting in July, 1998, Mr. Arbaugh was employed as an enforcement officer with the EPA Region 9 Pesticide Program Prior to working for the EPA at the Region 9 office, Mr. Arbaugh was employed by the Utah Department of Environmental Quality, Air Division. He was employed as an air quality planner and air quality enforcement specialist for 9 years

Enforcement Support Tracking System (ESTS) Database

Presented by Steven Arbaugh

ESTS Database



Address Verification Research (AVR) Report

- Compiles corporate research
- Identifies liable companies
- Examines viability of each company
- Identifies appropriate mailing address

Limitations of the Address Verification Research (AVR) Report

- The corporate information is dated and may require additional research to update the report
- Identical company names may appear causing confusion Careful review of the records should be made to ascertain that it is the correct company

Address Verification Research (AVR) Report Information Resources

- Information resources have changed over time
- Development of the world wide web (www) has contributed greatly to additional resources of information such as Google and company websites
- Information resources change over time and at the direction of the enforcement coordinator in order to save money

Current AVR Resources – Full Report

- *Corporate Data*
- *Fictitious Business Name Filings (FBN)*
- *State Board of Equalization (SBE)*
- *Uniform Commercial Code (UCC)*
- *Bankruptcy*
- *Tax Liens*
- *Real Property Records*
- *People Finder/Assets Search*
- *EPA RCRA Data*
- *Hoover's Online Dun & Bradstreet*
- *Dun & Bradstreet*
- *Company Website*
- *Google Search Engine*
  - www.archive.org - might provide past officers names, addresses and past company names etc
- *Yellow Pages*
  - SuperPages (http://superpages.com)
  - Switchboard (www.switchboard.com)

Current AVR Resources – Full Report (cont.)

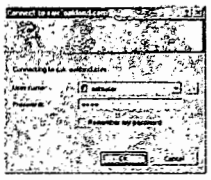
- *White Pages*
  - www.whitepages.com
- *Black Book Online*
  - www.crimetime.com/online.htm
- *Other sources* - http://www.sec.gov/edgar/searchedgar/webusers.htm
  - *Secretary of State websites allow access to basic corporate records online*
  - *U.S. Postal Service* to confirm the validity of an address (www.usps.gov) and can include the county designation
  - *EnviroFacts Multisystem and EnviroData Clearinghouse* databases to identify companies within EPA's system and to locate facility names and addresses

Abbreviated AVR Report

- *Corporate Data*
- *Fictitious Business Name Filings (FBN)*
- *Internet Directory*
  - SuperPages (http://superpages.com)
  - Switchboard (www.switchboard.com)
- *Google Search Engine*
  - www.archive.org - might provide past officers names, addresses and past company names, etc.

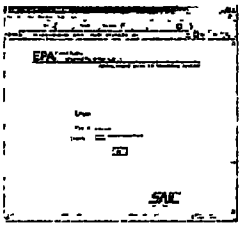
ESTS Instructions

- **Multi-Site Search Instructions**
- ***Website Address:*** https://www.saic-oakland.com/ests/login/login.aspx
- ***Firewall Login***
  1. Type in your assigned User Name
  2. Type in your ESTS Password



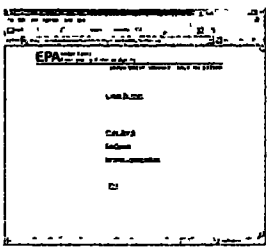
ESTS Instructions (Cont.)

- ***Logging Into ESTS***
  3. Type in your assigned ESTS User ID
  4. Type in your ESTS Password



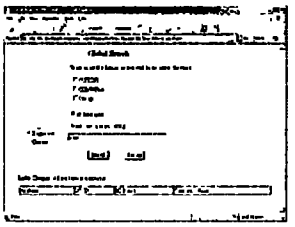
ESTS Instructions (Cont.)

- ***Searching for an LC AVR Report***
  5. Click the "Global Search" link



ESTS Instructions (Cont.)

- ***Searching for an LC AVR Report***
  6. Select the database you wish to search or select "all databases" to conduct a search of all available databases
  7. Enter a search term or terms under "Please enter a search string" and click the "Search" button

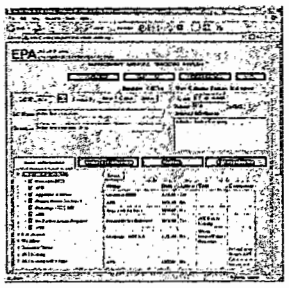


ESTS Instructions (Cont.)

- ***Searching for an LC AVR Report***
  8. Click on an LC Name to view a summary record

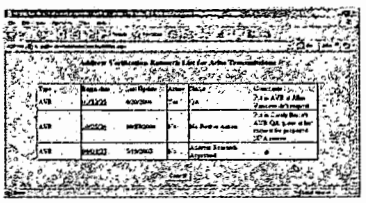
ESTS Instructions (Cont.)

- ***Searching for an LC AVR Report***
  9. Click on the "AVR Report" tab at the top of the summary page to view the AVR report on that LC

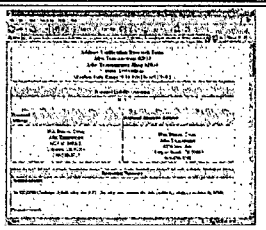


ESTS Instructions (Cont.)

- ***Searching for an LC AVR Report***
  10. If more than one AVR report is available, a list will be provided – click on the date of the version you wish to view



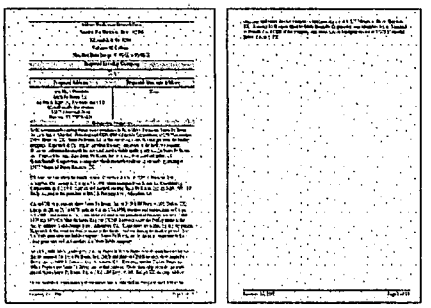
AVR Report



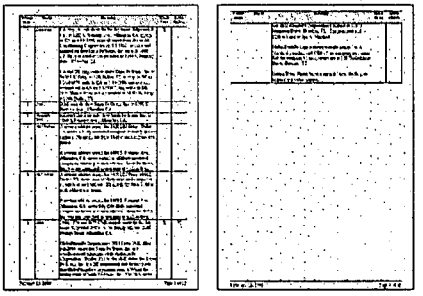
11. To return to the beginning menu, click on the "Cancel" button on each screen until the beginning menu pops up
12. To log out of the system, click the "Exit" button

Please direct any questions on searching the system to Catherine Souders-Mahanpour at Science Applications International Corporation (SAIC), telephone 510-433-0835, extension 181.

AVR Report (Cont.)



AVR Report (Cont.)



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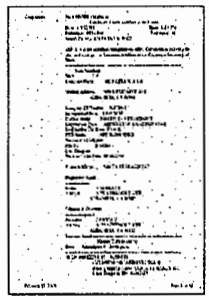

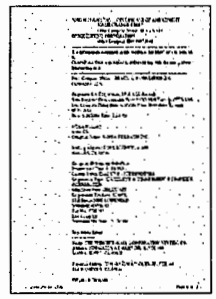

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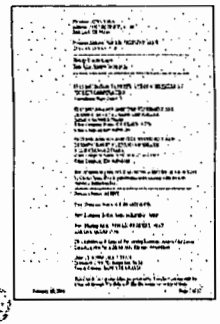

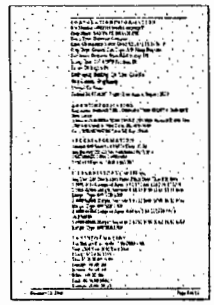

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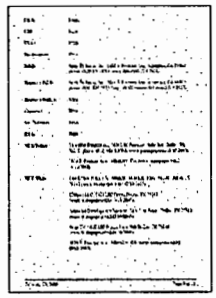
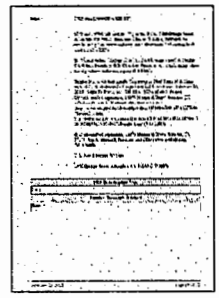
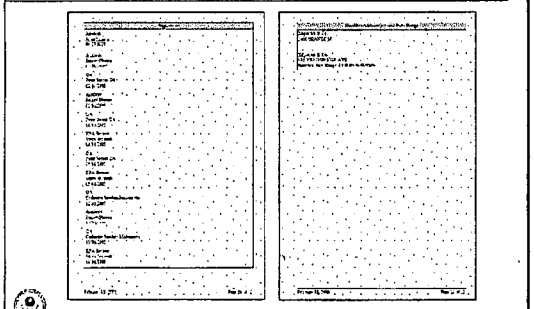




AVR Report (Cont.)



NOTES

Katrina & Rita: Our Role in Responding to Natural Disasters

HERB MILLER

Herb Miller is a civil investigator with the U.S. EPA Region 4 with 20 years experience in Superfund enforcement and PRP Search activities.

As a member of the National PRP Search Enhancement Team, Mr. Miller contributed to development of the 2003 PRP Search Manual.

Mr. Miller has received two bronze metals from EPA and a Commendation from the Department of Justice for his work on Cost Recovery Cases in Region 4.

KATRINA/RITA
EPA's Role in Natural Disasters

EPA's Role in Natural Disasters

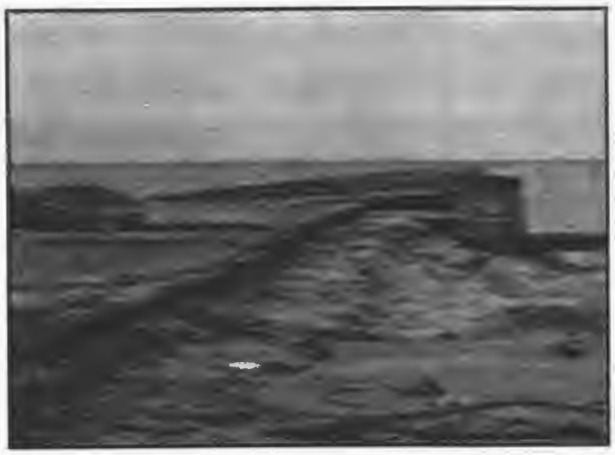
- Herb Miller – Reg 4
- Pam Travis – Reg 6
- Norma Tharp – Reg 7
- Gretchen Schmidt – Reg 10

2

Hurricanes Katrina / Rita
Unprecedented Disasters

- Superfund Enforcement in areas hit by natural disasters.
  - PRP Searches
  - Cost Recovery
  - Assisting responders
  - Other

3



Herb Miller – Reg 4

POST KATRINA / RITA
PRP SEARCHES
(CASE STUDIES)

10

Two Mercury Release Sites in Gulf Coast MS

- Hancock Co Hg Site — $ 250,000
  - September 2003
- Bay St Louis Hg Site — $ 14,000
  - September 2003

11

- On August 29, 2005, the eye of Hurricane Katrina slammed into Hancock County, Mississippi devastating the small coastal community with storm surge up to thirty feet deep. Thousands of homes and close to 1,000 businesses were either damaged or destroyed Five months later, almost half of the 3800 students in Hancock County's schools were still homeless or displaced.

12

Hancock County Mercury Site

- Occurred in Sept 2003
- 4 students played with mercury on school bus and spread to 3 schools and 2 other buses.
- The source of the Mercury was not known.
- EPA's response cost was approximately $250,000.

PRPs

- Students (Operators)
  - Parents responsible ?
- The School System (Owner)
- Source of Mercury (Generator)

PRP SEARCH /ENFORCEMENT

- Interviews
- Information Requests
- Financial Assessments
- Demand Letters

INTERVIEWS

- Source of Mercury was a deceased great grandfather
- His source of Mercury not determined
- Families heavily impacted by Katrina
- Schools heavily impacted by Katrina

FINANCIAL ASSESSMENTS

- Expedited Financial Assessment
  - Tax assessor values for real property
  - Photographs of real property

Murphy Elementary School

Post Katrina scene – Hancock County, Mississippi

Student Residence

Student Residence

Post – Katrina Enforcement

Hancock Co Site

- PRPs Identified:
  - Owner - School System
  - Operator - Students (Parents responsible ?)
  - Generator – Student's Great Grandfather
  - Generator – Grandfather's Source ? – Not Identified

Post – Katrina Enforcement

Hancock Co Site

- Operators – Students

  Relied on expedited Financial Assessments to determine Students' families lacked ability to pay for clean up, without requesting tax returns or financial statements.

Post – Katrina Enforcement

Hancock Co Site

- Owner – School system
  - Considered as Innocent Landowner.
  - Also limited ability to pay considering Katrina Impact
  - Financial Statements not requested

Post – Katrina Enforcement

Hancock Co Site

- Generators
  - Student's Great-Grandfather deceased
  - Great-Grandfather's source not identified

Post – Katrina Enforcement

Hancock Co Site

- Site Costs written off due to
  - Owner – Innocent landowner
  - Generators – Deceased / not identified
  - Operators' inability to pay.
- No Demand or Information request letters sent

Bay St Louis Mercury

- Occurred in Sept 2003
- A student admitted to spreading Mercury around the high school.
- The source of the Mercury was not known.
- EPA's response cost was approximately $14, 000

PRPs

- The Student (Operator)
  - Parents responsible ?
- The School (Owner)
- Source of Mercury (Generator)

PRP Search / Enforcement

- Small $$ Site – Usual Practice
  - Information Request Letters
    - Source of Mercury
    - Financial viability
  - Demand Letters

Post Katrina Enforcement

Bay St. Louis Site

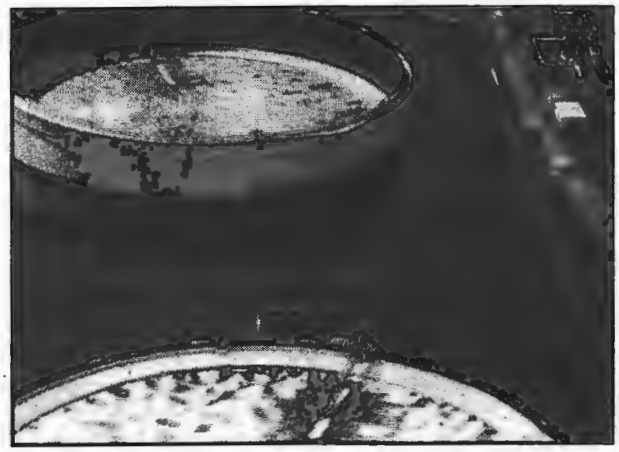
- Small Dollar Site – limit expense of resources
- Wrote off costs w/o financial assessments, information requests, or demand letters.

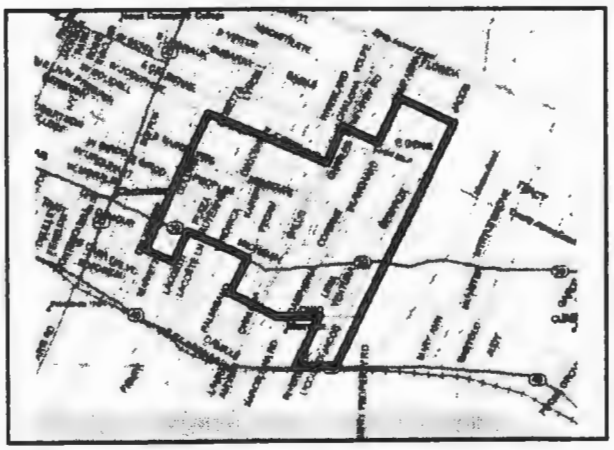
PAMELA J. TRAVIS

Pamela J. Travis is currently the Practice Group Leader for Superfund Litigation in the Office of Regional Counsel, U.S. EPA Region 6, Dallas, Texas. After joining the Agency in 1988, she initially represented EPA in administrative and judicial enforcement actions under the Clean Air Act, Toxic Substances Control Act, the Resource Conservation and Recovery Act, and the Federal Insecticide, Fungicide, and Rodenticide Act. Since 1991, her practice has focused primarily on Superfund enforcement to secure response costs and injunctive relief from responsible parties, with occasional forays into assignments in Clean Air Act counseling, interagency agreements, Brownfields and redevelopment of contaminated properties, state program review and oversight, Oil Pollution Act issues, and most recently, disaster response under the Stafford Act. She serves as lead counsel for EPA in case-specific matters with counsel for the regulated community, the Department of Justice, state Attorneys General, counsel for other federal agencies interacting with EPA in response work. She also advises program staff and Regional management on CERCLA issues and mentors junior attorneys on all aspects of Superfund work. Ms. Travis is a member of the Environmental Law Sections of the State Bar of Texas and the Dallas Bar Association.

Murphy Oil Spill Response

Murphy Oil Refinery USA, Inc.
Meraux, Louisiana





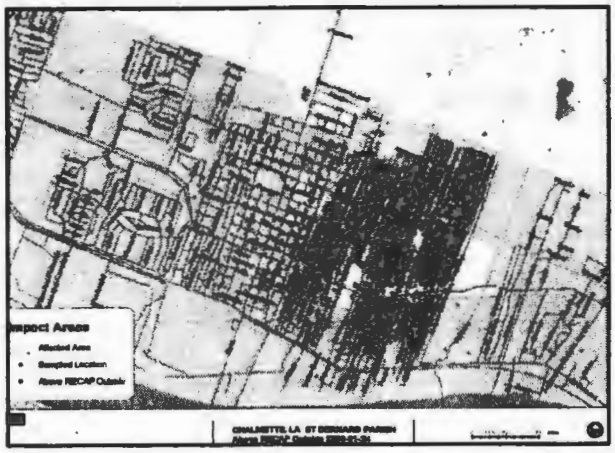


Exhibit B - The Court's Designated Class Boundary

Index

NORMA THARP

Ms. Tharp is a paralegal specialist in EPA Region VII's Office of Regional Counsel. Ms. Tharp joined EPA in the Kansas City office in 1997. She works primarily on PRP searches, legal research, and ability to pay investigations. Prior to joining EPA, Ms. Tharp worked at the FDIC, IRS, and for a private attorney. Ms. Tharp received her A.A.S.degree in Paralegal Studies from Penn Valley in Kansas City and her B.A. degree in English from the University of Missouri, Kansas City.

TAKE A TIP FROM THE SCOUTS

BE PREPARED FOR PRP SEARCHES IN THE EVENT OF A DISASTER OR NATIONAL EMERGENCY

By Norma Tharp, Paralegal Specialist, Region VII, US EPA

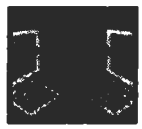
Standard Operating Procedures (SOP)

- Calls to the office from On-Scene Coordinators/Remedial Project Managers (OSCs and RPMs) in the field

- Provide contact information for a person or company – access issues

Research tools

- Great research tools – Lexis, Google search on Internet, www.switchboard.com, telephone work, Reference USA



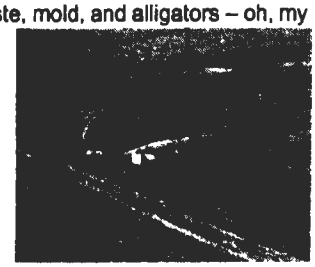
- Standard operating procedures (SOP)

Disaster or National Emergency

- SOP goes AWOL

HURRICANE KATRINA

- Calls from OSC in Plaquemines Parish in Southern Louisiana
- Waste, mold, and alligators – oh, my

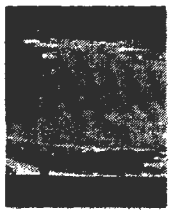


FIND A PROPERTY

- Find a public property, approximately ten acres, flat, with good highway access, near or south of Port Sulphur
- Property needed to store recovered hazardous waste

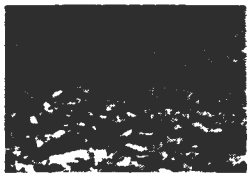
NOT A SIMPLE TASK

- No Parish information on line
- Public property not assessed and not available on any database
- Google
- A golf course?



YOU MAKE THE CALL

- Public officials, levels of cooperation
- Alternative to public property



PRIVATE PROPERTY?

- Called realtors
- Assessor's office
- Show me the money
- Eureka!

WHERE DID THIS COME FROM?

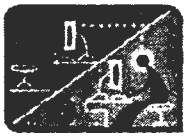
- Find owners of abandoned totes and tanks

TELL ME WHAT YOU HAVE

- Minimal information on totes and tanks
- Only a name
- Need to contact owner

GOOGLE

- Usually a name and Louisiana search resulted in information
- Successor search
- Paste and e-mail



OSC/RPM TOOLS

- Computer and cells phones essential
- Remote access that utilizes a security badge. Security code changes every 30 seconds (bounces off a satellite) – allows entry to EPA's LAN

OSCs TAKE THE INITIATIVE

- Different procedures in emergencies
- Normal procedures disrupted
- Dealing with people they don't normally work with from other regions and federal, state, and local officials

IMPROVEMENT?

- OSCs would like to see attorneys deployed in a legal capacity to deal with legal issues

HOW TO HELP

- **Be prepared** to be accessible and provide timely assistance from the office
- Think outside the box

GRECHEN F. SCHMIDT

Grechen Schmidt is an investigator with Region 10. Grechen started with EPA in 1988 as Community Involvement Coordinator. She worked on the Bunker Hill Superfund site helping the community understand the various aspects of the complex investigation underway. Grechen has served as a liaison between the affected community and the regulatory agencies during the investigation and cleanup of the Exxon Valdez oil spill, Commencement Bay Superfund site and the 22 federal facilities Superfund sites within the region. She helped develop national community involvement guidance for Federal Facilities and has conducted training for EPA and the Department of Defense on effective community involvement

Grechen designed and coordinated the implementation procedures for the Superfund Technical Assistance Grant program (TAG) in Region 10. She served as EPA's technical expert on the Superfund and TAG programs in a criminal trial, resulting in a fraud conviction, with the defendant serving a maximum jail sentence.

From 1995 to 1997, Grechen worked as a Compliance Officer in the Drinking Water program focusing on water systems in Washington state. In addition, she served as the regional contact with OECA and brought a 20-year old enforcement case close to resolution by combining resources of two neighboring (and failing) water systems.

Grechen took an IPA to Anchorage to work with the Alaska Department of Environmental Conservation's (ADEC) Contaminated Sites program as a community involvement coordinator from 1997 to 1999. ADEC was in the process of re-writing their regulations to include community involvement. Grechen developed guidance and trained ADEC staff to effectively work with the community.

Upon returning to EPA Region 10, after a short stay the in community involvement unit, she became an investigator in Office of Environmental Assessment in 2000. Grechen is the only investigator for Region providing investigative support the Superfund program along with all other EPA programs and sister agencies, including ATSDR, state Department of Labor and Industries, State Patrol, etc.

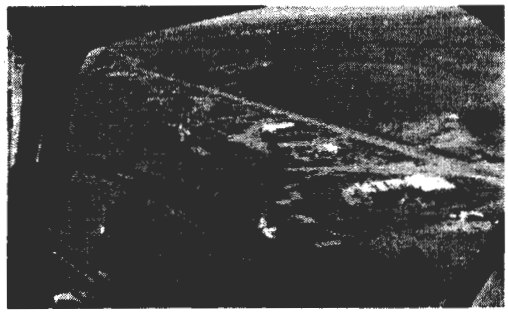
Grechen Schmidt
Reg 10

- Hurricane Rita
  - Hit September 23, 2005
  - Category 3 Hurricane
  - Top Winds 120 mph
  - 20 foot storm surge
  - Made landfall along Texas and Louisiana border

CAMERON PARISH

- Largest Parish in Louisiana
- Over 284,000 acres of marsh lands
- Population around 10,000
- No incorporated communities
- Communities of Cameron, Hackberry, Holly Beach and Creole significantly damaged or destroyed
- Sabine National Wildlife Refuge, along with several state refuges

WHAT IS LEFT OF CAMERON



No One is left

- Most everyone was evacuated
- Cameron Parish authorized parish wide access to EPA to conduct cleanup activities
- Court house was packed up and evacuated in September; structure flooded
- Court house reopened in February
- 2/3 of structures in county destroyed

HHW and Marsh Operations

- Arrived in September
- HHW pickup started Nov. 1
- Marsh Operations started Jan 1
  - Tanks, drums, equipment
  - Storm surge

Wrack Line

Access and Becoming a PRP

- DEQ representative knew everyone!
- When we found landowners, we asked for access
- Crossing Oil pipelines required special assistance from companies
- Failure to assist resulting in becoming a PRP for everything on the property.

NOTES

Acronyms & Abbreviations

Acronyms and Abbreviations

A

AA	Assistant Administrator
AAG	Assistant Attorney General
AAI	All Appropriate Inquiries
ACL	Alternate Concentration Limit
ADR	Alternative Dispute Resolution
AM	Action Memorandum
AO	Administrative Order
AOA	Advice of Allowance
AOC	Administrative Order on Consent
AOC	Area of Contamination
AR	Administrative Record
ARARs	Applicable or Relevant and Appropriate Requirements
ARCS	Alternative Remedial Contracts Strategy
ASTSWMO	Association of State and Tribal Solid Waste Management Organizations
ATP	Ability to Pay

B

BFPP	Bona Fide Prospective Purchaser
BIA	Bureau of Indian Affairs
BLM	Bureau of Land Management
BPA	Blanket Purchase Agreement
BRAC	Base Realignment and Closure
BUREC	Bureau of Reclamation

C

CA	Cooperative Agreement
CAA	Clean Air Act
CAG	Community Advisory Group
CBI	Confidential Business Information
CD	Consent Decree
CD ROM	Compact Disk Read-Only Memory
CEC	CERCLA Education Center (OSWER)
CERCLA	Comprehensive Environmental Response, Compensation and Liability Act of 1980
CERCLIS	CERCLA Information System
CFR	Code of Federal Regulations
CI	Civil Investigator
CIC	Community Involvement Coordinator
CLP	Contract Laboratory Program
CO	Contracting Officer
COI	Conflict of Interest
COR	Contracting Officer's Representative
CR	Community Relations
CR	Cost Recovery
CRC	Community Relations Coordinator
CRC	Cost Recovery Coordinator
CRP	Community Relations Plan
CWA	Clean Water Act

D

DA	Deputy Administrator
DAA	Deputy Assistant Administrator
D&B	Dunn and Bradstreet
DCN	Document Control Number
DD	Division Director
DFO	Designated Federal Official
DOD	Deputy Office Director
DOD	Department of Defense
DOE	Department of Energy
DOI	Department of Interior
DOJ	Department of Justice
DOT	Department of Transportation
DPO	Deputy Project Officer
DQO	Data Quality Objective

E

EDGAR	Electronic Data Gathering, Analysis, and Retrieval
EE/CA	Engineering Evaluation/Cost Analysis
EJ	Environmental Justice
EMSL	Environmental Monitoring and Systems Laboratory
ENRD	Environment and Natural Resources Division (DOJ)
EPA	Environmental Protection Agency
EPAAR	EPA Acquisition Regulation (Manual)
EPCRA	Emergency Planning and Community Right-to-Know Act
EPIC	Environmental Photographic and Investigation Center
EPM	Enforcement Project Manager
EPS	Environmental Protection Specialist
ERCS	Emergency Response Cleanup Services
ERNS	Emergency Response Notification System
ERS	Environmental Response Services
ERT	Environmental Response Team
ESAT	Emergency Services Assistance Team
ESD	Environmental Services Division
ESD	Explanation of Significant Difference
ESI	Expanded Site Investigation
ESS	Enforcement Support Services

F

FACA	Federal Advisory Committee Act
FAR	Federal Acquisition Regulation
FEMA	Federal Emergency Management Agency
FFA	Federal Facility Agreement
FFEO	Federal Facilities Enforcement Office (OECA)
FIFRA	Federal Insecticide, Fungicide, and Rodenticide Act
FINDS	Facility Index System
FMD	Financial Management Division
FOIA	Freedom of Information Act
FR	*Federal Register*
FRC	Federal Records Center
FS	Feasibility Study
FSAP	Field Sampling and Analysis Plan
FTE	Full-Time Equivalent

FUDS	Formerly Used Defense Sites
FWPCA	Federal Water Pollution Control Act
FY	Fiscal Year

G

GAAPs	Generally Accepted Accounting Principles
GAAS	Generally Accepted Accounting Standard
GAO	General Accounting Office
GFO	Good Faith Offer
GIS	Geographic Information System
GNL	General Notice Letter
GPRA	Government Performance and Results Act
GSA	General Services Administration

H

HASP	Health and Safety Plan
HAZWOPER	Hazardous Waste Operations and Emergency Response
HQ	Headquarters
HRS	Hazard Ranking System
HSWA	Hazardous and Solid Waste Amendments (RCRA)

I

IAG	Interagency Agreement
ICs	Institutional Controls
IFMS	Integrated Financial Management System
IG	Inspector General
IGCE	Independent Government Cost Estimate
IMC	Information Management Coordinator

L

LAN	Local Area Network
LDR	Land Disposal Restrictions
LOE	Level of Effort
LSI	Listing Site Inspection
LTRA	Long-Term Response Action
LUST	Leaking Underground Storage Tank

M

MARS	Management and Accounting Reporting System
MCL	Maximum Contaminant Level
MCLG	Maximum Contaminant Level Goal
MOA	Memorandum of Agreement
MOU	Memorandum of Understanding
MSDSs	Material Safety Data Sheets
MSCA	Multi-Site Cooperative Agreement
MSW	Municipal Solid Waste
MUNIS	Municipalities

N

NAAG	National Association of Attorneys General
NARPM	National Association of Remedial Project Managers
NBAR	Non-Binding (Preliminary) Allocation of Responsibility
NCLP	National Contract Laboratory Program
NCP	National Contingency Plan
NEIC	National Enforcement Investigations Center
NEJAC	National Environmental Justice Advisory Council
NEPA	National Environmental Policy Act
NESHAPS	National Emissions Standards for Hazardous Air Pollutants
NETI	National Enforcement Training Institute (OECA)
NFRAP	No Further Remedial Action Planned
NOAA	National Oceanic and Atmospheric Administration
NOSC	National Association of OSCs
NOV	Notice of Violation
NPDES	National Pollution Discharge Elimination System
NPL	National Priorities List
NRC	National Response Center
NRC	Nuclear Regulatory Commission
NRD	Natural Resource Damages
NRT	National Response Team
NTC	Non-Time-Critical (Removal)
NTIS	National Technical Information Service

O

O&F	Operational and Functional
O&M	Operation and Maintenance
OAM	Office of Acquisition Management
OARM	Office of Administration and Resources Management
OD	Office Director
ODCs	Other Direct Costs
OECA	Office of Enforcement and Compliance Assurance
OEJ	Office of Environmental Justice
OERR	Office of Emergency and Remedial Response (now known as OSRTI)
OGC	Office of General Counsel
OIA	Office of International Activities
OIG	Office of the Inspector General
OMB	Office of Management and Budget
OPA	Oil Pollution Act of 1990
ORC	Office of Regional Counsel
ORD	Office of Research and Development
OSC	On-Scene Coordinator
OSHA	Occupational Safety and Health Administration
OSRE	Office of Site Remediation Enforcement (OECA)
OSRTI	Office of Superfund Remediation and Technology Innovation (formerly known as OERR)
OSW	Office of Solid Waste (OSWER)
OSWER	Office of Solid Waste and Emergency Response
OTIS	On-Line Targeting Information System
OU	Operable Unit

P

PA	Preliminary Assessment
PA/SI	Preliminary Assessment/Site Investigation
PCB	Polychlorinated Biphenyl
PCOR	Preliminary Close-Out Report
PNRS	Preliminary Natural Resources Survey
PO	Project Officer
POLREP	Pollution Report
POTW	Publicly-Owned Treatment Works
PPA	Prospective Purchaser Agreement
PPB	Parts per Billion
PPED	Policy and Program Evaluation Division (OSRE)
PPM	Parts per Million
PR	Procurement Request
PRP	Potentially Responsible Party
PRSC	Post-Removal Site Control

Q

QA	Quality Assurance
QA/QC	Quality Assurance/Quality Control
QAPP	Quality Assurance Project Plan
QC	Quality Control

R

R&D	Research and Development
RA	Remedial Action
RA	Regional Administrator
RAC	Response Action Contractor
RACS	Response Action Contracting Strategy
RCMS	Removal Cost Management System
RCRA	Resource Conservation and Recovery Act
RCRAInfo	Resource Conservation and Recovery Act Information
RD	Remedial Design
RD/RA	Remedial Design/Remedial Action
RDT	Regional Decision Team
RI	Remedial Investigation
RI/FS	Remedial Investigation/Feasibility Study
ROD	Record of Decision
RODS	Record of Decision System
RP	Responsible Party
RPM	Remedial Project Manager
RPO	Regional Project Officer
RQ	Reportable Quantity
RRT	Regional Response Team
RSD	Regional Support Division (OSRE)
RSE	Removal Site Evaluation
RSI	Removal Site Inspection
RTP	Research Triangle Park, North Carolina

S

SACM	Superfund Accelerated Cleanup Model
SAM	Site Assessment Manager
SAP	Sampling and Analysis Plan
SARA	Superfund Amendments and Reauthorization Act of 1986
SAS	Special Analytical Services
SAS	Superfund Alternative Site
SBA	Small Business Administration
SBLR&BRA	Small Business Liability Relief and Brownfields Revitalization Act (commonly referred to as the "Brownfields Amendments")
SBREFA	Small Business Regulatory Enforcement Flexibility Act
SCA	State Cooperative Agreement
SCAP	Superfund Comprehensive Accomplishments Plan
SCORE$	Superfund Cost Organization and Recovery Enhancement System
SDWA	Safe Drinking Water Act
SEE	Senior Environmental Employee
SEPs	Supplemental Environmental Projects
SESS	Superfund Enforcement Support Service
SETS	Superfund Enforcement Tracking System
SF	Superfund
SI	Site Inspection
SMOA	State Memorandum of Agreement
SNL	Special Notice Letter
SOL	Statute of Limitations
SOP	Standard Operating Procedure
SOW	Scope of Work
SOW	Statement of Work
SREA	Superfund Recycling Equity Act
SSC	Superfund State Contract
SSI	Screening Site Investigation
STARS	Strategic Targeting Activities Reporting System
START	Superfund Technical Assessment and Response Team
SWDA	Solid Waste Disposal Act

T

TAG	Technical Assistance Grant
TAT	Technical Assistance Team
TBC	To Be Considered (Material)
TBD	To Be Determined
TC	Time-Critical (Removal)
TCLP	Toxicity Characteristic Leaching Procedure
TDD	Technical Directive Document
TDD	Telecommunications Device for the Deaf
TDM	Technical Direction Memorandum
TIO	Technology Innovation Office (OSWER) (now known as TIP)
TIP	Technology Innovation Program (OSWER) (formerly know as TIO)
TRI	Toxic Release Inventory
TSCA	Toxic Substances Control Act
TSDF	Treatment, Storage and Disposal Facility

U

UAO	Unilateral Administrative Order
UCC	Uniform Commercial Code
USACE	U.S. Army Corps of Engineers
USC	U.S. Code
USCG	U.S. Coast Guard
USDA	U.S. Department of Agriculture
USFWS	U.S. Fish and Wildlife Service
USGS	U.S. Geological Survey
UST	Underground Storage Tank

W

WA	Work Assignment
WACR	Work Assignment Completion Report
WAF	Work Assignment Form
WAM	Work Assignment Manager
WasteLAN	Waste Local Area Network

Glossary

Glossary

Administrative Order on Consent (AOC): A legal agreement signed by EPA and an individual, business, or other entity through which the entity agrees to take an action, refrain from an activity, or pay certain costs. It describes the actions to be taken, may be subject to a public comment period, applies to civil actions, and can be enforced in court. AOCs are most commonly used for removal actions and RI/FSs, but may be used for de minimis and cost recovery settlements.

Administrative Record (AR): The body of documents that "forms the basis" for the selection of a particular response at a site. For example, the AR for remedy selection includes all documents that were "considered or relied upon" to select the response action. An AR must be available at or near every site to permit interested individuals to review the documents and to allow meaningful public participation in the remedy selection process. This requirement does not apply to other ARs, such as those for deletion.

Administrative Subpoena: A command issued by EPA requiring testimony and, if necessary, the production of documents deemed necessary to the administrative investigation of a site. CERCLA section 122(e)(3)(B) authorizes the issuance of administrative subpoenas as is "necessary and appropriate" to gather information to perform a non-binding preliminary allocation of responsibility or "for otherwise implementing CERCLA section 122." No legal mandate prohibits the use of an administrative subpoena as an initial information gathering tool; however, the Agency prefers using 104(e) requests before issuing administrative subpoenas.

All Appropriate Inquiries: The inquiries that a landowner must make into the previous ownership and uses of a facility in order to claim the innocent landowner, contiguous landowner, or bona fide prospective purchaser defense to CERCLA liability. Standards and practices for conducting all appropriate inquiries were published in the Federal Register (70 Fed. Reg. 66069-66113) on November 5, 2005 as 40 CFR Part 312. These standards and practices also apply to persons conducting site characterization and assessments with the use of grants awarded under CERCLA section 104(k)(2)(B).

Alternative Dispute Resolution (ADR): A process that allows parties to resolve their disputes without litigating them in court. ADR involves the use of neutral third parties to aid in the resolution of disputes through methods that include arbitration, mediation, mini-trials, and fact finding.

Arbitrary and Capricious: Characterization of a decision or action taken by an administrative agency or inferior court meaning willful and unreasonable action without consideration or in disregard of facts or without determining principle. Under CERCLA section 130(j)(2), a court ruling on a challenge to a response action decision will apply the arbitrary and capricious standard of review.

Arbitration: An alternative dispute resolution technique that involves the use of a neutral third party to hear stipulated issues pursuant to procedures specified by the parties. Depending upon the agreement of the parties and any legal constraints against entering into binding arbitration, the decision of the arbitrator may or may not be binding.

Brownfields: CERCLA section 101(39), as amended by the Small Business Liability Relief and Brownfields Revitalization Act, defines "brownfield site" in general 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." The term does not include:

- a facility that is the subject of a planned or ongoing removal action under CERCLA;
- a facility that is listed or proposed for listing on the National Priorities List (NPL);
- a facility that is the subject of a unilateral administrative order, a court order, an order of consent or judicial consent decree that has been issued to or entered into by the parties under CERCLA, the Solid Waste Disposal Act (SWDA), the Federal Water Pollution Control Act (FWPCA), the Toxic Substances Control Act (TSCA), or the Safe Drinking Water Act (SDWA);
- a facility that is subject to corrective action under SWDA section 3004(u) or 3008(h), and to which a corrective action permit or order has been issued or modified to require the implementation of corrective measures;
- a facility that is a land disposal unit with respect to which a closure notification under Subtitle C of the SWDA has been submitted, and closure requirements have been specified in a closure plan or permit;
- a facility that is subject to the jurisdiction, custody, or control of a department, agency, or instrumentality of the United States for an Indian tribe;
- a portion of a facility at which there has been a release of polychlorinated biphenyls (PCBs), and that is subject to remediation under the TSCA; or
- a portion of a facility, for which portion, assistance for response activity has been obtained under Subtitle I of SWDA from the Leaking Underground Storage Tank Trust Fund established under section 9508 of the Internal Revenue Code of 1986.

Cash Out: A settlement that requires PRPs to provide up-front financing for a portion of the response action, rather than performing the work themselves. There are several types of cash-out settlement. A mixed-funding cash-out settlement requires the settling PRP to provide a substantial portion of the total response costs whereas a de minimis cash-out settlement requires a minor portion of the response costs to be paid by the settling PRPs.

CERCLA 106(b) Reimbursement Petition: Petition by an entity, which has complied with a unilateral administrative order, requesting reimbursement from EPA for reasonable costs plus interest of conducting a response action. A person may be entitled to reimbursement if the person can establish that he or she is not liable for response costs under CERCLA section 107(a) or if the person can demonstrate that the Agency's selection of the response action was arbitrary and capricious or was otherwise not in accordance with law.

CERCLIS: The acronym for the Comprehensive Enforcement Response, Compensation, and Liability Information System; a national information management system for the CERCLA program. CERCLIS inventories and tracks releases, accomplishments, expenditures, and planned actions at potential and actual Superfund sites.

Cleanup Activities: Actions taken to deal with a release or threatened release of a hazardous substance that could affect humans or the environment. The term "cleanup" is sometimes used interchangeably with the terms remedial action, removal action, response, or corrective action.

Comment Period: Period provided for public to review and comment on a proposed EPA action, rulemaking, or settlement.

Community Relations (Involvement): EPA's program to inform and encourage public participation in the Superfund process and to respond to community concerns and incorporate them into the Agency decision-making process.

Community Relations (Involvement) Coordinator (CRC or CIC): Lead Agency staff who works to involve and inform the public about the Superfund process and cleanup actions.

Community Relations Plan (CRP): A document that identifies techniques used by EPA to communicate effectively with the public during the Superfund cleanup process at a specific site. This plan describes the site history, the nature and history of community involvement, and concerns expressed during community interviews. Additionally, the plan outlines methodologies and timing for continued interaction between the Agency and the public at the site.

Consent Decree (CD): A legal document, approved by a judge, that formalizes an agreement reached between EPA and one or more potentially responsible parties (PRPs) outlining the terms under which that PRP(s) will conduct all or part of a response action, pay past costs, cease or correct actions or processes that are polluting the environment, or comply with regulations where failure to comply caused EPA to initiate regulatory enforcement actions. The CD describes the actions PRPs will take, is subject to a public comment period prior to its approval by a judge, and is enforceable as a final judgment by a court.

Contribution: A legal principle according to which an entity can seek to recover some of the response costs for which it has already resolved liability with the United States. For example, when several PRPs are liable for a hazardous substance release, EPA is not required to pursue all of the PRPs. If EPA settles with or wins its case against a subset of PRPs, then the right of contribution enables the PRPs (i.e., the settling PRPs or those against whom a judgment is rendered) to seek recovery of a proportional share from other PRPs who were not named as defendants in EPA's suit or settlement, but who nonetheless contributed to the release.

Contribution Protection: A statutory provision that provides that any PRP who resolved its liability to the United States in an administrative or judicially approved settlement is not liable to other PRPs for claims of contribution regarding matters addressed in the settlement.

Cooperative Agreement (CA): Mechanism used by EPA to provide Fund money to States, political subdivisions, or Indian tribes to conduct or support the conduct of response activities. Subpart O of the NCP, 40 CAR Part 35, outlines specific response actions that may be conducted using CA funds.

Cost Recovery: A process by which the U.S. government seeks to recover money previously expended in performing any response action from parties liable under CERCLA section 107(a). Recoverable response costs include both direct and indirect costs.

Covenants Not to Sue: A contractual agreement, such as those authorized by CERCLA section 122(f) and embodied in a consent decree or administrative order on consent, in which the Agency agrees not to sue settling PRPs for matters addressed in the settlement. EPA's covenant not to sue is given in exchange for the PRPs' agreement to perform the response action or to pay for cleanup by the Agency, and does not take effect until PRPs have completed all actions required by the consent decree and administrative order on consent.

Covenants not to sue are generally given in either consent decrees or administrative orders. Under CERCLA, the use of covenants not to sue is discretionary. In effect, the Agency is authorized to agree to such a release of future liability only if the terms of the covenant include "reopeners."

Declaratory Judgment: A binding adjudication of rights and status of litigants. Within the context of CERCLA, the United States may file a claim seeking declaratory judgment on liability for past and future response costs at the site. If declaratory judgment on liability is granted, the United States does not have to prove liability in any future action with the defendant.

Defendant: A person against whom a claim or charge is brought in a court of law.

Demand Letter: A written demand for recovery of costs incurred under CERCLA. The primary purposes of written demands are to formalize the demand for payment of incurred costs plus future expenditures, inform potential defendants of the dollar amount of those costs, and establish that interest begins to accrue on expenditures. A demand letter may be incorporated into the special notice letter.

De Micromis Exemption: CERCLA section 107(o), as amended by the Small Business Liability Relief and Brownfields Revitalization Act, provides that in general, a party shall not be liable under CERCLA section 107 if it can demonstrate that the total amount of the material containing hazardous substances that it generated and arranged for disposal at, or accepted for transport to, an NPL site was less than 110 gallons of liquid materials or less than 200 pounds of solid materials, unless those substances contributed significantly to the cost of the response action or natural resource restoration with respect to the facility; or the party has been uncooperative with EPA's response actions at the site; or the party has been convicted of a criminal violation for the conduct to which the exemption would apply.

De Minimis Contributor: PRPs who are deemed by the settlement agreement to be responsible for only a minor portion of the response costs at a particular facility. A determination of a PRP's responsibility is made based on the volume, toxicity, or other hazardous effects in comparison with other wastes at the facility. CERCLA section 122(g)(1)(A) expressly defines de minimis contributor.

De Minimis Landowner: PRPs who are deemed by the settlement agreement to be past or present owners of the real property at which the facility is located who did not conduct or permit the generation, transportation, storage, treatment or disposal of any hazardous substance at the facility, did not contribute to the release or threat of release of a hazardous substance at the facility through any act or omission, and had no actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substance at the time of purchase. CERCLA section 122(g)(1)(B) expressly defines de minimis landowner.

De Minimis Settlement: An agreement, either administrative or judicial, authorized by CERCLA section 122(g), between EPA and PRPs for a minor portion of response costs.

De Novo: Generally, a new hearing or a hearing for the second time. At a de novo hearing, the court hears the case as the court of original and not appellate jurisdiction. Under CERCLA, for example, a judge may hear a case de novo if the administrative record is found to be incomplete or inaccurate. Such a hearing would allow judicial review that is not limited to the administrative record. A potential result of a de novo trial could be the court selecting the remedy.

Discovery: A pre-trial procedure that enables parties to learn the relevant facts about the case. The Federal Rules of Evidence provide for extremely broad discovery. The basic tools of discovery are depositions, interrogatories, and requests for production of documents. One of the few limitations on the scope of discovery is that the material sought must be relevant to the subject matter of the pending suit, or likely to lead to the production of relevant material.

Easement: A right afforded to an entity to make limited use of another's real property. An easement is one form of institutional control that may be required at a Superfund site if all the hazardous substances cannot be removed from the site. Easements may include limiting access or control of surface activities.

Eminent Domain: The power to take private property for public use. Under the U.S. Constitution, there must be just compensation paid to the owners of this property. EPA exercises its power of eminent domain through the process of condemnation.

Enforcement Actions: EPA, state, or local legal actions to obtain compliance with environmental laws, rules, regulations, or agreements, or to obtain penalties or criminal sanctions for violations.

Environmental Justice (EJ): The fair treatment of people of all races, incomes, and cultures with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Fair treatment implies that no person or group should shoulder a disproportionate share of negative environmental impacts resulting from the execution of environmental programs.

Explanation of Significant Difference (ESD): A document regarding a significant change to the record of decision when new information is discovered about a site or difficulties are encountered during the remedial design/remedial action phase of cleanup. An ESD is appended to the administrative record to inform the public of any significant changes that are being made to the selected remedy.

Extraordinary Circumstances: Situations that justify the deletion of a standard reopener in a consent decree. This release is granted infrequently and is given in response to unusual conditions related to liability, viability, or physical circumstances.

Federal Lien: A lien in favor of the United States authorized by CERCLA section 107(l) that may be imposed upon a PRP's property subject to a response action. The lien arises when the PRP receives written notice of its potential liability for response costs under CERCLA, or the Agency actually incurs response costs at a particular site. The lien continues until the PRP's liability is fully satisfied or the claim becomes unenforceable by operation of the statue of limitations.

Federal Register: A federal government publication that includes proposed regulations, responses to public comments received regarding proposed regulations, and final regulations. The Federal Register is published every working day by the Office of Federal Register, National Archives and Records Administration, Washington, DC 20408. The Federal Register publishes regulations and legal notices issued by federal agencies. These include presidential proclamations and executive orders, federal agency documents required by Congress to be published, and other federal agency documents of public interest. The Federal Register is available to the public through public libraries that are federal depositories, law libraries, and large university libraries.

Force Majeure: A clause common to construction contracts which protects the parties in the event that a portion of the contract cannot be performed due to causes that are outside of the parties' control (i.e., problems that could not be avoided by the exercise of due care, such as an act of God). These causes are known as *force majeure* events. *Force majeure* provisions are included in administrative orders on consent and consent decrees. These provisions stipulate that the PRPs shall notify EPA of any event that occurs that may delay or prevent work and that is due to *force majeure.* Two examples of *force majeure* may be raised as defenses to liability. CERCLA section 107(b) releases from liability any person who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance was caused solely by an act of God or an act of war (i.e., *force majeure.*)

Full Release: An agreement by EPA to release a PRP from any further liability for response costs. Under CERCLA section 122(j)(2), natural resource trustees may grant full releases of liability for damages to natural resources.

Fund (Hazardous Substance Superfund or Superfund Trust Fund): A fund set up under CERCLA to help pay for cleanup of hazardous waste sites and for legal action to force cleanup actions on those responsible for the sites. The fund is financed primarily with a tax on crude oil and specified commercially used chemicals.

General Notice Letter (GNL): A notice to inform PRPs of their potential liability for past and future response costs and the possible future use of CERCLA section 122(e) special notice procedures and the subsequent moratorium and formal negotiation period.

Generator: Any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for disposal or treatment of hazardous substances owned or possessed by such a person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances.

Good Faith Offer (GFO): A written proposal submitted by a PRP to the EPA to perform or pay for a response action. PRPs are given 60 days from the special notice to provide EPA a written GFO. The GFO must be specific, consistent with the ROD or proposed plan, and indicate the PRPs' technical, financial, and management ability to implement the remedy.

Hazard Ranking System (HRS): The principal screening tool used by EPA to evaluate risks to public health and the environment associated with abandoned or uncontrolled hazardous waste sites. The HRS calculates a score based on the potential for hazardous substances spreading from the site through the air, surface water, or ground water, and on other factors such as nearby population. This score is the primary factor in deciding if the site should be on the NPL and, if so, what ranking it

should have compared to other sites on the list. A site must score 28.5 or higher to be placed on the NPL.

Indian Tribe: As defined by CERCLA section 101(36), any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village, but not including any Alaska Native regional or village corporation, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

Information Repository: Where the administrative record, current information, technical reports, and reference materials regarding a Superfund site are stored. EPA or the State establishes the repository in the community as soon as a site is discovered. It provides the public with easily accessible information. Repositories are established for all sites where cleanup activities are expected to last for more than 45 days. Typical community repository locations include public libraries and municipal offices.

Information Request Letter: Formal written requests for information, authorized by CERCLA section 104(e)(2)(A) through (C), issued during an administrative investigation. EPA is authorized to request information from any person who has or may have information relevant to any of the following:

- the kind and quantity of materials that have been or are being generated, treated, disposed of, stored at, or transported to a vessel or facility;
- the nature or extent of a release or threatened release of a hazardous substance, pollutant, or contaminant at or from a vessel or facility; and
- the ability of a person to pay for or perform a cleanup.

Failure to respond to or incomplete response to an informational request is subject to statutory penalties.

Innocent Landowner: A person who purchased or acquired real property without actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substances. PRPs may assert this claim as part of their defense, but only the court may make this determination based on CERCLA sections 107(b) and 101(35).

Institutional Controls: Non-engineered instruments such as administrative or legal controls that minimize the potential for human exposure to contamination or protect the integrity of a remedy by limiting land or resource use or providing information that helps modify or guide human behavior. ICs are generally used in conjunction with rather than in lieu of engineering measures such as waste treatment or containment. Some common examples of ICs are zoning restrictions, building or excavation permits, well drilling prohibitions, easements and covenants.

Joint and Several Liability: A legal doctrine defining the scope of a defendant's liability. When more than one PRP is involved at a site and the harm is indivisible, the court may impose joint and several liability upon all parties involved at the site. In this instance, each PRP involved at the site may be held individually liable for the cost of the entire response action.

Judicial Review: The court's review of a decision rendered by a federal agency or department or a court's review of an appeal challenging either a finding of fact or finding of law. Under CERCLA, for example, the court provides judicial review prior to entry of the consent decree. In addition, the court would provide judicial review of an EPA decision if a PRP submitted a "petition to review" to a federal court of appeals. The jurisdiction of the court and the scope of its review are defined by CERCLA section 113(h) and the Judicial Review Act, 28 U.S.C. §§2341-2351.

Lead Agency: The agency that primarily plans and implements cleanup actions. This could be EPA, State, or political subdivisions, other federal agencies, or Indian tribes. Other agencies may be extensively involved in the process, but the lead agency directs and facilitates activities related to a site, often including enforcement actions.

Mixed Funding: Settlements whereby EPA settles with fewer than all PRPs for less than 100 percent of the response costs. The settlement must provide a substantial portion, greater that 50 percent of the total response costs, and there must be viable non-settlers from which remaining response costs may be pursued. The three types of mixed funding settlement are preauthorization, cash-out, and mixed work.

Mixed Work: A type of mixed funding settlement whereby EPA and the PRPs agree to conduct discrete portions of the response action. Often EPA's portion of the work is paid for or performed by other PRPs as a result of subsequent settlements or unilateral administrative orders.

Moratorium: The period of time after special notice letters are issued during which the Fund will not be used to begin work at the site on the RI/FS or RA. EPA also will not seek to compel PRP action at the site during the moratorium.

Municipal Solid Waste (MSW): CERCLA section 107(p), as amended by the Small Business Liability Relief and Brownfields Revitalization Act, defines MSW as waste material generated by a household; and waste material generated by a commercial, industrial, or institutional entity, to the extent that the waste material:

- is essentially the same as waste normally generated by a household;
- is collected and disposed of with other MSW as part of normal MSW collection; and
- contains a relative quantity of hazardous substances no greater than the relative quantity of hazardous substances contained in waste generated by a typical single family household.

National Oil and Hazardous Substances Pollution Contingency Plan (NCP): The NCP is the major framework regulation for the federal hazardous substances response program. The NCP sets forth procedures and standards for how EPA, other federal agencies, States, and private parties respond under CERCLA to releases or threats of releases of hazardous substances, and under Clean Water Act section 311, as amended by the Oil Pollution Act of 1990, to discharges of oil.

Natural Resources: Land, fish, wildlife, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, or controlled by the United States, state or local government, any foreign government, any Indian tribe, or any member of an Indian tribe.

Natural Resource Damages: Damages for injury or loss of natural resources as set forth in CERCLA sections 107(1) and 111(b) and NCP section 300.615.

Non-Binding Preliminary Allocation of Responsibility (NBAR): An allocation of the total cost of response among PRPs at a facility. CERCLA section 122(e)(3) allows EPA to provide NBARs to PRPs to facilitate settlement. An NBAR is not binding on the United States or the PRPs and cannot be admitted as evidence in court.

Orphan Share: A portion of cleanup costs that cannot be assessed to a PRP as a result of either the PRP's insolvency or EPA's inability to identify PRP(s).

Owner or Operator: Any person owning or operating a vessel or facility, or in the case of a hazardous substance being accepted for transportation, the common or contract carrier. It does not include a unit of state or local government that acquired ownership or control involuntarily through bankruptcy, tax delinquency, or abandonment.

Performance Bond: A guarantee given by a contractor that a work assignment will be completed according to its terms and within the agreed time.

Performance Standards: Provisions in consent decrees and administrative orders specifying specific levels of performance that site activities must achieve; often incorporated by reference into the record decision. The inclusion of such performance standards enables the Agency to assure measurable levels of cleanup that provide the protection desired.

Person: An individual, firm, corporation, association, partnership, joint venture, commercial entity, U.S. government, State, municipality, or any interstate body.

Plaintiff: A party who brings a legal action; the party who complains or sues in a civil action and is so named on the record.

Potentially Responsible Party (PRP): Any individual or entity including owners, operators, transporters, or generators who may be liable under CERCLA section 107(a).

Preauthorization: A type of mixed funding settlement whereby EPA preauthorizes a claim against the Fund by the PRPs for a portion of costs of conducting a response action. Once the preauthorization agreement is finalized, the PRPs conduct the response action, as outlined in settlement agreement, petition non-settling PRPs for reimbursement, and, if necessary, seek reimbursement from the Fund for the preauthorized amount not received from non-settling PRPs.

Premium: A sum paid or agreed to be paid by a PRP to cover risks associated with settlement. This sum represents an amount in addition to the cost of the response action. For example, a premium may be part of an early de minimis settlement due to potential inaccuracy of total response cost estimates or remedy failure.

Record of Decision (ROD): The official Agency document that explains which remedial cleanup alternatives have been considered, the selected remedy, technical background relative to the decision, and how the decision complies with the law.

Recalcitrant: A PRP that is persistently uninterested in or refuses to reach settlement or that fails to comply with a settlement or order.

Recusal: The voluntary or involuntary removal of a government official from any involvement in a specific matter. Recusal is used to preserve the ethical standards of public service. Recusal generally occurs when there is an appearance of a conflict between governmental responsibilities and private interest. Once a person is removed through recusal, she cannot participate in any activity relating to the matter; specifically, she cannot see any correspondence or participate in any meetings or negotiations related to the issue.

Remand: A legal term used when a court sends a case back to either a lower court or an administrative agency for further action. For example, under CERCLA, if an administrative record is found to be incomplete or inaccurate, one option of the reviewing court is to remand the case to EPA with instructions to compile an accurate and complete administrative record.

Remedial: CERCLA section 101(24) defines a remedial action as one that is "consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment." Generally, response actions that take longer than a non-time-critical removal and are more complex than removals.

Removal: CERCLA section 101(23) defines a removal as "the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release...[and] such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances..." Such evaluations include RI/FS. Removals are classified according to urgency as "emergency," for those requiring immediate response; "time-critical," for those that take no more than six months; and "non-time-critical" for removals that need up to a year or more.

Reopeners: Contractual provisions that preserve the Agency's right to compel the PRPs to undertake additional response actions or to pay costs for Agency response actions in addition to those agreed to in the settlement. Reopeners to liability are triggered when previously unknown conditions at the site are discovered, or information previously unknown to EPA is received, that indicates the remedial action is not sufficiently protective. Reopener provisions restrict the covenant not to sue by defining the conditions under which the settlement may be re-examined.

Remedial Investigation/Feasibility Study (RI/FS): The remedial investigation and feasibility study are conducted at an NPL site by EPA, or a PRP acting under an administrative order on consent (AOC) or (rarely) a unilateral administrative order (UAO), to assess site conditions and evaluate alternatives to the extent necessary to select a remedy, described in the record of decision (ROD), that will clean up the site in accordance with CERCLA section 121.

Remedial Design/Remedial Action (RD/RA): The remedial design and remedial action are conducted at an NPL site by EPA or a PRP under a consent decree (CD) approved and entered by a federal court. RD is the engineered design of the selected remedy; RA is the construction and continuing operation and maintenance of the remedy.

Settlement: Resolution of a claim. Settlement occurs when a federal or state agency has a written agreement with PRPs regarding payment for and conduct of specified response actions. Settlements may be achieved administratively through an administrative order on consent or judicially through a consent decree.

Special Account: A sub-account of the Fund in which cash-out settlement funds may be deposited to segregate the funds and ensure that they are readily accessible for work at the site covered by the settlement.

Special Master: A court-appointed individual who oversees the progress of a complex case before it goes to trial. The scope of the special master's authority is set forth in an order of reference. Special masters are appointed only under exceptional conditions. For example, special masters may be appointed in cases requiring the interpretation of complicated technical data or voluminous information.

Special Notice Letter (SNL): A written notice to a PRP providing information on potential liability, conditions of the negotiation moratorium, future response actions, and demand for past costs. The SNL is authorized under CERCLA section 122(e)(1) and triggers the start of the negotiation moratorium.

Statute of Limitations (SOL): The statutorily defined period of time within which the United States, on behalf of EPA, must file a claim for cost recovery. If the United States does not file a case within the SOL, it may not be able to recover its costs from the PRPs.

Stipulated Penalties: Fixed sums of money that a defendant agrees to pay for violating the terms of a settlement. Procedures for invoking and appealing stipulated penalties and penalty amounts are agreed to in the administrative order on consent or the consent decrees.

Strict Liability: Legal responsibility for damages without regard to fault or diligence. The strict liability concept in CERCLA means that the federal government can hold PRPs liable without regard to a PRP's fault, diligence, negligence, or motive.

Transporter: CERCLA section 107(a) defines a transporter as a person who "accepts or accepted any hazardous substances for transport for disposal" to any site selected by such person, "from which there is a release or threatened release which causes the incurrence of response costs, of a hazardous substance..."

WasteLAN: The acronym for Waste Local Area Network. For historical reasons, EPA's Regions use it when referring to CERCLIS.