Brownfields Handbook:
How to Manage Federal Environmental Liability Risks

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Preface

Since the announcement of the Environmental Protection Agency's (EPA) Brownfields Action Agenda in January 1995, the Brownfields program has empowered states, tribes, communities, and other stakeholders to work together to assess, safely clean up and sustainably reuse contaminated property as well as prevent future brownfields. Through the brownfields pilot programs, more than $3.5 billion has been leveraged in public and private cleanups, over 3,000 properties have been assessed for contamination, and over $2.5 million in loans have been made for cleanup and reuse. In addition, EPA has entered into more than 150 prospective purchaser agreements and issued more than 1,000 comfort letters to facilitate the cleanup and reuse of property.

The Office of Site Remediation Enforcement (OSRE) plays a key role in the success of the program through the development of tools that clarify and address barriers to timely cleanup and reuse posed by federal environmental liability. In November 1998, EPA issued *The Handbook of Tools for Managing Federal Superfund Liability Risks at Brownfields and Other Sites*. The handbook provided a compilation of tools and a discussion of how to use them in evaluating the benefits of reusing a brownfield property.

EPA's Brownfields program continues to evolve. Until 1998, brownfields were associated primarily with Superfund liability and cleanup issues. As more properties were assessed through the pilot program, stakeholders raised concerns about environmental liabilities under the RCRA (Resource Conservation and Recovery Act), mirroring the Superfund experience.

This updated edition of the handbook summarizes the tools available that clarify and address barriers to cleanup and reuse posed by RCRA. In addition, the handbook also summarizes the new tools and initiatives that the Agency has undertaken since 1995. These include the Superfund Redevelopment

Initiative (SRI), USTfields, RCRA reforms, and improvements to the prospective purchaser agreement process. The new handbook also updates the list of related policies and guidance documents and EPA contacts. All of the other tools described in the 1998 edition remain unchanged.

An electronic copy of the handbook may be found at www.epa.gov/Compliance/about/offices/osre.html. For additional information regarding the handbook, please contact Elisabeth Freed at (202) 564-5117. For property-specific Superfund or RCRA discussions, please refer to the regional contact list provided in Appendix F.

I want to acknowledge key staff - Elisabeth Freed, Lori Boughton, Ilana Saltzbart, Myron Eng, Shannon Kendall and Tessa Hendrickson - who devoted their time and creativity to produce this Handbook. We look forward to continuing our progress and commitment to removing the barriers to timely cleanup and reuse of all types of contaminated property.

Barry N. Breen, Director
Office of Site Remediation Enforcement

Purpose and Use of This Handbook

This handbook summarizes the statutory and regulatory provisions of CERCLA and RCRA, and the policy and guidance documents most useful in managing environmental cleanup liability risks associated with brownfields and other sites.

The handbook also summarizes related documents and provides copies of relevant fact sheets and other documents, and lists EPA headquarters and regional contacts for cleanup and reuse issues. Designed for use by parties involved in the assessment, cleanup, and reuse of brownfields, this handbook provides a basic description of the purpose, applicability, and provisions of each tool. To gain a more complete understanding of any tool described in this handbook, please refer to the relevant reference documents listed in Appendix A, search any of EPA's web sites listed in the *Helpful Web Sites* box (*see box on page 10),* or call the office number listed with the referenced document. The websites also provide the latest information and updates.

Before developing a brownfield property, a party should collect and consider information on past uses and potential contamination. The party should next identify which level of government to consult about cleanup and liability protection, if needed. Most parties will find that they can proceed directly to their reuse activities. Others may want to pursue private mechanisms such as indemnification or insurance or work at the state level and make use of existing state tools *(see box on page 14)*. If the contamination on the property warrants EPA's attention under CERCLA or RCRA, the party should first determine if EPA or the state is taking or plans to take action at the property. After determining where the property fits in the federal or state cleanup pipeline, parties should find this handbook helpful in deciding which tool or tools are most appropriate to help them manage their federal CERCLA or RCRA liability risks.

Helpful Web Sites

The following web sites contain additional information about issues addressed in this handbook:

- Office of Site Remediation Enforcement: www.epa.gov/compliance/about/offices/osre.html
- Brownfields: www.epa.gov/brownfields
- Office of Solid Waste: www.epa.gov/osw
- Superfund: www.epa.gov/superfund
- Superfund Redevelopment Initiative: www.epa.gov/superfund/programs/recycle
- Federal Register: www.archives.govfederal_register/index.html
- Code of Federal Regulations: www.access.gpo.gov/nara/cfr
- U.S. Code: uscode.house.gov

Both CERCLA and RCRA are designed to protect human health and the environment from the dangers of hazardous waste. These two programs, however, take fundamentally different approaches to addressing the hazardous waste problem. The RCRA programs focus on how wastes should be managed to avoid potential threats to human health and the environment. CERCLA, on the other hand, is relevant primarily when mismanagement has already occurred.

Many prospective purchasers, developers, and lenders have avoided getting involved with brownfield properties because they fear that they too might be held liable under CERCLA or RCRA someday. The vast majority of brownfield properties will never require EPA's attention under CERCLA, RCRA, or any other federal law. Accordingly, parties' fears of potential liability, rather than their actual incurrence of liability, are the primary obstacles to the redevelopment and reuse of brownfields. EPA hopes that the remaining sections of this handbook will assist in eliminating or reducing these fears.

Introduction to Brownfields

In the United States, real property is one of the most valuable economic assets. While this country puts most real property into productive use, some properties lie abandoned or idled. These properties, called "brownfields," may remain unused or underutilized because of actual contamination from past commercial or industrial use or because people fear the property's previous use may have left contamination. This fear may result in relatively clean property remaining idle because parties, who otherwise would redevelop brownfields, may search out unused property, or "greenfields," to avoid the costs associated with the cleanup of contamination.

The Environmental Protection Agency ("EPA" or "Agency") believes that the cleanup of contaminated property, including brownfields, and the clarification of federal environmental cleanup liability, are the foundation for sustainable reuse of previously used property. By fostering the cleanup and appropriate reuse of brownfields, EPA fulfills its mission to protect human health and the environment as well as to conserve greenfields from development that leads to environmental degradation.

EPA recognizes that some private parties believe federal environmental laws and policies have created roadblocks to reusing property. The federal environmental laws that most affect the cleanup and reuse of brownfields are CERCLA (often referred to as Superfund) and RCRA. The cleanup provisions of these

Statutory Definition of "Brownfields"

The Small Business Liability Relief and Brownfields Revitalization Act of 2002 defines a 'brownfield site' as "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous waste substance, pollutant, or contaminant."

laws require EPA to focus its attention first on cleaning up the nation's most toxic waste sites in order to protect human health and the environment. Under CERCLA or RCRA, the current owner or operator of a contaminated property may be held responsible for the cleanup. Although potential liability is a valid and serious concern for landowners, it is important to keep this concern within context. For example, in 1995, the Office of Technology Assessment estimated that 450,000 brownfields existed nationwide. A more recent report from the January 2000 U.S. Conference of Mayors provides a national tally of 600,000. Only about 8% of all brownfields are considered for Superfund's National Priorities List (NPL) (a list of the nation's worst hazardous waste sites) with less than 1% actually placed. Therefore, at least 99% of all the potential brownfield properties across the country will not require federal EPA action. **Although the existence and applicability of federal environmental cleanup laws and regula-**

The Local Nature of Reuse Projects

By its very nature, property reuse is a local activity. Parties with the greatest stake in the economic and environmental benefits of a reuse project are the owner(s), surrounding property owners, local citizens, developer(s), local government, and state government. Because of their stake in the project, these parties are generally in the best position to plan, implement, and oversee required cleanup and reuse activities.

There are many issues that affect property reuse; federal environmental cleanup liability is only one. After a party has a clear understanding of its federal environmental cleanup liability risks and the ways it can minimize them, that party may work primarily or exclusively with state government, local government, and community interests in addressing non-federal issues and planning and implementing its reuse project.

tions could have an impact on development, the reality is that EPA has taken action at very few brownfield properties.

The relatively small number of these brownfield sites on the NPL is just one fact illustrating that federal environmental cleanup liability risks associated with brownfields are not nearly as large as one might imagine. Even for risks that could be significant, both Congress and EPA have developed mechanisms that can help parties minimize and manage the risks of reusing brownfields.

The fact that private parties, states, tribes, municipalities, communities, and federal agencies collaborate to effectively clean up and reuse property indicates that these tools are working. Evidence of growth and interest in brownfields reuse is demonstrated by several initiatives EPA has recently undertaken. Superfund Redevelopment Initiative (SRI), RCRA Brownfields Prevention Initiative, and USTfields are three such efforts to more broadly integrate brownfields approaches into remedial cleanup programs.

New Initiatives

Superfund Redevelopment Initiative

In an effort to help communities return Superfund sites to productive use, EPA launched SRI. The goal of SRI is to make sure that the Agency and its partners have the necessary tools to fully explore and implement land use opportunities at every site. This coordinated program uses a wide variety of tools, such as facilitation services, that bring liable parties, community groups, and local government leaders together to determine the future use of a Superfund site once it is clean. The site-specific nature of Superfund remedy decisions allow EPA regional staff to work with stakeholders to determine the best cleanup approach to ensure successful reuse.

A cornerstone of SRI is the pilot program. Since the summer of 1999, EPA an-

nounced 50 pilots that would receive national recognition through the development of reuse plans; use of local government and Agency cooperative agreements; workshops that bring together pilot participants to exchange information and share ideas; and a partnership conference where pilot participants meet with private organizations to develop alliances.

SRI has created a climate where liable parties, local governments, communities, developers, and others are rethinking the value of Superfund sites. They are now more likely to consider these sites for a variety of new uses - from golf courses and parks to national retail stores and transportation hubs. To date, 260 NPL sites are now,

Private Tools

Although not addressed in this handbook, various private tools can be used to manage environmental liability risks associated with brownfields and other properties. These tools may include the following:

- Indemnification Provisions - These are private contractual mechanisms in which one party promises to shield another from liability. Indemnification provisions provide prospective buyers, lenders, insurers, and developers with a means of assigning responsibility for cleanup costs, and encourage negotiations between private parties without government involvement.
- Environmental Insurance Policies - The insurance industry offers products intended to allocate and minimize liability exposures among parties involved in brownfields redevelopment. These products include cost cap, pollution legal liability, and secured creditor policies. Insurance products may serve as a tool to manage environmental liability risks, however, many factors affect their utility including the types of coverage available, the dollar limits on claims, the policy time limits, site assessment requirements, and costs for available products. Parties involved in brownfields redevelopment considering environmental insurance should always secure the assistance of skilled brokers and lawyers to help select appropriate coverage.

or soon will be, in reuse; on-site businesses employ over 15,000 people with an annual income of half a billion dollars; and over 60,000 acres have some ecological or recreational reuse.

RCRA Brownfields Prevention Initiative

The first brownfields assessment pilots highlighted the need to address environmental issues beyond the Superfund context. In June 1998, EPA announced the RCRA Brownfields Prevention Initiative. The objective of the Initiative is to prevent future Superfund sites or brownfields by using brownfields tools to clean up and provide long-term sustainable reuse of RCRA facilities. Through the Initiative, EPA is exploring opportunities within the existing statutory and regulatory framework to facilitate the reuse of RCRA sites. The goal is to foster a "brownfields" culture in RCRA cleanup programs by working together across EPA, states, tribes, industry, and communities to tap the redevelopment potential of RCRA sites. To date, the Initiative components include outreach workshops; industry and community stakeholder dialogue sessions to identify reuse impediments; informational documents; and, nine pilots.

USTfields Initiative

The Office of Underground Storage Tanks (OUST) defines USTfields as "abandoned or underused industrial and commercial properties where redevelopment is complicated by real or perceived environmental contamination from federally-regulated underground storage tanks (USTs)." Of the estimated 450,000 to 600,000 brownfields sites in the United States, approximately 100,000 to 200,000 contain abandoned USTs or are impacted by petroleum tank leaks. The Brownfields program, however, is unable to devote funds toward USTfields because CERCLA prohibits the use of Trust Fund money on most petroleum sites.

The USTfields Initiative plans to use the same kind of prob-

lem-solving methods implemented by the Brownfields program. This new program will provide 50 grants to states and tribes for community pilot projects. EPA will allot each pilot up to $100,000 to assess and/or clean up sites to ready them for reuse. The pilots are intended to supplement or coordinate with existing EPA cleanup and redevelopment pilots, such as brownfields assessment pilots. The USTfields pilots must involve corrective action with respect to petroleum releases from underground storage tanks and address the future reuse of sites. OUST believes the Initiative will demonstrate how to effectively assess and clean up petroleum-impacted sites and foster reuse using limited resources.

New Legislation

The Small Business Liability Relief and Brownfields Revitalization Act, P.L. 107-118 ("SBLRBRA"or “the Act”) signed into law by the President on January 11, 2002, creates new exemptions from Superfund liability, authorizes brownfields revitalization funding, and provides assistance to state and local site clean-up programs.

The SBLRBRA consists of two titles. Title I addresses liability exemptions for parties who generate and transport small quantities of hazardous substances and certain generators of municipal solid waste. Title I also provides for expedited settlements with certain parties that can demonstrate a limited or inability to pay their share of response costs. The Title II amendments focus on facilitating the responsible cleanup and re-use of contaminated properties. The amendments provide specific statutory authority for the U.S. Environmental Protection Agency’s (EPA or Agency) brownfields program and authorize appropriations to fund brownfields grants and grants for state and tribal response programs. Title II also provides conditional exemptions from CERCLA liability for contiguous property

clarifies the pre-existing innocent landowner defense. Finally, the amendments place certain limits on EPA's use of its enforcement and cost recovery authorities at low-risk sites where a person is conducting a response action in compliance with a state program.

The complete text of SBLRBRA may be found at http://www.epa.gov/brownfields/html-doc/hr2869.htm. A summary of SBLRBRA may be found at http://www.epa.gov/swerosps/bf/html-doc/2869sum.htm. A summary of the liability provisions may be found in Appendix B.

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CERCLA

As a result of several well-publicized hazardous waste disposal disasters in the 1970's, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in 1980. CERCLA, also known as Superfund, authorizes EPA to respond to environmental emergencies involving hazardous wastes or pollutants and contaminants, initiate investigations and cleanups, and take enforcement action against responsible parties. To provide money for these activities, Congress established a trust fund that was financed by taxes on the manufacture and import of chemicals and petroleum.

EPA may exercise its response authority through removal or remedial actions. Removal actions are implemented when there is an immediate threat to human health and the environment. EPA has used removal actions to avert fires and explosions, prevent exposure to acute toxicity, and protect drinking water supplies. Removal actions typically take less than twelve months to implement and cost less than two million dollars. Remedial actions address long-term threats to human health and the environment caused by more persistent contamination sources. Consequently, they usually take much longer to complete and cost considerably more to implement than removal actions.

Congress designed CERCLA to ensure that those who caused the pollution, rather than the general public, pay for the cleanup. In order to be held liable for the costs or performance of cleanup under CERCLA, a party must fall within one of four categories found in CERCLA section 107(a) *(see box)*. Using CERCLA's polluter pays liability scheme, EPA has ensured the successful cleanup of many of the nation's worst hazardous waste sites by those responsible for the contamination – the Potentially Responsible Parties (PRPs).

Despite its broad categories of liable parties, CERCLA also provides various forms of liability protection which extend to all lawsuits brought under CERCLA, whether initiated by EPA or by a private party. A party who satisfies the statutory provisions can avoid lawsuits brought by EPA seeking cleanup costs or a response action. Additionally, the party would be protected from third parties who are trying to recoup money they expended in cleaning up a site.

CERCLA's Four Liability Categories

- Current owner or operator of the facility;
- Owner or operator of the facility at the time of disposal of hazardous substances;
- Person who generated or arranged for the disposal or treatment of hazardous substances; or
- Transporter of the hazardous substances, if this person selected the disposal or treatment site.

CERCLA's Liability Scheme

Under CERCLA, liability for cleanup is strict and joint and several, as well as retroactive. The implications of these features are as follows:

- **Strict** - A party may be held liable even if it did not act negligently or in bad faith.
- **Joint and several** - If two or more parties are responsible for the contamination at a site any one or more of the parties may be held liable for the entire cost of the cleanup, unless a party can show that the injury or harm at the site is divisible.
- **Retroactive** - A party may be held liable even if the hazardous substance disposal occurred before CERCLA was enacted in 1980.

Contiguous Property Owners, Bona Fide Prospective Purchasers, and Innocent Landowners

The SBLRBRA creates two new conditional exemptions from CERCLA "owner/operator" liability for contiguous property owners and bona fide prospective purchasers (BFPP). Again, these exemptions embody aspects of pre-existing EPA policies. The new law also modified the existing innocent landowner defense by clarifying the meaning of "all appropriate inquiries." All three provisions embody some common elements for persons to maintain non-liable status while also including unique provisions and requirements.

Section 221 of the Act adds new § 107(q) which exempts from owner or operator liability persons that own land contaminated solely by a release from contiguous, or similarly situated property owned by someone else. In the case of a contiguous property owner, the owner must not have known or had reason to know of the contamination at the time of purchase and must not have caused or contributed to the contamination. The section also modifies what constitutes appropriate care/ reasonable steps for contiguous property owners by clarifying that the requirement does not obligate a contiguous property owner to conduct groundwater investigations or remediate groundwater contamination except in accordance with EPA's pre-existing policy.

The new law generally provides greater protections for contiguous property owners than EPA's existing policy on owners of contaminated aquifers. The new law does not limit

the exemption to properties contaminated by groundwater but may also apply to soil contamination resulting from neighboring properties. The Act also grants EPA the authority to provide assurances that the Agency will not take action against a person and protection from third party suits. As in EPA's Contaminated Aquifer Policy, a person who purchases with knowledge of the contamination cannot claim the exemption; however, the new law notes that a party who does not qualify for the exemption for this reason may still qualify as a BFPP.

The most notable aspect of the BFPP provision is that for the first time Congress has limited the CERCLA liability of a party who purchases real property with knowledge of the contamination. The caveats to this exemption, in addition to the common elements, include a requirement that all disposal takes place prior to the date of purchase, that the person does not impede a response action, and that the property may be subject to a "windfall lien". The windfall lien provision provides for a lien on the property of a BFPP if EPA has unrecovered response costs and the response action increased the fair market value of the property. The lien arises as of the date the response cost was incurred and the amount cannot exceed the increase in fair market value attributed to the response action.

EPA's policy on prospective purchaser agreements (PPAs) proved one of the most successful and high profile administrative liability reforms prior to enactment of the new law. Immediately after passage, EPA was asked repeatedly whether the Agency would continue to issue PPAs. Many people suggested that EPA needs to continue the practice, despite the fact that the legislation provides an exemption and confronts an ongoing complaint, from some of these same people, that EPA should not be involved in private real estate transactions.

To address this issue, on May 31, 2002, EPA's Office of Site Remediation Enforcement issued new guidance entitled *Bona Fide Prospective Purchasers and the New Amendments to CERCLA* (also found at http://epa.gov/compliance/resources/policies/cleanup/superfund/bonf-pp-cercla-mem.pdf). This guidance states that "EPA believes that, in most cases, the Brownfields Amendments make PPAs from the federal government unnecessary." Therefore, in the majority of cases EPA intends for the law to be self-implementing. However, the guidance does recognize the following two exceptions where EPA may enter into an agreement with the purchaser: 1) there is likely to be a significant windfall lien needing resolution; and 2) the transaction will provide significant public benefits and a PPA is needed to ensure the transaction will take place.

The contiguous property owner exemption, the definition of what constitutes a BFPP, and the innocent landowner defense found in CERCLA Section 107(b)(3) and the definition of "contractual relationship" in Section 101(35), all contain the following common obligations which persons seeking these exemptions must meet:

- conduct "all appropriate inquiry" prior to purchase of the property;
- not be potentially liable or affiliated with any person potentially liable;
- exercise appropriate care by taking reasonable steps to "stop any continuing release; prevent any threatened future release; and prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substance;"
- provide full cooperation, assistance, and access to persons undertaking a response action or natural resource restoration;
- comply with all governmental information requests
- comply with land use restrictions and not impede the performance of institutional controls; and
- provide all legally required notices regarding releases of hazardous substances

At time of publication, EPA is considering whether to produce general guidance on these "common elements." EPA has heard from stakeholders that they need clarification of these requirements to ensure they take appropriate actions to avoid liability. EPA would like to ensure national consistency and provide direction where needed. However, requirements such as what constitutes appropriate care/reasonable steps will greatly depend on site specific circumstances.

Changes to CERCLA Section 101(35)(B) now define "all appropriate inquiries" for purposes of all three provisions. First, the Act directs EPA to promulgate regulations based on statutory criteria within two years of date of enactment, establishing standards for all appropriate inquiry. For purchases prior to issuance of these regulations, the Act utilizes two standards based on date of purchase. For purchases prior to May 31, 1997, the Act sets forth a narrative standard, directing courts to consider such factors as, inter alia, specialized knowledge of the defendant, the obviousness of the contamination, and relationship of purchase price to property value. For purchases after May 31, 1997, the Act states that procedures set forth in the American Society for Testing and Materials, Standard Practice for Environmental Site Assessment: Phase 1 Environmental Site Assessment Process, Standard E1527-97 shall satisfy the requirement. The section also provides that for purchasers of property for residential use or similar use by a nongovernmental or noncommercial entity a facility inspection and title search shall fulfill the requirements.

Secured Creditor Exemption

CERCLA Section 101(20)(A) contains a secured creditor exemption that eliminates owner/operator liability for lenders who hold indicia of ownership in a CERCLA facility primarily to protect their security interest in that facility, provided they do not participate in the management of the facility.
Before 1996, CERCLA did not define the key terms used in this provision. As a result, lenders often hesitated to loan money to owners and developers of contaminated property for fear of exposing themselves to potential CERCLA liability. In 1992, EPA issued the "CERCLA Lender Liability Rule" to clarify the secured creditor exemption. After the Rule was invalidated by a court in 1994, Congress incorporated many sections of the Rule into the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996. That Act amended CERCLA's secured creditor exemption to clarify the situations in which lenders will and will not be protected from CERCLA liability. The amended exemption appears at CERCLA Section 101(20)(E)-(G).

Other Considerations

The 1996 amendment also protects lenders from contribution actions and government enforcement actions. Regardless of CERCLA's secured creditor exemption from owner/operator liability, a lender may be liable under CERCLA as a generator or transporter if it meets the requirements outlined in CERCLA Section 107 (a)(3) or (4). In June 1997, EPA issued a lender policy that further clarifies the liability of lenders under CERCLA *(see page 59)*. Statutory and Regulatory Provisions

"Participation in Management" Defined

A lender "participates in management" (and will not qualify for the exemption) if the lender:

- Exercises decision-making control over environmental compliance related to the facility, and in doing so, undertakes responsibility for hazardous substance handling or disposal practices; or
- Exercises control at a level similar to that of a manager of the facility, and in doing so, assumes or manifests responsibility with respect to
  1. Day-to-day decision-making on environmental compliance, or
  2. All, or substantially all, of the operational (as opposed to financial or administrative) functions of the facility other than environmental compliance.

The term "participate in management" does not include certain activities such as when the lender:

- Inspects the facility;
- Requiries a response action or other lawful means to address a release or threatened release;
- Conducts a response action under CERCLA section 107(d)(1) or under the direction of an on-scene coordinator;
- Provides financial or other advice in an effort to prevent or cure default; and,
- Restructures or renegotiates the terms of the security interest; provided the actions do not rise to the level of participating in management.

After foreclosure, a lender who did not participate in management prior to foreclosure is not an "owner or operator" if the lender:

- Sells, releases (in the case of a lease finance transaction), or liquidates the facility;
- Maintains business activities or winds up operations;
- Undertakes a response action under CERCLA section 107(d)(1) or under the direction of an on-scene coordinator; or,
- Takes any other measure to preserve, protect, or prepare the facility for sale or disposition; provided the lender seeks to divest itself of the facility at the earliest practicable, commercially reasonable time, on commercially reasonable terms. EPA considers this test to be met if the lender, within 12 months after foreclosure, lists the property with a broker or advertises it for sale in an appropriate publication.

Limitation of Fiduciary Liability

A "fiduciary" is a person who acts for the benefit of another party. Common examples include trustees, executors, and administrators. CERCLA Section 107(n), added by the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, protects fiduciaries from personal liability in certain situations, provides a liability limit for those fiduciaries who are found liable, and describes situations in which fiduciaries will and will not receive this statutory protection. CERCLA's fiduciary provision, however, does not protect the assets of the trust or estate administered by the fiduciary.

Fiduciary Liability

For actions taken in a fiduciary capacity, liability under any CERCLA provision is limited to assets held in the fiduciary capacity. A fiduciary will not be liable in its personal capacity for certain actions such as:

- Undertaking or requiring another person to undertake any lawful means of addressing a hazardous substance;
- Enforcing environmental compliance terms of the fiduciary agreement; or
- Administering a facility that was contaminated before the fiduciary relationship began.

The liability limitation and "safe harbor" described above do not limit the liability of a fiduciary whose negligence causes or contributes to a release or threatened release.

The term "fiduciary" means a person acting for the benefit of another party as a bona fide trustee, executor, or administrator, among other things. It does not include a person who:

- Acts as a fiduciary with respect to a for-profit trust or other for-profit fiduciary estate, unless the trust or estate was created:
  - Because of the incapacity of a natural person, or
  - As part of, or to facilitate, an estate plan.
- Acquires ownership or control of a facility for the purpose of avoiding liability of that person or another person.

Nothing in the fiduciary subsection applies to a person who:

- Acts in a beneficiary or non-fiduciary capacity, directly or indirectly, and benefits from the trust or fiduciary relationship; or
- Is a beneficiary and fiduciary with respect to the same fiduciary estate and, as a fiduciary, receives benefits exceeding customary or reasonable compensation.

Protection of Government Entities That Acquire Property Involuntarily

CERCLA sections 101(20)(D) and 101(35)(A) protect federal, state, and local government entities from owner/operator liability if they involuntarily acquire contaminated property while performing their governmental duties. If a unit of state or local government makes an involuntary acquisition, it is exempt from owner/operator liability under CERCLA. Additionally, a state, local, or federal government entity that makes an involuntary acquisition will have a third-party defense to owner/operator liability under CERCLA if:

- The contamination occurred before the government entity acquired the property;
- The government entity exercised due care with respect to the contamination (e.g., did not cause, contribute to, or exacerbate the contamination); and
- The government entity took precautions against certain acts of the party that caused the contamination and against the consequences of those acts.

Regulations set forth at 40 CFR 300.1105, and validated by the 1996 Asset Conservation, Lender Liability, and Deposit Insurance Protection Act, provide some examples of involuntary acquisitions.

As the following examples indicate, a government entity need not act completely passive in order to acquire property involuntarily. Often government entities must take some sort of discretionary, volitional action before they can acquire property following circumstances such as abandonment, bankruptcy, or tax delinquency. In these cases, the "involuntary" status of the acquisition is not jeopardized.

Acceptable Involuntary Acquisitions

EPA considers an acquisition to be "involuntary" if the government's interest in, and ultimate ownership of, the property exists only because the conduct of a non-governmental party gives rise to the government's legal right to control or take title to the property.

Involuntary acquisitions by government entities include the following:

- Acquisitions made by a government entity functioning as a sovereign (such as acquisitions following abandonment or tax delinquency);
- Acquisitions made by a government entity acting as a conservator or receiver pursuant to a clear and direct statutory mandate or regulatory authority (such as acquisitions of the security interests or properties of failed private lending or depository institutions);
- Acquisitions made by a government entity through foreclosure and its equivalents while administering a governmental loan, loan guarantee, or loan insurance program; and
- Acquisitions made by a government entity pursuant to seizure or forfeiture authority.

Other Considerations

A government entity will **not** have a CERCLA liability exemption or defense if it has caused or contributed to the release or threatened release of contamination. As a result, acquiring property involuntarily does not unconditionally or permanently insulate a government entity from CERCLA liability. Furthermore, the liability exemption and defense described above do not shield government entities from liability as generators or transporters of hazardous substances under CERCLA section 107(a)(3) or (4).

In June 1997, EPA issued a policy that further clarifies the CERCLA liability of government entities that involuntarily acquire property *(see page 59 and fact sheet on page 125)*.

De Minimis Waste Contributor Settlements , Ability to Pay, and the De Micromis Exemption

At a CERCLA site, some parties may have contributed only minimal amounts of hazardous substances compared to the amounts contributed by other parties. Under CERCLA section 122(g), these contributors of small amounts may enter into de minimis waste contributor settlements with EPA. Such a settlement provides the waste contributor with a covenant not to sue and contribution protection from the United States. As a result, the settling party is protected from legal actions brought by EPA or other parties at the site. In exchange for the settlement, the de minimis party agrees to provide funds, based on its share of total waste contribution, toward cleanup, or to undertake some of the actual work.

Section 102(b) of SBLRBRA amended Section 122(g) of CERCLA and grants EPA the authority to enter into expedited settlements with persons who demonstrate an inability or limited ability to pay response costs. The Act directs EPA to consider whether the person can pay response costs and still maintain basic business operations, which includes consideration of financial condition and ability to raise revenues. The SBLRBRA also requires EPA to provide a written determination of ineligibility to a potentially responsible party that requests a settlement under any provision in Section122(g). Any determination regarding eligibility is not subject to judicial review.

Section 102(a) of SBLRBRA also added new §107(o) to CERCLA and exempts generators and transporters of de micromis quantities of hazardous substances from response

cost liability.[1] The new law requires a person seeking the exemption to demonstrate that "the total amount of the material containing hazardous substances they contributed was less than 110 gallons of liquid materials and 200 pounds of solid materials" and that "all or part of disposal, treatment, or transport occurred before April 1, 2001." This exemption is subject to the following exceptions: 1) if the materials contribute significantly, either on their own or in the aggregate, to the cost of the response action or natural resource to the cost of the response action or natural resource restoration; 2) if the person fails to comply with an information request; 3) if the person impedes a response action or natural resource restoration; or 4) if the person has been convicted of a criminal violation for conduct to which the exemption would apply.

The Act provides significant protection for generators and transporters of de micromis amounts of hazardous substances at NPL sites where disposal, treatment or transport occurred after April 1, 2001. While EPA is not directed to provide contribution protection to these parties, the Act includes substantial disincentives for litigation by private party plaintiffs. First, the exemption shifts the burden of proof to private party plaintiffs to show that the exemption does not apply. Second, the new law makes private party plaintiffs liable for the defendant's costs and fees if a court finds the defendant to be exempt under this provision. These provisions should force potentially responsible parties seeking contribution for response costs to exercise greater diligence in respect to whom they drag into court.

The complete text of SBLRBRAmay be found at http://www.epa.gov/brownfields/html-doc/hr2869.htm

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1. § 102(a), 115 Stat. 2356 (to be codified at 42 U.S.C. § 9607(o))(subsequent citations are to 42 U.S.C.).

Service Station Dealers Exemption

The Superfund law includes a liability exemption for service station dealers who accept used oil for recycling. The exemption is meant to encourage service station dealers to accept used motor oil for recycling from do-it-yourself recyclers, i.e., people who change the oil in their own cars, trucks, and appliances. A dealer may be eligible for the exemption if the recycled oil is not mixed with any other hazardous substance and is managed in compliance with Solid Waste Disposal Act regulations.

As long as a small quantity of used oil was removed from the engine of a "light duty motor vehicle" or house appliances by the owner, and the owner presents it to the dealer for delivery to an oil recycling facility, the dealer can presume that the used oil is not mixed with other hazardous substances. The mixing of the used oil with other hazardous substances is what would trigger Superfund liability.

Superfund defines a service station dealer as persons who own or operate retail establishments that sell, repair, or service motor vehicles and accept recycled oil from light vehicle and household appliance owners for recycling.

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Municipal Solid Waste

Section 102(a) o f SBLRBRA also added §107(p) to CERCLA which exempts certain generators of municipal solid waste (MSW) from Superfund response cost liability at NPL sites. The persons covered by this exemption are owners, operators, and lessees of residential property; small businesses; and certain non-profit organizations. This exemption is subject to all but one of the same exceptions as found in the de micromis exemption. The new law defines MSW in the following two ways: 1) as waste generated by a household; and 2) as waste generated by a commercial, industrial, or institutional entity which is essentially the same as waste generated by a household, is collected as part of normal MSW collection, and contains no greater amounts of hazardous substances than that contained in the waste of a typical single family household.

Similar to the de micromis exemption, the MSW exemption has burden of proof and fee shifting provisions to discourage litigation against exempt parties. However, the burden of proof provision in the MSW exemption is a bit more complicated because it differs based on time of disposal and applies in some cases to both private and governmental plaintiffs. Furthermore, the statute sets forth a complete bar to private party actions against owners, operators, or lessees of residential property which generated MSW. As with the de micromis exemption, the cost and fee shifting provision only applies to nongovernmental entities.

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Brownfields Grants, State and Tribal Funding

In addition to the contiguous property owner, bona fide prospective purchaser, and innocent landowner provisions, Title II for the first time provides explicit statutory authority for EPA's brownfields program. Title II also authorizes EPA to provide grants to states and tribes to develop response programs. While this article focuses on the liability provisions these aspects of the new law are certainly worth mentioning.

Generally, brownfields are considered properties which have real or perceived contamination that discourages redevelopment or reuse due to the potential liability of those persons associated with the site. Since 1995, EPA has maintained a successful brownfields program aimed at promoting the cleanup and redevelopment of brownfield properties. The brownfields program has provided numerous grants and assistance to states and communities for brownfields assessments, revolving loan funds for brownfields cleanup, and job training and development. The program has also worked to identify "Showcase Communities" that serve as national models for successful brownfields assessments, cleanups, and redevelopment.

The new law recognizes EPA's efforts and expands the existing program. The Act authorizes annual appropriations of $200 million for the brownfields grant program for fiscal years 2002 through 2006. EPA will use appropriations to provide brownfield characterization and assessment grants, to capitalize revolving loan funds, and for the first time to provide direct grants for brownfields cleanup. The Act also provides an

expanded list of persons eligible for these funds that include states, local governments, state chartered redevelopment agencies, tribes, land clearance authorities, and for certain funds nonprofits and other private entities. The Act provides ranking criteria for grant distribution and directs EPA to provide guidance for grant applicants. EPA published guidance in the Federal Register on October 24, 2002 (Volume 67, Number 207, pp. 65348-65350) available on line at http://www.epa.gov/fedreg. Fact sheets titled "Eligibility for Brownfields Funding" and "Summary of Brownfields Grant Guidelines" may be found in Appendix B.

Title II also authorizes $50 million annually from 2002 through 2006 to provide assistance for state and tribal response programs, to capitalize a revolving loan fund for brownfield remediation, or purchase insurance or create a risk sharing pool, an indemnity pool, or insurance mechanism to help fund response actions. To receive grants state and tribal programs must meet or be working towards several criteria or the state or tribe must have a memorandum of agreement for voluntary response programs with EPA. States receiving funds must also maintain and update annually a public record of sites going through a state's response program.

Limitations on the EPA CERCLA Enforcement and Cost Recovery Authority

Section 231 of SBLRBRA amends CERCLA by adding a new Section 128. Section 128(b) sets forth limitations on EPA's enforcement authority under Section 106(a) and cost recovery authority under Section 107(a). These limitations apply to actions against persons who have conducted or are conducting response actions at "eligible response sites" in compliance with a "State program that specifically governs response actions for the protection of public health and the environment." The limitations only apply to response actions commenced after February 15, 2001 and in states that maintain a public record of sites being addressed under a state program in the upcoming year and those addressed in the preceding year. Additionally, these limitations are subject to specified exceptions.

The definition of an "eligible response site" is found in new CERCLA Section 101(41). The definition includes "brownfield sites" as defined in Section 101(39)(A) and (B). The definition of a brownfield site is very broad in that it essentially captures any real property with real or perceived contamination and, generally, excludes facilities:

- subject to a planned or ongoing CERCLA removal; listed or proposed for listing on the national priorities list;
- subject to a unilateral administrative order, court order, administrativeorder on consent, or consent decree under CERCLA;
- subject of a unilateral administrative order, court order, administrative order on consent, consent decree, or permit under the Resource Conservation & Recovery Act (RCRA, 42 U.S.C. Section 6901 et seq.), the Clean Water Act (CWA, 33 U.S.C. Section 1251 et seq.), the Toxic Substances Control Act (TSCA, 15 U.S.C. Section 2601 et seq.), or the Safe Drinking Water Act (SDWA, 42 U.S.C. Section 300f et seq.);

- subject to corrective action under RCRA §§ 3004(u) or 3008(h), to which a corrective action permit or order has been issued or modified requiring the implementation of corrective measures;
- a land disposal unit with closure notification submitted and a closure plan or permit;on land subject to the custody, jurisdiction, or Ccontrol of a department, agency, or instrumentality of the United States, except for land held in trust by the United States for an Indian Tribe;
- a portion of a facility contaminated by PCBs subject to remediation under TSCA; or
- a portion of a facility receiving assistance from the Leaking Underground Storage Tank Trust Fund (LUST Fund sites).

For purposes of the definition of an eligible response site, LUST Fund sites are included. EPA may include sites excluded under the fourth, fifth, sixth, and eighth bullets on a site-by-site basis. The definition of eligible response site contains an additional exclusion for sites at which EPA has conducted a PA or SI and after consulting with the State has determined that the site achieves a preliminary score sufficient for, or otherwise qualifies for, listing on the NPL.

The limitations on EPA's authority in Section 128(b)(1) are subject to a number of statutory exceptions. EPA is not prohibited from taking action if the state requests EPA assistance; contamination has migrated across state lines or onto federal property; after considering response actions already taken, a release or threatened release poses an imminent and substantial endangerment requiring additional response actions; or new information indicates that conditions or contamination at the site may present a threat. If EPA intends to take an action that may be prohibited under § 128(b)(1), it must notify the state and wait forty-eight hours for a reply, unless one of these exceptions applies, in which case EPA must still notify the state but may act immediately. Additionally, the new law does not prohibit EPA from seeking to recover costs incurred prior to

date of enactment or during a period during which the limitations did not apply.

EPA has decided not to issue guidance on these new limits on EPA authority. Congress provided a fairly detailed statutory structure. Also, this provision appears to embody EPA's current practice of generally not getting involved at sites being cleaned up under a state program. Some EPA regional personnel have communicated with their respective states regarding how they anticipate handling the notification requirements and state requests for assistance, if necessary.

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RCRA

Congress enacted the Resource Conservation and Recovery Act (RCRA) in 1976 to protect human health and the environment from the potential hazards of waste disposal; to conserve energy and natural resources; to reduce the amount of waste generated; and to ensure that wastes are managed in an environmentally sound manner. RCRA is actually a combination of the first federal solid waste statutes with subsequent amendments to address hazardous waste and underground storage tanks (USTs). These three distinct yet interrelated programs exist as part of RCRA. Subtitle D is the solid waste program and its focus is on the management of household garbage and non-hazardous industrial solid waste. Subtitle C is the hazardous waste program and its focus is on the management of hazardous waste from the time it is generated until its ultimate disposal. Subtitle I is the underground storage tank program and its mission is to prevent and clean up releases of petroleum or hazardous substances from tanks.

States are an integral part of all three of RCRA's programs. The states oversee most of the Subtitle D solid waste program whereby they issue permits and ensure compliance with its requirements. "Under Subtitle C, EPA reviews state programs that consist of requirements for the generation, transportation, treatment, storage, and disposal of hazardous wastes for facilities within that state. If the state program is acceptable, EPA authorizes that state to administer the state program in lieu of the federal program and facilities must then comply with the authorized state requirements rather than the corresponding federal requirements. However, after authorization, both the state and EPA have the authority to enforce those requirements."

Past and present activities at RCRA facilities have sometimes resulted in releases of hazardous wastes into the soil, ground

water, surface water, and air. Subtitle C of RCRA requires the investigation and cleanup of these hazardous waste releases at RCRA facilities. This program is known as corrective action. The facilities that fall under the corrective action program are generally active ones that are permitted or are seeking a permit to treat, store, or dispose of hazardous waste. As a condition of the operating permit, owners/operators are required to clean up hazardous wastes that are or have been released through current or past activities. It is, therefore, usually the current owner and operator of a facility that is held responsible for cleaning up any contamination. However, other parties may be held responsible under certain conditions.

RCRA Cleanup Reforms

In order to expedite the cleanup at hazardous waste sites regulated by RCRA, EPA launched a set of administrative reforms in 1999 and 2001, known as the RCRA Cleanup Reforms. EPA developed the reforms as a comprehensive way to address the key impediments to cleanups, maximize program flexibility, and spur progress toward a set of ambitious national cleanup goals. The reforms include methods to enhance public access to cleanup information and improve opportunity for public involvement in the cleanup process; focus the program more effectively on achievement of environmental results; pilot innovative approaches; and capitalize on the redevelopment potential of RCRA facilities to expedite cleanup. (*See Appendix B*)

The RCRA Corrective Action enforcement program requires owners and operators of RCRA facilities to:

- conduct investigations
- conduct a thorough cleanup of the hazardous release
- monitor the cleanup to make sure it complies with applicable state and federal requirements

Underground Storage Tanks - Lender Liability Rule

(40 CFR Parts 280 and 281)

September 7, 1995

Subtitle I of RCRA contains a "security interest exemption" that provides secured creditors ("lenders") an explicit statutory exemption from corrective action for releases from petroleum USTs. Because the statute is unclear about the scope of the exemption coverage, EPA issued the UST Lender Liability Rule which specifies the conditions under which certain secured lenders may be exempted.

Both prior to and after foreclosure of a facility, a lender is eligible for an exemption from compliance with all Subtitle I requirements as an UST "owner" and "operator" if the lender: 1) holds an ownership interest in an UST, or in a property in which the UST is located, to protect its security interest (a lender typically holds property as collateral as part of the loan transaction); 2) does not engage in petroleum production, refining, and marketing; and 3) does not participate in the management or operation of the UST. A lender also must empty its UST(s) within 60 days after foreclosure and either temporarily or permanently close the UST(s) unless there is a current operator at the site who can comply with UST regulations.

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Standards Applicable to Owners and Operators of Closed and Closing Hazardous Waste Management Facilities: Post-Closure Permit Requirements and Closure Process

(40 CFR Parts 264, 265, 270, and 271)

October 22, 1998

Under Subtitle C of RCRA, an owner/operator is required to obtain a permit to operate a hazardous waste treatment, storage, or disposal facility (TSDF). RCRA regulations specify the requirements that must be met when closing hazardous waste land disposal units ("units"). There are two ways to close units under RCRA. The units may either be clean closed by removal or decontamination of waste or they may be closed by leaving waste in place with post-closure care. If the facility operates under a permit, the permit should already contain a closure plan and include any post-closure requirements. If the facility does not have a permit, then a post-closure permit is needed only if waste will be left in place.

This rule, known as the Closure/Post-Closure Rule, amends RCRA's closure and post-closure care requirements by expanding regulatory options available to EPA and authorized state programs. These options remove impediments to cleanup at hazardous waste facilities in two areas. First, regulators may either issue a post-closure permit to a facility or impose the

same requirements in an enforceable document issued under an alternate non-permit authority. Second, EPA and authorized states may use corrective action requirements to address these units. The corrective action program, as discussed in the rule, allows EPA and authorized states to clean up under RCRA, CERCLA, or state authority authorized for this rule.

Hazardous Waste Identification Rule for Contaminated Media (HWIR-Media) Rule

(40 CFR Part 260 et seq)

November 30, 1998

EPA issued new RCRA requirements for hazardous remediation waste that is treated, stored, or disposed of during cleanup actions. This rule, known as the HWIR-Media rule, streamlines the RCRA permit requirements for cleanup activities through the use of remedial action plans (RAPs). It also eliminates the requirement for facility-wide corrective action at sites that are only required to obtain a permit because of the cleanup activities and discusses the use of a "staging pile" for temporary cleanup waste storage.

HWIR Media Rule:

- Makes permits for treating, storing, and disposing of hazardous remediation wastes faster and easier to obtain;
- Provides that obtaining these permits will not subject the owner and/or operator to facility-wide corrective action;
- Creates a new kind of unit called a "staging pile" that allows more flexibility to temporarily store remedia-tion waste during cleanup;
- Excludes dredging materials from RCRA Subtitle C (hazardous waste management requirements) if they are managed under an appropriate permit under the Marine Protection, Re-search and Protection Act or the Clean Water Act; and,
- Makes it faster and easier for states to receive author-ization when they update their RCRA programs to incorporate Federal RCRA regulation revisions.

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Corrective Action Management Unit (CAMU) CFR Amendments

Use of CAMUs was authorized in 1993 for the purpose of on-site treatment, storage, and disposal of hazardous wastes managed for implementing cleanup. When cleanup wastes are managed within a CAMU, they do not trigger certain Resource Conservation and Recovery Act requirements that apply to wastes generated by industrial processes. This gives the site cleanup manager much more flexibility to consider a broader range of cleanup options tailored to site- and waste-specific conditions, and has led to faster and more aggressive cleanups at individual sites.

The CAMU amendments are intended to provide minimum standards for operation of CAMUs. They address concerns of some stakeholders that management discretion under the original rule might lead to mistakes or abuse. EPA believes the amendments protect human health and the environment without undoing the benefits of the CAMU rule, and make the corrective action process is more consistent nationally, more explicit, and more predictable in its results.

The final CAMU amendments for the management of remediation wastes were signed by the Administrator on December 21, 2001. They establish standards governing: (1) the types of wastes that may be managed in a CAMU; (2) the design standards that apply to CAMUs; (3) the treatment requirements for wastes placed in CAMUs; (4) information submission requirements for CAMU applications; (5) responses to releases from CAMUs; and (6) public participation requirements for CAMU decisions.

In addition, this rule "grandfathers" certain categories of CAMUs and creates new requirements for CAMUs used only for treatment or storage. States currently authorized for the CAMU rule are granted "interim authorization by rule." Expedited authorization is provided for states authorized for corrective action, but not the CAMU rule.

In response to comments, the Agency modified staging pile rules to allow physical treatment in staging piles, expanding the universe of CAMU-eligible wastes to include buried tanks containing wastes, and giving Regional Administrators discretion to choose a leaching test other than the Toxicity Characteristic Leaching Procedure (TCLP) to assess treatment. It also adds a new provision allowing off-site placement of hazardous CAMU-eligible waste in hazardous waste landfills, if they are treated to meet modified CAMU treatment standards. States that are already authorized for the 1993 CAMU Rule have 60 days to notify EPA that they intend to use the revised Corrective Action Management Unit Standards rule as guidance.

EPA Policies and Guidances

Issuing a policy or guidance document is the strongest statement that EPA may make, short of issuing regulations, regarding the manner in which EPA will generally approach the handling and evaluating of a regulated entity. Although courts are not required to consider EPA's administrative policies or guidance documents, they have recognized EPA's technical expertise and have previously given deference to EPA's administration of the laws over which the Agency has jurisdiction. When a site, circumstance, or party fall within the defined criteria of an EPA policy or guidance document, individuals should find satisfaction in the fact that EPA will act in a manner consistent with that policy. In many cases, EPA's statement of policy not to pursue a particular party will provide adequate protection and comfort to an eligible party so that additional documentation from EPA is not needed. In other cases, the potential for liability may motivate a party either to enter into an agreement with EPA that provides protection from CERCLA or RCRA actions brought by EPA or other parties, or to seek written comfort from EPA.

The policy and guidance documents summarized in this section describe the different options to manage CERCLA and RCRA liability risks. Because the documents focus on issues at non-federally-owned properties, parties interested in property currently or formerly owned by the federal government should consult the relevant documents listed in Appendix A.

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Policy Towards Owners of Residential Property at Superfund Sites

July 3, 1991

Owners of residential property located on a CERCLA site have raised concerns that they would be responsible for performance of a response action or payment of cleanup costs because they fell within the definition of "owner" under CERCLA. Additionally, these owners were concerned that they might be unable to sell their properties given the uncertainty of EPA taking action against them or the new owners. EPA issued its policy toward residential property owners to clarify when it would not require these owners to perform or pay for cleanup. The policy states that EPA, in the exercise of its enforcement discretion, will not take an enforcement action against an owner of residential property unless his activities lead to a release or threat of release of hazardous substances, resulting in EPA taking a response action at the property.

EPA's policy also applies to lessees of residential property whose activities are consistent with the policy. In addition, the policy applies to parties who acquire residential property through purchase, foreclosure, gift, inheritance, or other form of acquisition, as long as those persons' activities after acquisition are consistent with the policy.

Other Considerations

With respect to EPA's exercise of enforcement discretion under this policy, it is irrelevant whether an owner of residential property has or had knowledge or reason to believe that contamination was present on the site at the time of purchase or sale of the residential property.

Threshold Criteria

An owner of residential property located on a CERCLA site is protected if the owner:

- Has not and does not engage in activities that lead to a release or threat of release of hazardous substances, resulting in EPA taking a response action at the site;
- Cooperates fully with EPA by providing access and information when requested and does not interfere with the activities that either EPA or a state are taking to implement a CERCLA response action;
- Does not improve the property in a manner inconsistent with residential use; and
- Complies with institutional controls (e.g., property use restrictions) that may be placed on the residential property as part of the Agency's response action.

For further information contact:
(202) 564-5100
Office of Site Remediation Enforcement

Policy Towards Owners of Property Containing Contaminated Aquifers

July 3, 1995

The contaminated aquifer policy addresses the CERCLA liability of owners of property that contain an aquifer contaminated by a source or sources outside their property. These owners were concerned that EPA would hold them responsible for cleanup under CERCLA even though they did not cause and could not have prevented the groundwater contamination. The policy states that EPA, in an exercise of its enforcement discretion, will not take an action under CERCLA to require cleanup or the payment of cleanup costs provided that the landowner did not cause or contribute to the contamination.

Other Considerations

If a third party who caused or contributed to the contamination sues or threatens to sue the landowner, EPA may consider entering into a *de minimis* landowner settlement with the landowner covered under this policy.

For further information contact:
Elisabeth Freed - (202) 564-5117
Office of Site Remediation Enforcement

Threshold Criteria

A landowner is protected by this policy if **all** of the following criteria are met:

- The hazardous substances contained in the aquifer are present solely as the result of subsurface migration from a source or sources outside the landowner's property;
- The landowner did not cause, contribute to, or make the contamination worse through any act or omission on his part;
- The person responsible for contaminating the aquifer is not an agent or employee of the landowner, and was not in a direct or indirect contractual relationship with the landowner (exclusive of conveyance of title); and
- The landowner is not considered a liable party under CERCLA for any other reason such as contributing to the contamination as a generator or transporter.

This policy may not apply in cases where:

- The property contains a groundwater well that may influence the migration of contamination in the affected aquifer*;* or
- The landowner acquires the property, directly or indirectly, from a person who caused the original release.

Policy on Interpreting CERCLA Provisions Addressing Lenders and Involuntary Acquisitions by Government Entities

June 30, 1997

The lender liability policy clarifies the circumstances in which EPA intends to apply, as guidance, the provisions of the 1992 CERCLA Lender Liability Rule ("Rule") and its preamble in interpreting CERCLA's lender and involuntary acquisition provisions. The Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996 amended these CERCLA provisions and generally followed the approach of the Rule. EPA's subsequent lender policy explains that when interpreting the amended secured creditor exemption, EPA will treat the Rule and its preamble as authoritative guidance. For example, the amendments do not clarify the steps that a lender may take after foreclosure and still remain exempt from owner/operator liability. In making liability determinations, EPA, following its policy, will defer to the Rule (*see box,* page 60).

The 1996 amendment also validates the portion of the Rule that addresses involuntary acquisitions by government entities. EPA's policy clarifies that similar to the preamble of any valid regulation, EPA will look to the preamble to the CERCLA Lender Liability Rule as authoritative guidance on the meaning of the portion of the Rule that addresses involuntary acquisitions.

For further information contact:
Bob Kenney - (202) 564-5127
Office of Site Remediation Enforcement

Example

After foreclosure, a lender who did not "participate in management" prior to foreclosure may generally:

- Maintain business activities;
- Wind up operations; and
- Take actions to preserve, protect, or prepare the property for sale provided that the lender attempts to sell or re-lease the property held pursuant to a sale or lease financing transaction, or otherwise divest itself of the property in a reasonably expeditious manner using commercially reasonable means. This timeframe will generally be met if the lender, within 12 months of foreclosure, lists the property with a broker or advertises it for sale in an appropriate publication.

Policy on the Issuance of EPA Comfort/Status Letters

November 12, 1996

Some properties may remain unused or underutilized because potential property owners, developers, and lenders are unsure of the environmental status of these properties. By issuing comfort/status letters, EPA helps interested parties better understand the likelihood of EPA involvement at a potentially contaminated property. Although not intending to become involved in typical private real estate transactions, EPA is willing to provide a comfort/status letter when appropriate.

Comfort/status letters are intended to clarify the likelihood of EPA involvement at a site; identify whether a party is protected by a statutory provision or discretionary enforcement policy; or indicate the progress of a Superfund cleanup. If EPA is not involved at the property, the party may be referred to the appropriate state agency for further information.

Comfort letters address a particular set of circumstances and provide whatever information is contained within EPA's databases. Questions typically addressed by comfort letters include:

- Is the site or property listed in CERCLIS?
- Has the site been archived from CERCLIS?
- Is the site or property contained within the defined boundaries of a CERCLIS site?
- Has the site or property been addressed by EPA and deleted from the defined site boundary?
- Is the site or property being addressed by a state voluntary cleanup program?
- Is EPA planning or currently performing a response action at the site?

Evaluation Criteria

EPA may issue a comfort letter upon request if:

- The letter may facilitate cleanup and redevelopment of potentially contaminated property;
- There is the realistic perception or probability of incurring CERCLA liability.
- There is no other mechanism available to adequately address the party's concerns.

- Are the conditions at the site or activities of the party addressed by a statutory provision or EPA policy?
- Is the site in CERCLIS but designated as state-lead or deferred to the state agency for cleanup?

The agency generally uses four **sample** comfort letters to respond to requests. The samples can be found in Appendix D. A summary of the report on the effectiveness of comfort/status letters may be found in Appendix C.

For further information contact:
Elisabeth Freed - (202) 564-5117
Office of Site Remediation Enforcement

Interim Approaches for Regional Relations with State Voluntary Cleanup Programs

November 14, 1996

State and local empowerment to clean up sites is at the center of EPA's Brownfields program. Many states have developed voluntary cleanup programs that are designed to achieve protective cleanups at sites that are not on the NPL.

EPA regional offices have developed partnerships with states that have voluntary cleanup programs through the negotiation of Memoranda of Agreements (MOAs). Through the MOA, EPA and the interested state address state capabilities, programmatic areas, and the types of sites the state will include in the MOA.

With the guidance, EPA intends to facilitate regional/state MOA negotiations. The MOA delineates the roles and responsibilities between a state and EPA with respect to sites being cleaned up under the state's voluntary cleanup programs. This interim guidance sets out six baseline criteria that are evaluated before a region enters into an MOA with a state for its voluntary cleanup program. Through the completed and signed MOA, EPA acknowledges the adequacy of the state voluntary cleanup program. EPA also agrees that for sites addressed under the MOA, it does not plan or anticipate taking a removal or remedial action, unless EPA determines that there may be an imminent and substantial danger to public health or welfare or the environment.

Similar to CERCLA MOAs, EPA is developing Memoranda of Understanding (MOUs) between interested states and EPA

regional offices when states use an appropriate non-RCRA authorized state authority to oversee the cleanup of specific RCRA facilities. Where considered mutually beneficial, a regional office, working with Headquarters, may enter into a MOU to solidify expectations and worksharing arrangements between the region and state.

For further information contact:
Matt Sander - (202) 564-7233
Office of Site Remediation Enforcement

Jennifer Wilbur - (202) 566-0797
Outreach and Special Project Staff

Program Evaluation Criteria

EPA may enter into a MOA that addresses a state voluntary cleanup program if all of the following baseline criteria are met:

- Opportunities for meaningful community involvement.
- Voluntary *response actions* are protective of human health and the environment.
- Adequate resources to ensure that voluntary *response actions* are conducted in an appropriate and timely manner, and that both technical assistance and streamlined procedures, where appropriate, are available from the state agency responsible for the voluntary cleanup program.
- Mechanisms for the written approval of *response action* plans and a certification or similar documentation indicating that the response actions are complete.
- Adequate oversight to ensure that voluntary *response actions* are conducted in such a manner to assure protection of human health and the environment, as described above.
- Capability, through enforcement or other authorities, of ensuring completion of *response actions* if the volunteering party(ies) conducting the response action fail(s) or refuse(s) to complete the necessary response action, including operation and maintenance or long-term monitoring activities, if appropriate.

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

November 6, 2002

EPA provides enhanced protection for a subset of *de minimis* waste contributors referred to as non-exempt de micromis waste contributors. Non-exempt de micromis settlements may be available to parties who generated or transported a minuscule amount of waste to a Superfund site, which is an amount less than the minimal amount normally contributed by *de minimis* parties. EPA's revised guidance defines eligible non-exempt de micromis parties as those parties who fall outside the statutory definition of a qualified exempt de micromis (see Section 107(o)), but who may be deserving of similar treatment based on case-specific factors. The presumptive cut-off for a non-exempt de micromis party is 110 gallons (e.g., two 55 gallon drums) or 200 pounds of material containing hazardous substances. Regions have the flexibility to consider higher amounts on a site-specific basis.

As a matter of policy, EPA does not pursue non-exempt *de micromis* waste contributors for the costs of cleaning up a site. If, however, a non-exempt de micromis party is threatened with litigation by other parties at the site for the costs of cleanup, EPA may enter into a zero dollar settlement with the non-exempt de micromis party. Non-exempt de micromis settlements provide both a covenant not to sue from the Agency and contribution protection against other parties at the site.

Refer to http://cfub.sdc-moses.com/compliance/policies/cleanup/superfund/index.cfm for more information.

For further information contact:
Victoria Van Roden - (202) 564-4268
Office of Site Remediation Enforcement

Guidance on Enforcement Approaches for Expediting RCRA Corrective Action

Expediting corrective action cleanup activities at facilities that treat, store, or dispose hazardous waste is essential to protecting human health and the environment and potentially making these properties available for other uses. EPA Regions and States authorized to implement the corrective action program in lieu of EPA have developed innovative approaches to achieve timely, protective, and efficient cleanups. This guidance describes a number of enforcement approaches to expedite corrective action (*see box on page 68*). It provides examples of approaches designed to reduce the amount of process and procedures such as creative use of schedules and other federal statutory cleanup authorities. It also provides specific examples of tools such as facility-initiated agreements that are more flexible than typical corrective action enforcement orders.

For further information contact:
Karin Koslow - (202) 564-0771

Expediting Components of Corrective Action

Creative Schedules and Deadlines - include time limits to negotiate work plans, consent orders, and permits; fixed and flexible schedules of compliance; and limiting work product revisions.

Alternatives to a Collaborative Approach - encourage a more cooperative response from the facility owner/operator by presenting a less collaborative alternative such as a judicial action or a unilateral administrative order (UAO).

Penalty Provisions - include penalty provisions in enforcement documents, and collection of penalties when the facility fails to comply with the permit or order.

Other Federal Statutory Authorities - use other federal authorities such as CERCLA §106(a).

Innovative Mechanisms to Require Corrective Action

Facility-Initiated Agreement

A facility-initiated agreement is a non-binding corrective action agreement between EPA and a facility owner/operator. The purpose of the agreement is to allow a motivated owner/operator to initiate and perform corrective action in a manner that is consistent with all relevant laws and regulations and avoid negotiating an enforceable order.

Streamlined Consent Order

A streamlined consent order is a pared-down, results-based order. It contains enforceable deadlines and stipulated penalties and lacks the traditional specificity as to how the owner/operator should accomplish corrective action activities. Instead, it identifies performance standards that must be met by specific dates. With this type of order, EPA's oversight role is minimized throughout the corrective action process.

Innovative Mechanisms to Require Corrective Action

Unilateral Letter Order

The unilateral letter order is a legally binding, results-based order that can be entered into under any RCRA statutory administrative order authority. It is similar to a letter in that it is written in a less formal format and style than a traditional order.

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Coordination Between RCRA Corrective Action and Closure and CERCLA Site Activities

September 24, 1996

The goal of this memorandum is to continue to coordinate the CERCLA and RCRA cleanup programs in order to eliminate duplication of effort, streamline cleanup processes, and build effective relationships with states and tribes. Three areas are discussed in the memorandum to accomplish this goal: acceptance of decisions made by other remedial programs; deferral of activities and coordination among RCRA, CERCLA and state/tribal cleanup programs; and coordination of the specific standards and administrative requirements for closure of regulated units with other cleanup activities. Topics that are discussed in greater detail in the memorandum include program deferral and coordination between programs with examples of current approaches that are in use.

For further information contact:
Office of Site Remediation Enforcement
(202) 564-5100

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Comfort/Status Letters for RCRA Brownfield Properties

February 14, 2001

On November 8, 1996, the Office of Enforcement and Compliance Assurance (OECA) issued its "Policy on the Issuance of Comfort/Status Letters," which focuses on properties primarily associated with Superfund sites. Since that time, regional staff and private parties have inquired about the applicability of that policy to property within or adjacent to facilities subject to RCRA.

While EPA has not yet issued a formal policy on the use of RCRA comfort/status letters, there may be sites subject to RCRA requirements where the circumstances are analogous to the circumstances at Superfund sites. Site-specific circumstances determine whether a comfort/status letter is appropriate, but generally comfort/status letters may be appropriate at brownfields associated with RCRA treatment, storage, and disposal facilities; "generator-only" sites; or other property where RCRA hazardous waste is discovered during cleanup and/or redevelopment activities. This memorandum encourages regional staff to use "comfort/status" letters at such RCRA facilities, where appropriate, and provides some examples of regional RCRA comfort/status letters. In the RCRA context, comfort/status letters relate only to EPA's intent to exercise its RCRA corrective action response and enforcement authorities. As with the Superfund policy, the "comfort" comes from knowing what EPA knows about the property and what EPA's intentions are in terms of a response action. Regional

staff should look to the Superfund comfort/status letter policy for general guidelines on the issuance of RCRA comfort/ status letters.

For further information contact:
Elisabeth Freed- (202) 564-5117
Office of Site Remediation Enforcement

APPENDIX A

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Related Policies and Guidance

In addition to issuing policy and guidance documents that provide tools to manage CERCLA and RCRA liability risks, EPA has issued various policy and guidance documents that promote faster investigation, cleanup, and redevelopment of sites. Summarized below is just a small sampling of the many policy and guidance documents that may be helpful to parties interested in managing CERCLA and RCRA liability risks at brownfields and other sites.

Copies of the policy and guidance documents can be obtained from the Superfund and RCRA Hotline (800) 424-9346 or on EPA's web pages.

Office of Site Remediation Enforcement
www.epa.gov/compliance/about/offices/osre.html
Brownfields
www.epa.gov/brownfields
Office of Solid Waste
www.epa.gov/osw
Superfund
www.epa.gov/superfund

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CERCLA

CERCLA Orientation Manual

October 1992

The CERCLA Orientation Manual serves as a program orientation guide and reference document to the Comprehensive Environmental Response, Compensation, and Liability Act. The purpose of the manual is to assist EPA and state personnel involved with hazardous waste remediation, emergency response, and chemical and emergency preparedness. The organizational and operational components of the Superfund program also are described.

To order a hard copy:
National Center for Environmental Publications and Information
P.O. Box 42419
Cincinnati, OH 45242-2419
(513) 489-8190
Document number: EPA542-R-92-005

National Contingency Plan (40 CFR Part 300)

The National Oil and Hazardous Substances Pollution Contingency Plan, more commonly called the National Contingency Plan (NCP), establishes a comprehensive process by which the federal government responds to both oil spills and hazardous substances. The NCP coordinates response efforts such as accident reporting, spill containment, cleanup, and personnel contacts.

To access on line:
www.epa.gov/oilspill/ncpover.htm

This Is Superfund - A Citizen's Guide to EPA's Superfund Program

"This is Superfund" introduces basic issues regarding the Superfund program. Topics addressed include how Superfund sites are discovered and who pays for and is involved in clean-ups. Key terms for understanding the Superfund program, such as potentially responsible party and National Priorities List are defined.

To order a hard copy:
National Center for Environmental Publications and Information
P.O. Box 42419
Cincinnati, OH 45242-2419
(513) 489-8190
Document number: EPA540-K-99-006
To access on line:
www.epa.gov/superfund/whatissf/sfguide.htm

Community Reinvestment Act (CRA)

In 1997 Congress enacted the Community Reinvestment Act requiring lenders to make capital available in low- and moderate-income urban neighborhoods, thereby giving rise to concerns over potential environmental and financial liability for cleanups at sites by lenders, developers, and property owners. The Community Reinvestment Act establishes creative initiatives for economic development while easing fears of financial liability and regulatory burdens.

For further information contact:
Outreach and Special Projects Staff
(202) 260-4039
To access on line:
www.epa.gov/swerosps/bf/html-doc/cra.htm

Partial Deletion of Sites Listed on the NPL

November 1, 1995

EPA deletes sites from the NPL with state concurrence when no further cleanup response is warranted under CERCLA. Historically, only entire sites could be deleted from the NPL. Under this policy, parties may submit petitions for partial deletions to EPA. Additionally, the policy gives EPA regional offices the flexibility to clarify which areas of NPL sites are considered uncontaminated due to the completion of proper investigation or cleanup actions.

Before a portion of a site can be considered for partial deletion from the NPL, it must meet the same deletion criteria that an entire site must meet. (See 40 CFR § 300.425).

For further information contact:
Office of Emergency and Remedial Response
(703) 603-8960
To access on line:
www.epa.gov/swerffrr/documents/fr110195.htm

Guidance on Deferral of NPL Listing Determinations While States Oversee Response Actions

May 3, 1995

The deferral guidance provides a framework for regional offices, states, and tribes to determine the most appropriate, effective, and efficient means to respond to hazardous waste sites. Implementation is flexible in order to account for the different capabilities of these acting parties.

For further information contact:
Office of Emergency and Remedial Response
(703) 603-8960
To access on line:
www.epa.gov/swerosps/bf/html-doc/deferral.htm

The NPL for Uncontrolled Hazardous Waste Sites; Listing and Deletion Policy for Federal Facilities

November 24, 1997

This document establishes an interim final revision to the Agency's policy on placing federal facility sites on the National Priorities List. The interim final policy revisions also apply to federal facility sites that are RCRA-regulated facilities engaged in treatment, storage, or disposal of hazardous waste.

For further information contact:
Federal Facilities Restoration and Reuse Office
(202) 260-9924
To access on line:
www.epa.gov/fedrgstr/EPA-WASTE/1997/November/Day-24/f30518.htm

Policy Towards Landowners and Transferees of Federal Facilities

June 13, 1997

This policy was created to address the potential liability concerns of non-federal parties who acquire federal facility property. Such acquisitions have become increasingly common with the reduction in size and number of federal facilities such as military bases. The intent of this policy is to alleviate uncertainty regarding potential enforcement action by EPA against landowners and transferees (i.e., lessees) of federal facility properties.

For further information contact:
Federal Facilities Restoration and Reuse Office
(202) 260-9924
To order a hard copy:
Superfund Docket Center at (703) 603-9232
the Superfund Hotline at (800) 424-9346,
or the National Technical Information Service (NTIS) at (800) 533-NTIS.

EPA Guidance on the Transfer of Federal Property by Deed Before All Necessary Remedial Action Has Been Taken Pursuant to CERCLA Section 120(h)(3).

June 16, 1998

This guidance, referred to as the "Early Transfer Guidance," describes EPA's process in determining a federally-owned property's suitability for transfer to a private party prior to the completion of all necessary cleanup action Concurrence of a state's governor is required.

For further information contact:
Federal Facilities Restoration and Reuse Office
(202) 260-9924
To access on line:
www.epa.gov/swerffrr/documents/hkfin.htm

Road Map to Understanding Innovative Technology Options for Brownfields Investigation and Cleanup

June 1997

The Road Map identifies potential technology options available at each of the basic phases involved in the characterization and cleanup of brownfields sites: site assessment, site investigation, cleanup options, and cleanup design and implementation. The Road Map is not a guidance document. Rather, each section describes the steps involved in the characterization and cleanup of brownfields sites and connects those steps with available technology options and supporting technology information resources. Appendices in the Road Map include a list of common contaminants found at typical brownfields sites, a detailed guide to common environmental terms and acronyms, and a list of state and EPA brownfields contacts.

For further information contact:
Technology Innovation Office
(703) 603-9910

To order a hard copy:
National Center for Environmental Publications and Information
P.O. Box 42419
Cincinnati, OH 45242-2419
Telephone: (513) 489-8190
Document number: EPA 542-B-97-002
To access on line:
Second edition available at www.clu-in.org/roadmap/

Tool Kit of Information Resources for Brownfields Investigation and Cleanup

June 1997

The Tool Kit provides abstracts and access information for a variety of relevant resources, including electronic databases and bulletin boards, newsletters, regulatory and policy guidance, and technical reports. The Tool Kit describes the resources identified in the Road Map, explains how to obtain the publications, and provides a "starter kit" of important information resources to help brownfield stakeholders understand available technology.

For further information contact:
Technology Innovation Office
(703) 603-9910

To order a hard copy:
National Center for Environmental Publications and Information
P.O. Box 42419
Cincinnati, OH 45242-2419
Telephone: (513) 489-8190
Document number: EPA 542-B-97-001
To access on line:
Second edition available at www.clu-in.org/roadmap/

Soil Screening Guidance: Fact Sheet

May 17, 1996

EPA's Soil Screening Guidance helps standardize and accelerate the evaluation and cleanup of contaminated soils at NPL sites where future residential land use is anticipated. To help identify areas at sites on the NPL that need further investigation or that may be screened out from further consideration, the guidance provides a step-by-step methodology for determining levels of soil contamination. The Soil Screening Guidance can help speed up the investigation and cleanup of contaminated sites, save time and money and make sites available for redevelopment more quickly.

Documents related to the guidance include the Soil Screening Guidance User's Guide, Fact Sheet, and Technical Background Document.

For further information contact:
Office of Emergency and Remedial Response
(703) 603-8960
To access on line:
http://www.epa.gov/superfund/resources/soil/fact_sht.pdf

Land Use in the CERCLA Remedy Selection Process Description

May 1995

EPA's land use directive promotes early discussions with local land use planning authorities, local officials, and the public regarding reasonably anticipated future uses of the property on which a NPL site is located. The directive also encourages the use of realistic assumptions regarding future land use in the baseline risk assessment the development of remedial alternatives, and the CERCLA remedy selection process.

For further information:
Office of Emergency and Remedial Response
(703) 603-8960
To access on line:
www.epa.gov/swerosps/bf/pdf/land_use.pdf

Overview of Presumptive Remedies

Presumptive remedies are technologies or strategies that are preferred for use at sites with specific common characteristics. They have been developed to take advantage of Superfund's extensive experience in remediating complex hazardous waste sites. This experience has shown that certain remedies are generally appropriate for sites with specific common characteristics, e.g., type of contaminant present, type of previous industrial use, and environmental medium affected. Relying on presumptive remedies can streamline the site assessment, remedy selection, and RD/RA processes. EPA has developed presumptive remedy guidance for five types of site:

- Municipal landfills
- Volatile organic compounds ("VOCs") in soils
- Metals in soils
- Wood treatment
- Contaminated ground water

EPA has been using presumptive remedies since 1993. As of October 1997, presumptive remedies had been used or were being used at 48 Superfund sites accounting for more than 80 operable units. Using presumptive remedies has a number of advantages:

- **Saving time and money**. EPA estimates that municipal landfills implementing the presumptive remedy of containment, for example,

experience time savings ranging from 36 to 56 percent, and cost savings of up to 60 percent from streamlining the remedial investigation/feasibility study process.

- **Promoting consistency in remedy selection.** Using similar remedies at similar types of sites saves time and allows cross-site comparisons, which help to refine remedy implementation.

- **Improving predictability in remedy selection**. When a presumptive remedy is proposed, interested parties can review previous actions at similar sites. This may increase their confidence in the proposed remedy and speed up remedy selection.

- **Workload reduction.** Implementation of presumptive remedies has been tried and tested, accelerating the process of screening and selecting remedies. Thus savings in time and money often may be achieved at the same time workloads are reduced.

- **Expert support.** RPMs can access presumptive remedy experts who can provide information and support during remedy implementation.

- **NCP compliance.** Use of presumptive remedies advances NCP remedy selection objectives by promoting consistency in remedy screening and selection.

Relying on presumptive remedies is EPA policy. EPA guidance states that presumptive remedies are to be used at all appropri-

ate sites, except under unusual, site-specific circumstances. This means that RPMs working at the types of sites listed above should always investigate the possibility of implementing a presumptive remedy.

For more information contact:
Office of Emergency and Remedial Response
(703) 603-8960
To access on line:
http://www.epa.gov/superfund/resources/presump

Methodology for Early De Minimis Waste Contributor Settlements under CERCLA Section 122(g)(1)(A)

June 2, 1992

Under CERCLA section 122(g)(1)(A), EPA is authorized to enter into settlements with minor waste contributors *de minimis* parties of a site when practicable and in the public interest. This policy provides guidance for early consideration and proposals of such *de minimis* settlements, including the methodology to facilitate settlement, and procedures for identifying early *de minimis* candidates.

For further information contact:
Office of Site Remediation Enforcement
(202) 564-5100
To access on line:
http://www.epa.gov/compliance/resources/policies/cleanup/superfund/demin-sec122-rpt.pdf

Policy for Municipality and Municipal Solid

Waste CERCLA Settlements at NPL Co-Disposal Sites

February 5, 1998

This policy supplements the Interim Policy on CERCLA Settlements Involving Municipalities and Municipal Waste issued September 30, 1989. Under this policy, EPA continues the practice of generally not identifying generators and transporters of municipal solid waste as potentially responsible parties at NPL sites. The policy identifies a settlement methodology for making settlements to MSW generators and transporters seeking to resolve liability. It also identifies a presumptive settlement range for municipal owners and operators of co-disposal sites on the NPL seeking to settle their Superfund liability.

For further information conmtact:
Office of Site Remediation Enforcement
(202) 564-5100
To access on line:
http://www.epa.gov/compliance/resources/policies/cleanup/superfund/munic-solwst-mem.pdf

General Policy on Superfund Ability to Pay Determinations

September 30, 1997

The Superfund ability to pay (ATP) policy document explains what is necessary for an acceptable ability to pay settlement in Superfund cases. The main text of the policy document addresses general issues that apply to the ATP process and ATP settlements. The policy document also contains two appendices that address issues specific to making ATP determinations for individuals and businesses.

The policy document establishes an “undue financial hardship”

standard for determining a party's ability to pay its share of Superfund clean up costs and uses a two-part analysis to determine what is an acceptable ATP settlement amount.

This policy is intended to apply outside of a formal bankruptcy context because the bankruptcy laws provide other mechanism to protect debtors from undue financial hardship or to allow viable business to reorganize.

For further information contact:
Office of Site Remediation Enforcement
(202) 564-5100
To access on line:
http://www.epa.gov/compliance/resources/policies/cleanup/superfund/genpol-atp-rpt.pdf

Fact Sheet: Revised De Micromis Guidance

June 4, 1996

This fact sheet describes EPA's efforts in reducing transaction costs for very small volume contributors (de micromis parties). It outlines cut-off ranges considered in assessing a party's waste contribution and also discusses additional reference documents that may be of interest to de micromis parties.

For further information contact:
Office of Site Remediation Enforcement
(202) 564-5100
To access on line:
http://www.epa.gov/compliance/resources/policies/cleanup/superfund/fs-demicromis-rpt.pdf

Streamlined Approach for Settlements With De

Minimis Waste Contributors under CERCLA Section 122(g)(1)(A)

July 30, 1993

This guidance encourages EPA regional offices to take a more active role in facilitating *de minimis* settlements by establishing minimum levels of information necessary before considering a *de minimis* settlement, and providing a methodology for payment.

For further information contact:
Office of Site Remediation Enforcement
(202) 564-510
To access on line:
http://www.epa.gov/compliance/resources/policies/cleanup/superfund/app-deminimis-rpt.pdf

Advance Notice of Proposed Rulemaking: Corrective Action for Releases from Solid Waste Management Units at Hazardous Waste Management Facilities

May 1, 1996

The action proposed in this Notice (ANPR) was a key step in EPA's effort to improve the RCRA corrective action program. The ANPR introduced EPA's strategy to develop corrective action issues; provided a status report on the successes of the program; and emphasized areas of flexibility within current corrective action implementation. The ANPR encourages and describes tools that create a consistent holistic approach to clean up at RCRA facilities; establishes protective, practical clean up expectations; shifts more of the responsibilities to achieve clean up on those responsible for the contamination; streamlines corrective action and reduces cost; and enhances opportunities for timely, meaningful public participation. In addition, the ANPR serves as the primary guidance document

for the RCRA corrective action program.

For further information contact:
Office of Solid Waste
(703) 308-8404
Office of Site Remediation Enforcement
(202) 564-5100
To access on line:
http://www.epa.gov/epaoswer/hazwaste/ca/resource/guidance/gen_ca/anpr.htm

RCRA Expanded Public Participation Rule 60 FR 63417

December 1995

EPA developed the RCRA Expanded Public Participation Rule to empower communities to become more actively involved in local hazardous waste management. This rule makes it easier for citizens to become involved earlier and more often in the process of permitting hazardous waste facilities. It also expands public access to information about facilities. As a result, the rule enables communities to become more active participants in important local environmental decisions.

The RCRA Expanded Public Participation Rule also helps facilities. Earlier participation can eliminate confusion or delays in the permitting process that can occur when the public is not involved until much later. This helps ensure that the permitting process moves forward in a timely manner. By fostering better relationships with communities, the rule also can help improve facilities' images and reduce potential conflict. In addition, citizens are often able to provide valuable information regarding local conditions for facilities to consider in developing their permit applications. Furthermore, the rule is very flexible--it identifies the basic requirements needed to satisfy EPA's public participation goals and recommends

additional activities that facilities might conduct.

For further information contact:
Office of Solid Waste
(703) 308-8404
To access on line:
http://www.epa.gov/epaoswer/hazwaste/permit/pubpart/manual.htm

Corrective Action Oversight

February 7, 1992

Oversight in general is the management of all activities related to corrective action at a site. The oversight approach discussed in this guidance encourages project managers and owners/operators to develop a plan that allows for the appropriate level of oversight rather than a pre-determined "one size fits all" process. The guidance emphasizes that the project manager should base the oversight plan on facility-specific conditions and owner/operator capabilities and develop an appropriate level of oversight that will ensure timely, efficient, and protective cleanups.

For further information contact:
Office of Site Remediation Enforcement
(202) 564-5100
To access on line:
http://www.epa.gov/Compliance/about/offices/osre.html

The RCRA Public Participation Manual

EPA designed this document as a "user's manual." It explains how public participation works in the RCRA permitting process (including corrective action), and how citizens, regulators, and industry can cooperate to make it work better. It also describes a wide assortment of activities to enhance public participation, and includes several appendices that provide lists of contacts, sources of information, and examples of public participation

tools and activities. The 1996 RCRA Public Participation Manual supersedes the 1993 RCRA Public Involvement Manual.

For further information contact:
Office of Solid Waste
(703) 308-8404
To access on line:
http://www.epa.gov/epaoswer/hazwaste/permit/pubpart/manual.html

The Handbook of Groundwater Protection and Cleanup Policies for RCRA Corrective Action

The *Handbook of Groundwater Protection* contains the Environmental Protection Agency's (EPA's) latest interpretation of policies on such topics as cleanup goals, the role of groundwater use, point of compliance, source control, and monitored natural attenuation. This *Handbook* ties 15 different topics together with an overall Groundwater Protection and Cleanup Strategy that emphasizes a phased, results-based approach to cleaning up contaminated groudwater.

For further information contact:
Office of Solid Waste
(703) 308-8404
To access online:
http://www.epa.gov/correctiveaction/resource/guidance/gw/gwhandbk/gwhbfinl.pdf

APPENDIX B

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Eligibility for Brownfields Funding

September 2002,

Introduction

President George W. Bush signed, the Small Business Liability Relief and Brownfields Revitalization *Act* into law on January 11, 2002. The Brownfields Law expands potential federal financial assistance for brownfield revitalization, including grants for assessment, cleanup, and job training. The new law also limits the liability of certain contiguous property owners and prospective purchasers of brownfield properties, and clarifies innocent landowner defenses to encourage revitalization and reuse of brownfield sites. The Brownfields Law also includes provisions to establish and enhance state and tribal response programs, which will continue to play a critical role in the successful cleanup and revitalization of brownfields.

This summary highlights the eligibility requirements of the new law.

Type of Grant	Eligible Entities
Brownfields *assessment grants*	"Eligible entities" as defined in the new Brownfields Law
Brownfields *revolving loan fund grants*	"Eligible entities" as defined in the new Brownfields Law
Brownfields *direct cleanup grants*	*and Nonprofit Organizations* (note: EPA will use the definition of nonprofit organizations contained in Section 4(6) of the Federal Financial Assistance Management Improvement Act of 1999, Public Law 106-107)
To be used only for the remediation of properties owned by the eligible party	

Eligible Entities and Properties under the New Law

There are two aspects to brownfields funding eligibility:

1) Eligible Entities
(who can receive a brownfields grant)

2) Eligible Properties
(which properties are eligible for funding).

Parties eligible for brownfields grants include:

The new Brownfields Law defines "Eligible Entities"

- General purpose unit of local government (note: for purposes of the brownfields grant program, EPA defines general purpose unit of local government as a "local government" as that term is defined under 40 CFR Part 31)
- Land clearance authority or other quasi-governmental entity that operates under the supervision and control of or as an agent of a general purpose unit of localgovernment
- Government entity created by a state legislature
- Regional council or group of general purpose units of local government
- Redevelopment agency that is chartered or otherwise sanctioned by a state
- StateIndian tribe other than in Alaska (note: intertribal Consortia are eligible for funding in accordance with EPA's policy for funding intertribal consortia)
- Alaska native Regional Corporation and an Alaska Native Village Corporation and the Metlakatla Indian community

Under the new Brownfields Law, Eligible Properties include:

- Properties that meet the definition of a Brownfield Site under the new Brownfields Law

- Properties for which EPA has made a property-specific funding determination, based upon the criteria provided in the new Brownfields Law.

The new Brownfields Law defines a *"Brownfield Site"* to mean: "...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." Brownfield sites include residential, as well as commercial and industrial properties.

Property-Specific Determinations of Eligibility

Property-Specific Determinations: The Brownfields Law excludes certain types of property from funding eligibility, *unless EPA makes a property-specific funding determination*:

- Facilities subject to planned or ongoing CERCLA removal actions.
- Facilities that are subject to unilateral administrative orders, court orders, administrative orders on consent or judicial consent decree or to which a permit has been issued by the United States or an authorized state under the Solid Waste Disposal Act (as amended by the Resource Conservation and Recovery Act (RCRA)), the Federal Water Pollution Control Act (FWPCA), the Toxic Substances Control Act (TSCA), or the Safe Drinking Water Act (SDWA).
- Facilities subject to corrective action orders under RCRA (sections 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.

- Land disposal units that have filed a closure notification under subtitle C of RCRA and to which closure requirements have been specified in a closure plan or permit.
- Facilities where there has been a release of polychlorinated biphenyls (PCBs) and are subject to remediation under TSCA.
- Portions of facilities for which funding for remediation has been obtained from the Leaking Underground Storage Tank (LUST) Trust Fund.

Criteria for Property Specific Funding Determinations:

The new legislation allows EPA to award financial assistance *to an eligible entity* for assessment or clean up activities at the site, if it is found that financial assistance will:

1. Protect human health and the environment, **and**
2. Either:
   promote economic development; or
   enable the creation of, preservation of, or addition to parks, green ways, undeveloped property, other recreational property, or other property used for nonprofit purposes.

- Facilities subject to unilateral administrative orders, court orders, administrative orders on consent or judicial consent decree issued to or entered into by parties under CERCLA.
- Facilities that are subject to the jurisdiction, custody or control of the United States government.

Facilities *not* Eligible for Brownfields Funding:

- Facilities listed (or proposed for listing) on the National Priorities List (NPL).

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Summary of Brownfields Grants Guidelines

September 2002

President George W. Bush signed, the Small Business Liability Relief and Brownfields Revitalization Act into law. on January 11, 2002. The Brownfields Law expands potential federal financial assistance for brownfield revitalization, including grants for assessment, cleanup, and job training. The new law also limits the liability of certain contiguous property owners and prospective purchasers of brownfield properties, and clarifies innocent landowner defenses to encourage revitalization and reuse of brownfield sites. The Brownfields Law also includes provisions to establish and enhance state and tribal response programs, which will continue to play a critical role in the successful cleanup and revitalization of brownfields.

This summary highlights the new grant guidelines and select provisions of the new law relevant to applicants.

Fiscal Year 2003 Grant Guideline Highlights

The FY03 Brownfields Grant Guideline is a document that provides applicants with information on requirements for applying for three types of Brownfields grants: assessment grants, revolving loan fund (RLF) grants, and, new in FY03, direct cleanup grants. These grants are authorized under Subtitle A of the new Brownfields law to promote the cleanup and redevelopment of brownfields by providing financial assistance for revitalization efforts. Job training grant guidelines and Grant Funding Guidance for State and Tribal Response programs under Subtitle C of the Brownfields law are being published separately.

The FY03 Brownfields grant guidelines reflect a new approach. The proposal process has also been streamlined to allow applicants to prepare an initial proposal for funding under three different types of grants: assessment, RLF anddirect cleanup. EPA will review the applicants' Initial Proposals, and, after ranking, will invite a subset of these applicants to submit to EPA their final proposals.

Eligible Entities

A wide range of governmental entities are eligible for assessment, RLF and direct cleanup grants. Eligible governmental entities include states, tribes, local governments, councils of government, and state chartered redevelopment agencies.

In addition, the new Brownfields law provides two new ways in which non profit organizations may receive funding to clean up *sites that they own*. Non profit organizations may apply directly to EPA for cleanup grants for sites that they own, In addition, governmental RLF grant recipients may use their funding to award cleanup subgrants to other eligible entities, which now includes certain non profit organizations. Cleanup grants and RLF subgrants, unlike RLF loans, do not need to be repaid.

Grant Funding Amounts

Eligible governmental entities may apply for up $400,000 in assessment funding–up to $200,000 of which has to be used to address sites contaminated by hazardous substances, pollutants or contaminants, and up to $200,000 of which has to be used to address sites contaminated by petroleum. Applicants may request a waiver of the $200,000 site limits up to a $350,000 site limit, based on the anticipated level of

contamination, size, or status of ownership. Due to budget limitations, no entity may apply for funding assessment activities in excess of $700,000.

Eligible governmental entities may apply for up to $1 million for an initial RLF grant. Coalitions–groups of eligible entities–may apply together under one grant recipient for up to $1 million per eligible entity. Revolving loan funds generally are used to provide no-interest or lower-interest loans for brownfields cleanups. The new Brownfields law requires the applicant to contribute a 20 percent cost sharing for RLF awards; this cost share may be in the form of money or, labor, material or services that would be eligible and allowable costs under the RLF grant. Applicants may requests waivers of the cost share requirements based on hardship, as described in the guideline.

Eligible governmental entities may apply for up to $200,000 per site for cleanup grants for sites they own. Due to budget limitations, no entity should apply for cleanup grants at more than five sites. Cleanup grants also require the applicant to contribute a 20 percent cost sharing for cleanup grant awards; this cost share may be in the form of money, labor, material or services that would be eligible and allowable costs under the cleanup grant.. Applicants may requests waivers of the cost share requirements based on hardship, as described in the guideline.

Grant Application Schedule and Details

Initial Proposals must be postmarked or sent via registered or tracked mail to the appropriate Regional representative by November 27, 2002 with a copy to Headquarters.

Applicants are encouraged to work with their EPA Regional Brownfields Contacts in the preparation of their Initial Proposals.

CERCLA Liability and the Small Business Liability Relief and Brownfields Revitalization Act

September 2002

Title I - Small Business Liability Protection

The new Brownfields Law provides liability protection for certain businesses and municipal waste contributors to NPL sites:

- CERCLA liability exemption for certain small volume waste contributors to NPL sites (i.e., contributors of less than 110 gallons or 200 pounds), if waste has not contributed significantly to cost of response action.
- CERCLA liability exemption for certain contributors of municipal solid waste (MSW)(e.g., certain residential property owners, small businesses, non-profits), if MSW has not contributed significantly to cost of response action
- Shifts court costs and attorneys fees to a private party if a private party loses a Superfund contribution action against de micromis or municipal solid waste exempt party.

EPA anticipates issuing guidance related to the de micromis and MSW exemptions by December, 2002.

Title II - Brownfields Revitalization and Environmental Restoration – Subtitle B

The new Brownfields Law provides that, under certain circumstances, simply owning contaminated property does not result in CERCLA liability. The law clarifies Superfund liability for:

- Contiguous Property Owners
- Bona Fide Prospective Purchasers
- Innocent Landowners.

Contiguous Property Owners: property owners owning contaminated property

contiguous to a Superfund site are exempt from CERCLA liability, if the owner:

- is not otherwise liable for the contamination and is not affiliated with a liable party
- takes reasonable steps with respect to hazardous substances on the property, cooperates and provides assistance and site access, complies with land use controls, site information requests, and legal notice requirements
- conducts "all appropriate inquiry" at time of purchase and demonstrates they did not know or have reason to know of contamination.

Prospective Purchasers:
For purchasers buying contaminated property after date of enactment, potential CERCLA liability is limited to a "windfall lien" for increase in value of the property attributable to EPA's response action, provided the purchaser:

- is not otherwise liable for the contamination and is not affiliated with a liable party
- does not impede cleanup, exercises appropriate care by taking reasonable steps, cooperates and provides assistance and site access, complies with land use controls, site information requests, and legal notice requirements,
- and conducts "all appropriate inquiries" prior to purchase

EPA issued guidance on its approach to implementing the Bona Fide Prospective Purchaser amendments
in view of the limitation on liability for prospective purchasers. See, Memorandum from Barry Breen, "Bona Fide Prospective Purchasers and the New Amendments to CERCLA." (May 31, 2002). Prior to the amendments, prospective purchasers needed to enter into prospective purchaser agreements (PPAs) with EPA to address their CERCLA liability concerns. In its May 31 guidance EPA explained that by providing a statutory liability limitation, Congress had made the need for PPAs unnecessary in most instances and identified those limited circumstances where they might be appropriate.
EPA is planning on issuing guidance on implementation of the "windfall lien" provision in December 2002.

Use of Alternative Dispute Resolution in Enforcement and Compliance Activities

September 2001

Introduction

Alternative Dispute Resolution (ADR) is a tool which enhances a negotiation process and is a standard component of EPA's enforcement and compliance program. ADR should be considered at any point when negotiations are possible. This fact sheet answers common questions about the use of ADR in enforcement and compliance activities.

What is ADR?

ADR is a short-hand term for a set of processes which assist parties in resolving their disputes quickly and efficiently. Central to each method of ADR is the use of an objective third party or neutral. In this fact sheet the use of the term "ADR" refers to all ADR processes. The methods used by the Agency include the following:

- **Convening** is the first step in a dispute resolution process. A neutral party explores with the parties whether they are interested in using ADR, makes a recommendation about the most appropriate way to proceed, and assists the parties in selecting a neutral.
- **Mediation** is the primary ADR tool used by EPA. It is a voluntary and informal process in which the disputing parties select a neutral third party to assist them in reaching a negotiated settlement. Since mediators have no power to impose a solution on the parties, they help disputants shape solutions to meet the interests and needs of all parties. In mediation, EPA retains its control of the case as well as its settlement authority.
- **Allocation** is the use of third party-neutrals to assist the parties in determining their relative responsibilities for Superfund site costs.
- **Fact-finding**, often used in technical disputes, involves the

investigation of issues by a neutral party who gathers information and prepares a summary of key issues. (Fact finding is often used as part of a negotiation process.)

- **Neutral Evaluation** is a process which is useful for cases involving complex scientific and technical issues. A neutral party conducts an evaluation and provides the disputants with an assessment of the strengths and weaknesses of each party's case and a prediction about the potential outcome of the case.
- **Mini-trial** is a process in which the decision-makers for each side of a dispute hear a summary of the best case presented by the attorneys for each side. Following the presentations, the principals engage in negotiations, often with the assistance of the neutral party.
- **Arbitration** is the process in which a neutral party considers the facts and arguments presented by parties in a dispute and renders a binding or non-binding decision using applicable law and procedures.
- **Facilitation** is a process in which parties with divergent views use a neutral facilitator to improve communications and work toward agreement on a goal or the solution to a problem. The facilitator runs the process, helping the parties set ground rules, design meeting agendas, and communicate more effectively.
- **Partnering** is a collaborative process in which the participants commit to work cooperatively to improve communications and avoid disputes in order to achieve a common goal. Typically, a neutral helps the participants create a partnering agreement that defines how they will interact and what goals they seek to achieve.

What is EPA's policy on the use of ADR in enforcement actions?

EPA has utilized ADR in appropriate enforcement and compliance activities since 1987. The Administrative Dispute Resolution Act of 1996, (P.L. 104-320), 5 U.S.C. 571 (ADRA), which encourages the use of ADR in all federal disputes, strengthened EPA's enforcement and compliance ADR policy. Each Federal district court is required to establish its own ADR program and to encourage and promote the use of

ADR in its district (Alternative Dispute Resolution Act of 1998 (P.L. 105-315), 28 U.S.C. 651).

What is EPA's experience with ADR in enforcement actions?

The Agency has used ADR to assist in the resolution of over 200 enforcement-related disputes to date. ADR has been used in negotiations arising under every environmental statute that EPA enforces. Mediated negotiations have ranged from two-party Clean Water Act (CWA) cases to Superfund disputes involving upwards of 1200 parties.

Participants in the 1990 ADR pilot for Superfund cases reported the following benefits:

- constructive working relationships were developed
- obstacles to agreement and the reasons therefor were quickly identified
- mediators helped prevent stalemates
- costs of preparing a case for DOJ referral were eliminated.
- ongoing relationships were preserved.

What are the benefits of using ADR in enforcement actions?

- It lowers the transaction costs for resolving the dispute.
- Mediated negotiations tend to focus more on resolving real issues, rather than posturing, and are less likely to get derailed by personality conflicts.
- In mediation, the parties are more likely to identify settlement options that are tailored to their particular needs.
- It alleviates the time-consuming burdens on EPA of organizing negotiations because a third party neutral is available to handle these tasks. This is particularly valuable in multi-party cases.

How do I know that ADR is appropriate for my enforcement case?

If you can answer the following questions affirmatively, then ADR may be appropriate for your case:

- Are there present or foreseeable difficulties in the negotiation which will require time or resources to overcome in order

to reach settlement?

- Is your case negotiable, i.e. no precedent-setting issues are involved?
- Is there enough case information to substantiate the violation(s)?
- Is there sufficient time to negotiate in light of court or statutory deadlines, or are the parties willing to sign a tolling agreement (an understanding that a statutory deadline for starting a lawsuit will be extended)?

What ADR services are available for enforcement/compliance disputes?

Assistance for the use of ADR for enforcement and compliance cases is available by phone at any time from the Headquarters and/or Regional Enforcement/Compliance ADR Specialists, identified at the end of this fact sheet. EPA has an indefinite services contract for dispute resolution services with a management consulting firm that focuses on environmental dispute resolution and public participation. Through in-house expertise and contract support EPA can also provide assistance in: confidential consultation regarding use of ADR in specific enforcement/ compliance cases; assistance in the location, selection and contracting of ADR professionals; provision of the entire range of ADR services and logistical support of consensus building processes.

What funding is available to pay for EPA's share of ADR expenses in these enforcement/compliance cases?

Funding for ADR services needs to come from each Region's extramural funds. In the Superfund program there is a delivery order funded and managed by the Office of Site Remediation Enforcement (OSRE) for limited convening services for enforcement and compliance disputes.

What contract mechanisms are available to obtain ADR services for enforcement/ compliance related activities?

The following options are available: (1) the consensus and dispute resolution support

services contract managed by the Consensus and Dispute Resolution Program (Debbie Dalton, Project Officer, 202-564-2913), (2) expedited sole source contracting authorized by recent changes to Federal Acquisition Regulations (FAR), and (3) the Regional Enforcement Support Services (ESS) contract, depending on the language in the contract. To date, the dispute resolution support services contract has been the primary vehicle used by the ADR program.

A procurement request and other contracting documents must be submitted for each case to the appropriate contract official. It takes approximately 30 days to process the contracting documents through the contracts office. Models of an ADR procurement request and other contracting documents for enforcement actions are available on disk from the HQ ADR Team or your regional ADR Specialist. Each Region should designate a lead staff contact for contract coordination.

Who manages the contract with the selected ADR neutral in an enforcement/ compliance case?

Each site-specific use of ADR in an enforcement case requires either a separate contract or task order which is managed by the nominating region. To establish a contract or task order, the contracts office requires the designation of a Task Order Project Officer (TOPO). The Remedial Project Manager (RPM), On Scene Coordinator (OSC), or other person familiar with the case may serve as a TOPO.

What are the requirements for expedited sole source hiring of neutrals in enforcement/compliance cases?

The FAR allows for expedited sole source contracting in enforcement actions when the anticipated value of neutral services does not exceed $2500, and the price is reasonable[1]. Contracts

where the anticipated value exceeds $2500, but is less than $100,000 are set aside for small business concerns[2]. If the TOPO receives only one offer from a small business concern, the contract should be awarded to that firm. If there are no acceptable offers, the set aside is withdrawn. Sole source contracting can then be used if only one source is reasonably available[3], but the TOPO must provide a written explanation for the absence of competition[4].

How do I identify appropriate neutrals for my enforcement/ compliance case?

EPA has developed a National Roster of Environmental Dispute Resolution and Consensus Building Professionals in conjunction with the U.S. Institute for Environmental Conflict Resolution (USIECR)[5]. This Roster will be one of several sources of information which federal agencies can use to identify appropriately experienced conflict resolution professionals for use in resolving environmental and natural resource disputes or issues in controversy under the ADRA of 1996 and the Negotiated Rulemaking Act of 1996. The Roster can be used to identify neutrals for an enforcement action "when the ADR Services Contract is not appropriate, cost effective or timely." Roster information is available on the USIECR website, http://www.ecr.gov. ADR specialists and others who have been trained will be able to obtain information from the Roster for case teams.

How does a case team in an enforcement/ compliance activity select and contract with an ADR neutral for his/ her services? How long does this take?

The selection of an appropriate ADR neutral for an enforcement/compliancecase is by agreement of all parties to the dispute. The regional/ DOJ case team represents the U.S. in this decision. Assistance in identifying and considering appropriate neutrals for an enforcement action is available from the

HQ ADR Team or through EPA's contractor.
The services of the selected ADR neutral are obtained by all the parties to a dispute by entering a contract with the neutral. The contract, generally called a "mediation agreement," covers arrangements for sharing and paying the mediator's fees, the role of the mediator, confidentiality issues, and the right of any party to withdraw from the mediation. An EPA approved model mediation agreement is available on disk from your regional ADR Specialist or from the HQ ADR Team. You should use this as the basis for your negotiations in enforcement cases.

The agreement is negotiated by the case team and the private parties, with assistance, if needed, from the HQ ADR Team or an ADR expert from Marasco Newton. Experience has shown that the model agreement is generally acceptable to private parties and it often takes no longer than two weeks to obtain a signed agreement.

Does a Region have the authority to sign the agreement with the ADR professional?

Yes. Once the funding has been committed by the Agency, the Region, generally the staff attorney, signs the agreement for EPA.

How much does it usually cost to use ADR in an enforcement/ compliance case?

The cost of ADR services in an enforcement/compliance case is determined by several factors, including the ADR professional's fees and travel, costs of meeting space, and the length of settlement discussions. All costs associated with the selected ADR process are shared equitably among the parties. EPA staff

1. FAR Subpart 6.001 (a)
   FAR Subpart 13.202 (a) (2)
2. FAR Subpart 19.5
3. FAR Subpart 13.106-1 (b)(1)
4. FAR Subpart 13.106-3(a)(2)
5. The Institute is affiliated with the Morris K. Udall Foundation in Tucson,Arizona

should keep the Agency's share payment commensurate with EPA's interest in the ADR process. At present, the Agency may pay a portion of the costs of the convening process and up to 50% of the ADR costs in an enforcement/ compliance activity, where the Agency is a party to the selected ADR process. The Agency may, in appropriate circumstances, help to defray private parties' costs of obtaining ADR services in Superfund allocation deliberations. The Agency may pay up to 20% of the costs of ADR services in these situations.

The average costs of some specific ADR processes are as follows:

- Allocation is generally between $50,000 and $75,000;
- Convening costs are approximately $25,000; and
- Community involvement cases are usually between $100,000 and $150,000 depending on the number of stakeholders and the complexity of the issues.

Why must the costs associated with using ADR in enforcement/ compliance activities be shared equitably by the parties?

To assure the neutrality of the ADR professional involved, it is important that all parties to the dispute share the costs to the greatest extent possible. This creates a more equal ground and prevents parties from feeling any bias in an enforcement/compliance action. Some parties can provide in-kind contributions towards the cost of ADR when they are unable to provide an equal share of the costs. In all other cases, EPA must share the costs of a neutral's services with the other parties to an enforcement/compliance dispute.

Are there specific guidelines for the use of arbitration in EPA enforcement and compliance activities?

Section 575 of the ADRA permits the use of binding arbitration in an enforcement action with the consent of all parties and eliminates the Agency's right to vacate an award issued within 30 days.

However, prior to using binding arbitration, the Agency must have issued guidance on the appropriate use of arbitration[6]. The act has two other prerequisites: 1) arbitration agreements[7] must specify a maximum award, and 2) the person offering to use arbitration must have settlement authority. At present EPA may enter into binding arbitration for Superfund cost recovery claims not exceeding $500,000 (excluding interest) under CERCLA Section 122(h)(2), 42 U.S.C. 9622(h)(2) and 40 C.F.R. 304 (1996). This regulation requires that the Administrator and one or more Potentially Responsible Parties (PRPs) submit a joint request for arbitration.

Are government payments made to an ADR professional in a Superfund action tracked and recoverable as site costs for cost recovery purposes?

Expenditures by the Agency in support of the use of ADR in a Superfund action are cost recoverable expenses, reimbursement of which may be obtained through regional settlements or legal action. Regions may exercise their enforcement discretion regarding recovery of ADR expenditures. Each ADR case is assigned a separate task order or contract to allow for site tracking of ADR expenses.

Is training available for the use of ADR in enforcement actions?

Yes. A one day overview training on the use of ADR in enforcement negotiations is offered in all of the regions. Furthermore, there are ADR components in several other popular EPA training courses. If you are interested in the training schedule for the current year call NETI at (202-564-6069).

6. 40 C.F.R. 304
7. Agreements to arbitrate are enforceable pursuant to 9 U.S.C. 4

Enforcement/Compliance ADR Specialists

NAME	PHONE #	FAX #
Region 1		
Ellie Tonkin	617/918-1726	918-1809
Marcia Lamel	918-1778	918-1809
Doug Thompson	918-1543	918-1809
Andrea Simpson	918-1738	918-1809
Catherine Garypie	918-1540	918-1809
Region 2		
Tom Lieber	212/637-3158	637-3115
Janet Conetta	637-4417	637-4429
Region 3		
Pat Hilsinger	215/814-2642	814-2601
Joan A. Johnson	814-2619	814-3001
Region 4		
Lisa Ellis	404/562-9541	562-9486
Region 5		
John Tielsch	312/353-7447	886-7160
Beth Henning	312/886-5892	353-9176
Region 6		
Jim Dahl	214/665-2151	665-2182
Manisha Patel	665-2770	665-6660
Region 7		
Cheryle Micinski	913/551-7274	551-7925
Region 8		
Maureen O'Reilly	303/312-6402	312-6409
Karen Kellen	312-6518	312-6953
Arnie Ondarza	312-6777	312-7025
Region 9		
Kim Muratore	415/744-2373	744-1917
Marie Rongone	744-1313	744-1041
Allyn Stern	744-1372	744-1041
Region 10		
Ted Yackulic	206/553-1218	553-0163

HQ Enforcement/Compliance ADR Team

David Batson	202/564-5103	564-0093
Lee Scharf	564-5143	564-0091
Phil Page	564-4211	564-0091

Policy Toward Owners of Property Containing Contaminated Aquifers

United States Environmental Protection Agency
Office of Enforcement and Compliance Assurance
November 1995

This fact sheet summarizes a new EPA policy regarding groundwater contamination. The "Policy Toward Owners of Property Containing Contaminated Aquifers" was issued as part of EPA's Brownfields Economic Redevelopment Initiative which helps states, communities, and other stakeholders in economic redevelopment to work together in a timely manner to prevent, assess, safely clean up, and sustainably reuse brownfields. Brownfields are abandoned, idled, or under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination.

EPA issued this policy to help owners of property to which groundwater contamination has migrated or is likely to migrate from a source outside the property. This fact sheet is based on EPA's interpretation of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, commonly known as Superfund) and existing EPA guidance. Under the policy, EPA will not take action to compel such property owners to perform cleanups or to reimburse the agency for cleanup costs. EPA may also consider *de minimis* settlements with such owners if they are threatened with law suits by third parties.

Background

Approximately eighty-five percent of the sites listed on the National Priorities List involve some degree of groundwater contamination. The effects of such contamination are often widespread because of natural subsurface processes such as

infiltration and groundwater flow. It is sometimes difficult to determine the source of groundwater contamination.

Under Section 107(a)(l) of CERCLA (also found at 42 United States Code § 9607(a)(l)), any "owner" of contaminated property is normally liable regardless of fault. This section of CERCLA creates uncertainty about the liability of owners of land containing contaminated aquifers who did not cause the contamination. This uncertainty makes potential buyers and lenders hesitant to invest in property containing contaminated groundwater. The intent of the Contaminated Aquifer Policy is to lower the barriers to the transfer of property by reducing the uncertainty regarding future liability. It is EPA's hope that by clarifying its approach towards these landowners, third parties will act accordingly.

Policy Summary

EPA will exercise its enforcement discretion by not taking action against a property owner to require clean up or the payment of clean-up costs where: 1) hazardous substances have come to the property solely as the result of subsurface migration in an aquifer from a source outside the property, and 2) the landowner did not cause, contribute to, or aggravate the release or threat of release of any hazardous substances. Where a property owner is brought into third party litigation, EPA will consider entering a *de minimis* settlement.

Elements of the Policy

There are three major issues which must be analyzed to determine whether a particular landowner will be protected from liability by this policy:

- the landowner's role in the contamination of the aquifer;
- the landowner's relationship to the person who contaminated the aquifer; and
- the existence of any groundwater wells on the landowner's property that affect the spread of contamination within the aquifer.

Landowner's Role in the Contamination of the Aquifer

A landowner seeking protection from liability under this policy must not have caused or contributed to the source of contamination. However, failure to take steps to mitigate or address groundwater contamination, such as conducting groundwater investigations or installing groundwater remediation systems, will not, in the absence of exceptional circumstances, preclude a landowner from the protection of this policy.

Landowner's Relationship to the Person who Caused the Aquifer Contamination

First, this policy requires that the original contamination must not have been caused by an agent or employee of the landowner. Second, the property owner must not have a contractual relationship with the polluter. A contractual relationship includes a deed, land contract, or instrument transferring possession. Third, Superfund requires that the landowner inquire into the previous ownership and use of the land to minimize liability. Thus, if the landowner buys a property from the person who caused the original contamination after the contamination occurred, the policy will not apply if the landowner knew of the disposal of hazardous substances at the time the property was acquired. For example, where the property at issue was originally part of a larger parcel owned by a person who caused the release and the property is subdivided and sold to the current owner, **who is aware of the pollution and the subdivision,** there may be a direct or indirect "contractual relationship" between the person that caused the release and the current landowner. In this instance, the owner would not be protected by the policy.

In contrast, land contracts or instruments transferring title are not considered contractual relationships under CERCLA if the land was acquired after the disposal of the hazardous substances and the current landowner did not know, and had no reason to know, that

any hazardous substance had migrated into the land.

The Presence of a Groundwater Well on the Landowner's Property and its Effects on the Spread of Contamination in the Aquifer

Since a groundwater well may affect the migration of contamination in an aquifer, EPA's policy requires a fact-specific analysis of the circumstances, including, but not limited to, the impact of the well and/or the owner's use of it on the spread or containment of the contamination in the aquifer.

Common Questions Regarding Application of the Policy

"If a prospective buyer knows of aquifer contamination on a piece of property at the time of purchase, is he or she automatically liable for clean-up costs?"

No. In such a case the buyer's liability depends on the seller's involvement in the aquifer contamination. If the seller would have qualified for protection under this policy, the buyer will be protected. For example, if the seller of the property was a landowner who bought the property without knowledge, did not contribute to the contamination of the aquifer and had no contractual relationship with the polluter, then the buyer may take advantage of this policy, ***despite*** knowledge of the aquifer contamination.

In contrast, if the seller has a contractual relationship with the polluter and the buyer ***knows*** of the contamination, then this policy will not protect the buyer.

"If an original parcel of property contains one section which has been contaminated by the seller and another uncontaminated section which is threatened with contamination migrating through the aquifer, can a buyer be protected under the policy if he or she buys the threatened section of the property?"

The purchase of the threatened parcel separate from the contaminated parcel establishes a contractual relationship between the buyer and the person responsible for the threat. This policy will not protect such a buyer unless the buyer can establish that he or she did not know of the pollution at the time of the purchase and had no reason to know of the pollution. To establish such lack of knowledge the buyer must prove that at the time he acquired the property he inquired into the previous ownership and uses of the property.

Protection from Third Party Law Suits

Finally, EPA will consider *de minimis* settlements with landowners who meet the requirements of this policy if a landowner has been sued or is threatened with third-party suits. A *de minimis* settlement is an agreement between the EPA and a landowner who may be liable for clean up of a small portion of the hazardous waste at a particular site. To be eligible for such a settlement, the landowner must not have handled the hazardous waste and must not have contributed to its release or the threat of its release. Once the EPA enters into a *de minimis* settlement with a landowner, third parties may not sue that landowner for the costs of clean-up operations.

Whether or not the Agency issues a *de minimis* settlement, EPA may seek the landowner's full cooperation (including access to the property) in evaluating and implementing cleanup at the site.

For further information contact:
This policy was issued on May 24, 1995 and published in the Federal Register on July 3, 1995 (volume 60, page 34790). You may order a copy of the policy from the National Technical Information Service (NTIS), U.S. Department of Commerce, 5825 Port Royal Rd., Springfield, VA 22161.

Orders must reference NTIS accession number PB96-109145.

For telephone orders or further information on placing an order:
call NTIS at
(703) 487-4650
for regular service, or
(800) 553-NTIS for rush service.

For orders via e-mail/Intemet, send to the following address:
orders@ntis.fedworld.gov
For more information about the Contaminated Aquifer Policy, call Elisabeth Freed, (202) 564-5117, Office of Site Remediation Enforcement.

Fact Sheet

The Effect of Superfund on Involuntary Acquisitions of Contaminated Property by Government Entities

United States Environmental Protection Agency
Office of Enforcement and Compliance Assurance
December 1995

Units of state, local, and federal government sometimes involuntarily acquire contaminated property as a result of performing their governmental duties. Government entities often wonder whether these acquisitions will result in Superfund liability. This fact sheet summarizes EPA's policy on Superfund enforcement against government entities that involuntarily acquire contaminated property. This fact sheet also describes some types of government actions that EPA believes qualify for a liability exemption or a defense to Superfund liability.

Introduction

EPA's Brownfields Economic Redevelopment Initiative is designed to help states, communities, and other stakeholders in economic redevelopment to work together in a timely manner to prevent, assess, safely clean up, and sustainably reuse brownfields. Brownfields are abandoned, idled, or underused industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination. Many municipalities and other government entities are eager for brownfields to be redeveloped but often hesitate to take any steps at these facilities because they fear that they will incur Superfund liability.

This fact sheet answers common questions about the effect of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, commonly known as Superfund, and set forth at 42 United States Code

beginning at Section 9601) on involuntary acquisitions by government entities. EPA hopes that this fact sheet will facilitate government entities' plans for redevelopment of brownfields and the "brokerage" of those facilities to prospective purchasers.

What is an involuntary acquisition?

EPA considers an acquisition to be "involuntary" if it meets the following test:

- The government's interest in, and ultimate ownership of, the property exists only because **the actions of a non-governmental party give rise to the government's legal right to control or take title to the property.**

For example, a government's acquisition of property for which a citizen failed to pay taxes is an involuntary acquisition because the citizen's tax delinquency gives rise to the government's legal right to take title to the property.

Will a government entity that involuntarily acquires contaminated property be liable under CERCLA?

To protect certain parties from liability, CERCLA contains both liability exemptions and affirmative defenses to liability. A party who is exempt from CERCLA liability with respect to a specified act cannot be held liable under CERCLA for committing that act. A party who believes that he or she has an affirmative defense to CERCLA liability must prove so by a preponderance of the evidence.

After it involuntarily acquires contaminated property, a unit of state or local government will generally be exempt from CERCLA liability as an owner or operator. In addition, the unit of state or local government will have a somewhat redundant affirmative defense to CERCLA liability known as a "third-party" defense, provided other requirements for the defense, which are described below, are met. A federal government entity that involuntarily acquires contaminated prop-

erty and meets the requirements described below will have a third-party defense to CERCLA liability.

The requirements for a third-party defense to CERCLA liability are the following:

- The contamination occurred before the government entity acquired the property;
- The government entity exercised due care with respect to the contamination (e.g., did not cause, contribute to, or exacerbate the contamination); and
- The government entity took precautions against certain acts of the party that caused the contamination and against the consequences of those acts.

A government entity will **not** have a CERCLA liability exemption or defense if it has caused or contributed to the release or threatened release of contamination from the property. As a result, acquiring property involuntarily does not unconditionally or permanently insulate a government entity from CERCLA liability. Government entities should therefore ensure that they do not cause or contribute to the actual or potential release of hazardous substances at facilities that they have acquired involuntarily. For more information, see 42 U.S.C. 9601(20) (D), 9607(b)(3), and 9601(35)(A) and (D).

It is also important to note that the liability exemption and defense described above do not shield government entities from any potential liability that they may have as "generators" or "transporters" of hazardous substances under CERCLA. For additional information, see 42 U.S.C. 9607(a).

What are some examples of involuntary acquisitions?

CERCLA provides a non-exhaustive list of examples of involuntary acquisitions by government entities. These examples include **acquisitions following abandonment, bankruptcy, tax delinquency, escheat** (the transfer of a deceased person's property to the government when there are no competent

heirs to the property), **and other circumstances in which the government involuntarily obtains title by virtue of its function as a sovereign.**

What is EPA's official policy regarding CERCLA enforcement against government entities that involuntarily acquire contaminated property?

In 1992, EPA issued its Rule on Lender Liability Under CERCLA ("Rule"), 57 *Federal Register* 18344 (April 29, 1992). The Rule included a discussion of involuntary acquisitions by government entities. In 1994, the Rule was invalidated by the court.

In September 1995, EPA and the U.S. Department of Justice (DOJ) issued their "Policy on CERCLA Enforcement Against Lenders and Government Entities that Acquire Property Involuntarily" ("Lender Policy"). In the document, EPA and DOJ reaffirm their intentions to follow the provisions of the Rule as enforcement policy. The Lender Policy advises EPA and DOJ personnel to consult both the Rule and its preamble while exercising their enforcement discretion with respect to government entities that acquire property involuntarily. Most of the relevant portions of the Rule and preamble have been summarized in this fact sheet.

Under the Lender Policy, EPA has expanded the examples listed in CERCLA by describing the following categories of involuntary acquisitions:

- Acquisitions made by government entities **acting as a conservator or receiver pursuant to a clear and direct statutory mandate or regulatory authority** (such as acquisition of the security interests or properties of failed private lending or depository institutions);
- Acquisitions by government entities through **foreclosure and its equivalents while administering a governmental loan, loan guarantee, or loan insurance program;** and
- Acquisitions by government entities **pursuant to seizure or forfeiture authority.**

Similar to the examples listed in CERCLA, EPA's list of

categories of involuntary acquisitions is non-exhaustive. To determine whether an activity not listed in CERCLA or under the Lender Policy is an "involuntary acquisition," one should analyze whether the actions of a non-governmental party give rise to the government's legal right to control or take title to the property.

If a government entity takes some sort of voluntary action before acquiring the property, can the acquisition still be considered "involuntary"?

Yes. Involuntary acquisitions, including the examples listed in CERCLA, generally require some sort of discretionary, volitional action by the government. A government entity need not be completely "passive" in order for the acquisition to be considered "involuntary" for purposes of CERCLA. For further discussion, see 57 *Fed. Reg*. 18372 and 18381.

Will a government entity that involuntarily acquires contaminated property be liable under CERCLA to potentially responsible parties and other non-federal entities?

If a unit of state or local government involuntarily acquires property through any of the means listed in CERCLA, it will be exempt from CERCLA liability as an owner or operator. In addition, any government entity will have a third-party defense to CERCLA liability if all relevant requirements for that defense are met (see above).

If a government entity acquires property through any other means, it appears likely-based on the way that courts have treated lender issues during the last few years - that a court would apply principles and rationale that are consistent with EPA and DOJ's Lender Policy. Analysis of these acquisitions may require an examination of case law and state or local laws.

If someone dies and leaves

contaminated property to a government entity, is this considered an involuntary acquisition?

No, this type of property transfer is not considered an involuntary acquisition under CERCLA. However, CERCLA provides a third-party defense for parties that acquire property by inheritance or bequest (a gift given through a will). Thus, a government entity that acquires property in this manner will have a third-party defense to CERCLA liability if all relevant requirements of that defense are met and the government entity has not caused or contributed to the release or threatened release of contamination from the property (see above). For more information, see 42 U.S.C. 9607(b)(3) and 9601 (35)(A) and (D).

Will a government entity that uses its power of eminent domain be liable under CERCLA?

After a government entity acquires property through the exercise of eminent domain (the government's power to take private property for public use) by purchase or condemnation, it will have a third-party defense to CERCLA liability if all requirements for that defense are met (see above). For more information, see 42 U.S.C. 9607(b)(3) and 9601(35)(A).

Will parties that purchase contaminated property from government entities also be exempt from CERCLA liability?

No. Nothing in CERCLA allows non-governmental parties to be exempt from liability after they knowingly purchase contaminated property. However, EPA encourages prospective purchasers of contaminated property to contact their state environmental agencies to discuss these properties on a site-by-site basis. At sites where an EPA action has been taken, is ongoing, or is anticipated to be undertaken, various tools, including "prospective purchaser agreements," may be an option.

For further information:

The Lender Policy was published in the Federal Register in Volume 60, Number 237, at pages 63517 to 63519 (December 11, 1995).

You may order copies of the Lender Policy from the National Technical Information Service (NTIS), U.S. Department of Commerce, 5285 Port Royal Rd., Springfield, VA 22161. Orders must reference NTIS accession number PB95-234498. For telephone orders or further information on placing an order, call NTIS at 703-487-4650 for regular service or 800-553-NTIS for rush service. For orders via e-mail/ Internet, send to the following address orders @ ntis.fedworld.gov

If you have questions about this fact sheet, contact Bob Kenney of EPA's Office of Site Remediation Enforcement at (202) 564-5127.

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Fact Sheet

Using Supplemental Environmental Projects to Facilitate Brownfields Re-development

United States Environmental Protection Agency
Office of Enforcement and Compliance Assurance
330-F-98-001
Office of Site Remediation Enforcement
Policy and Program Evaluation Division 2273G
September 1998

In April 1998, EPA issued the final "Supplemental Environmental Projects Policy." In that policy EPA encourages the use of Supplemental Environmental Projects in the settlement of environmental enforcement actions. Using SEPs to assess or cleanup brownfield properties is an effective way to enhance the environmental quality and economic vitality of areas in which the enforcement actions were necessary,

Introduction

In settlements of environmental enforcement cases, defendant/respondents often pay civil penalties. EPA encourages parties to include Supplemental Environmental Projects (SEPs) in these settlements and will take SEPs into account in setting appropriate penalties. While penalties play an important role in deterring environmental and public health violations, SEPs can play an additional role in securing significant environmental and public health protection and improvement. EPA's final Supplemental Environmental Projects Policy (SEP Policy) describes seven categories of SEPs, the legal guidelines for designing such projects, and the methodology for calculating penalty credits. In certain cases, SEPs may facilitate the reuse of "brownfield" property. This fact sheet answers common questions about how SEPs can be used in the brownfields context.

What are Brownfields?

EPA defines brownfields as abandoned, idled, or under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination. In many cases assessment of the environmental condition of a property is all that is necessary to spur its reuse. Through the Brownfields Economic Development Initiative, EPA has developed a number of tools to prevent, assess, safely cleanup and promote the sustainable reuse of brownfields. SEPs are one of the tools that can be used at brownfields properties.

What is a SEP?

A SEP is an environmentally beneficial project that a defendant/respondent agrees to undertake in settlement of a civil penalty action, but that the defendant/respondent is not otherwise legally required to perform. In return, a percentage of the SEP's cost is considered as a factor in establishing the amount of a final cash penalty. SEPs enhance the environmental quality of communities that have been put at risk due to the violation of an environmental law.

Meeting Legal Requirements

The SEP Policy has been carefully structured to ensure that each SEP negotiated by EPA is within the Agency's authority and consistent with statutory and Constitutional requirements. Although all of the legal requirements in the Policy must be met when considering a SEP at a brownfield, the following requirements are particularly important:

SEPs at Brownfields Cannot Include Action that the Defendant/Respondent is Otherwise Legally Required to Perform

Activities at a brownfield site for which the defendant/respondent is otherwise legally required to perform under federal, state, or local law or regulation cannot constitute a SEP. This restriction includes actions that the defendant/respondent

is likely to be required to perform (1) as injunctive relief in any action brought by EPA or another regulatory agency, or (2) as part of an order or existing settlement in another legal action. This restriction does not pertain to actions that a regulatory agency could compel the defendant/respondent to undertake if the Agency is *unlikely* to exercise that authority.

As a general rule, if a party owns a brownfield or is responsible for the primary environmental degradation at a site, assessment or cleanup activities cannot constitute a SEP.

SEPs at Brownfield Require an Adequate Nexus between the Violation and the Project

The SEP Policy requires that a relationship, or nexus, exist between the violation and the proposed project. A SEP at a brownfield will generally satisfy the nexus requirement if the action enhances the overall public health or environmental quality of the area put at risk by the violation.

A SEP is not required to be at the same facility where the violation occurred provided that it is within the same ecosystem or within the immediate geographical area. In general, the nexus requirement will be satisfied if the brownfield is within a 50 mile radius of the site from which the violation occurred. However, location alone is not sufficient to satisfy the nexus requirement - the environment where the brownfield is located must be affected or potentially threatened by the violation.

A relationship between the statutory authority for the penalty and the nature of the SEP is not required in order for the nexus test to be met. Therefore, the violation need not relate to hazardous waste or contaminated properties in order for EPA to consider a SEP at a brownfield. (e.g., in the case of a Clean Air Act violation, EPA could approve a SEP at a brownfield).

SEPs at Brownfields Cannot include Actions that the Federal Government is Likely to Undertake or Compel Another to Undertake

If EPA or another federal agency has a statutory obligation to assess, investigate, or take other response actions at a brownfield, or to issue an order compelling another to take such action, the Agency may not negotiate a SEP whereby the defendant/ respondent carries out those activities.

As a general rule, SEPs are inappropriate at the following site types because of EPA's statutory obligations:

- sites on the National Priorities List under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), § 105, 40 CFR Part 300, Appendix B;
- sites where the federal government is planning or conducting a removal action pursuant to CERCLA § 104(a) and the National Oil and Hazardous Substances Pollution Contingency Plan, 40 CFR § 300.415; and
- sites for which the defendant/ respondent or other party would likely be ordered to perform an assessment, response, or remediation activity pursuant to CERCLA § 106, the Resource Conservation and Recovery Act (RCRA), § 3013, § 7003, § 3008(h), the Clean Water Act (CWA) § 311, and other federal law.

SEPs may be Performed at Brownfields Involuntarily Acquired by Municipalities

As stated above, if EPA would likely issue an order compelling a Party to cleanup a brownfield, such remedial action cannot be the subject of a SEP. Pursuant to the portion of the CERCLA Lender Liability Rule addressing involuntary acquisitions, 40 C.F.R. § 300.115, the Agency will not issue a remediation order to a municipality that has involuntarily acquired a brownfield even if the Agency would otherwise issue such an order to a private owner. Therefore, if

(1) a brownfield is acquired involuntarily by a local government,

(2) there are no other potential liable parties, and

(3) the known level of contamination would not compel the Agency to take action itself,

a SEP at this property would be appropriate.

SEPs May Be Limited at Brownfields that Received Federal Funds

A SEP cannot provide a municipality, state, or other entity that has received a federal Brownfields Assessment Demonstration Pilot or other federal brownfields grant with additional funds to perform a specific task identified within the assistance agreement. If a defendant/respondent proposes a SEP whereby the party provides money to a local government to assess or cleanup a brownfield, the municipality must not have received a federal grant to carry out the same work. Similarly, a defendant/respondent cannot on its own undertake assessment or other response work at a brownfield when a grant recipient has received federal funds to undertake the same project. A SEP could, however, include additional cleanup activities at a site so long as those activities are not the same as those performed with federal brownfield funding. For example, at a site which a federal Brownfields Targeted Site Assessment is performed, a SEP that cleans up the same site would be an appropriate project (provided that a CERCLA 104(a) removal action is not warranted).

Selecting an Appropriate SEP Activity for a Brownfield Site

The SEP Policy identifies two categories of SEPs that are appropriate for brownfields.

Environmental Quality Assessment Projects

In general terms, environmental quality assessments involve investigating or monitoring the environmental media at a property. To be eligible as SEPs, such activities must be conducted in accordance with recognized protocols, if applicable, for the type of work to be undertaken.

Assessment projects may not, as indicated, include work that the federal government would undertake itself or issue an order to accomplish. Therefore if a SEP involves an assessment of site conditions at a brownfield, the site must not be one where EPA is planning or conducting assessment activities. Both CERCLIS and EPA's Pre-CERCLIS Screening Guidance are useful to determine whether a federal assessment is warranted or planned.

Environmental Restoration Projects

For sites at which contamination does exist, but where an EPA response action or order to a party is not warranted, a SEP may involve removing or remediating contaminated media or material. Restoration SEPs can involve restoring natural environments, such as ecosystems, or man-made environments, such as facilities and buildings. Creating conservation land, such as transforming a former landfill into wilderness land may be an appropriate SEP. The removal of substances that the federal government does not have clear authority to address, such as contained asbestos or lead paint, may also constitute an appropriate restoration project.

Community Input

No one can judge the value to a community of an assessment or cleanup project at a brownfield better than the community in which the site is located. Local communities are the most affected by environmental violations, and have the most to gain by SEPs that address their concerns. Therefore, in appropriate cases local communities should be afforded an opportunity to comment on and contribute to the design of proposed SEPs at brownfield sites. Accordingly, Regions are encouraged to promote public involvement in accordance with the Community Input procedures set forth within the SEP Policy.

Evaluation Checklist for SEPs at Brownfields

On the next page, two ex-

amples are provided to demonstrate typical proposals Regions may receive from parties that wish conduct SEPs at brownfields. One of the proposals would be approved and the other would not. A checklist of questions along with answers is provided to demonstrate the analysis Regions should apply when considering such requests.

For further information contact:
If you have any questions regarding this fact sheet, please contact the Office of Site Remediation Enforcement at (202) 564-5100. To access the SEP Policy on the internet, open page: http://epa.gov/compliance/resources/policies/cleanup/superfund/proj-brownf-mem.pdf

For further information about EPA's Brownfield Economic Development Initiative go to page http://www.epa.gov/brownfields

Hypothetical A:

The Company A owns and operates a manufacturing facility in downtown Cityville. The company uses solvents as part of its manufacturing process. During its operation, Company A discharges wastewater into the Running River. EPA alleges that on at least one occasion, the level of solvents in the wastewater exceeded the level specified in EPA's effluent standards under the Clean Water Act.

EPA filed a civil complaint seeking penalties for the CWA violation. Company A proposed doing a SEP to partly reduce the penalty. The project involves assessing the environmental conditions of a nearby abandoned lot. The lot is owned not by the Company, but by the Cityville government, which obtained title from the previous owner via tax foreclosure. To date, Cityville has been attempting to interest developers in the property but to no avail due to concerns regarding possible contamination from a prior industrial operation at the lot. To determine the extent of contamination, Cityville recently received a federal Brownfields Assessment Demonstration Pilot.

Hypothetical B:

Company B owns and operates a factory in downtown Springfield. EPA conducted an inspection of the factory's air emissions and determined that the Company has violated certain Clean Air Act (CAA) standards resulting in the release of air pollutants into the nearby neighborhood. EPA filed a civil complaint seeking penalties for the CAA violations. Company B proposed doing a SEP that involves the cleanup of debris at an abandoned parcel located several blocks away, downwind from Company B's factory. The lot is filled with used tires and abandoned trash, and is infested with vermin. The lot is the site of a former bakery which long ago went bankrupt. There is no history of any past industrial operation on-site.

CHECKLIST

• Does the project contribute to the revitalization of an abandoned, idled, or under-used industrial or commercial property where redevelopment has been complicated by real or perceived environmental contamination?

A. Yes. Conducting soil sampling will help revitalize the abandoned lot because it will resolve the questionable environmental condition of the property that has discouraged developers.

B. Yes. Cleaning up the used tires and trash and addressing the vermin problem at this former bakery site will make the property more attractive to developers.

• Does the project include actions that the defendant/respondent would otherwise likely be required to perform under federal, state, or local law or regulation? Is there a court or administrative order or existing settlement agreement that would obligate the defendant/respondent to undertake the proposed project?

A. No. Company A does not own the property, and there is no reason to suspect that Company A would be responsible for any contamination that may be discovered at the site.

B. No. Company B does not own the property, and there is no reason to suspect that the company would be required under federal, state, or local law to remove debris from the site.

• Is there an adequate nexus between the violation and the brownfield? Is the project within the same ecosystem or within a 50 mile radius of the facility where the violation occurred?

A. Yes. The site is located close to the Company's facility, and the proposed SEP addresses the same ecosystem and human population threatened by the Company's wastewater discharge.

B. Yes. The abandoned parcel is located downwind of Company B's factory. The proposed SEP addresses the same ecosystem and human population threatened by the illegal air emissions.

• Does the SEP address environmental conditions that the federal government is statutorily obligated to either address itself or order another to address? Is the site on CERCLA's National Priorities List? Is the Agency likely to conduct a removal under CERCLA, or might the Agency order any party to perform remediation activity pursuant to CERCLA, RCRA, or the CWA?

A. No. There is no indication that EPA has documented any contamination at the site or would investigate the abandoned lot. Therefore, there is no reason to believe that the Agency would consider conducting an investigation or removal action or compel any party to undertake such activities.

B. No. There is no indication that the federal government has a statutory obligation to remove debris from the abandoned parcel. The site is not on the National Priorities List, and there is no reason to believe that the types of debris at issue would warrant the Agency to conduct a removal action or compel any party to undertake any response activity.

• Does the SEP provide a municipality, state, or other entity that has received a federal brownfields grant additional funds to perform a specific task identified within the assistance agreement? Does the defendant/respondent seek to undertake work at a site where a federal grant recipient has received an award to undertake the same work?

A. Yes. Cityville has received funding through a federal Brownfields Assessment Demonstration Pilot.

B. No. There is no indication that Springfield or any entity has received a federal grant to clean up the property.

• Does the SEP involve an Environmental Quality Assessment Project or an Environmental Restoration Project?

A. Yes. The soil sampling project can be categorized as an Environmental Quality Assessment Project.

B. Yes. Removal of the debris can be categorized as an Environmental Restoration Project.

Brownfields and RCRA Fact Sheet

United States Environmental Protection Agency
Office of Site Remediation Enforcement
EPA 330/F/99/001
November 1999

Background

In February 1995, EPA announced its Brownfields Action Agenda, launching the first federal effort of its kind designed to empower states, tribes, communities, and other parties to safely cleanup, and return brownfields to productive use. Building on the original agenda, in 1997 EPA initiated the Brownfields National Partnership Agenda, involving nearly 20 other federal agencies in brownfields cleanup and reuse. Since the 1995 announcement, EPA has funded brownfield pilot projects, reduced barriers to cleanup and redevelopment by clarifying environmental liability issues, developed partnerships with interested stakeholders, and stressed the importance of environmental workforce training.

To date, EPA has focused primarily on brownfield issues associated with the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund). Representatives from cities and industries, as well as other stakeholders however, have begun emphasizing the importance of looking beyond CERCLA and addressing environmental issues at brownfield sites in a more comprehensive manner, including issues related to the Resource Conservation and Recovery Act (RCRA). This fact sheet provides a brief overview of RCRA and its potential requirements for parties dealing with

> Brownfields are abandoned, idled, or underused industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination.

brownfields and their associated assessment and cleanup activities.

RCRA

The Resource Conservation and Recovery Act, an amendment to the Solid Waste Disposal Act, was enacted in 1976 to address a problem of enormous magnitude--the huge volumes of municipal and industrial solid waste generated nationwide. Generally, the RCRA program focuses on prevention rather than cleanup.

RCRA allows the state to assume responsibility for implementing a hazardous waste regulatory program, with oversight from the federal government. In order for a state to implement such a program under RCRA, it must receive authorization from EPA. To obtain authorization the state program must be at least equivalent to and consistent with the federal rules, and must provide for adequate enforcement. In states that have received authorization, known as "authorized states," the state's authorized hazardous waste program applies in lieu of the

Table 1

RCRA's Three Interrelated Programs

Subtitle D	Subtitle C	Subtitle I
Solid Waste Program Focuses on state and local governments as the primary planning, regulation, and implementing entities for the management of nonhazardous solid waste, such as household garbage and nonhazardous industrial solid waste.	Hazardous Waste Program Establishes a system for controlling hazardous waste from the time it is generated until its ultimate disposal - in effect, from cradle to grave.	Underground Storage Tank Program Regulates underground tanks storing hazardous substances and petroleum products. Major objectives are to prevent and clean up releases from these tanks.

federal program, although EPA retains its enforcement authorities.

RCRA establishes three distinct yet interrelated programs. The solid waste program, under RCRA Subtitle D, encourages states to develop comprehensive plans to manage nonhazardous industrial solid waste and municipal solid waste, sets criteria for municipal solid waste landfills and other solid waste disposal facilities, and prohibits the open dumping of solid waste. The underground storage tank (UST) program, under RCRA Subtitle I regulates underground tanks storing hazardous substances (but not hazardous waste) and petroleum products. Subtitle C of RCRA provides for the comprehensive regulation of hazardous waste. When fully implemented, this program provides "cradle-to-grave" regulation of hazardous waste by establishing a system for controlling and tracking the waste from its generation through its ultimate disposal.

The hazardous waste requirements under RCRA Subtitle C are the focus of this fact sheet because brownfield activities may, in certain instances, involve the management of hazardous waste.

RCRA's Cradle-to-Grave Hazardous Waste Management System

Under RCRA Subtitle C, EPA has developed a comprehensive program to ensure that hazardous waste is managed safely from the moment it is generated; while it is transported, treated, or stored; including final disposal (see Figure 1). Therefore, Subtitle C requirements apply to three

Figure 1

classes of hazardous waste handlers: generators; transporters; and treatment, storage or disposal facilities.

Generators
Subtitle C regulations broadly define the term generator to include any person who:

- First creates or produces a hazardous waste (e.g., from an industrial process)

  OR

- First brings a hazardous waste into the RCRA Subtitle C system (e.g., imports a hazardous waste into the US).

Hazardous waste (HW) generators may include various types of facilities and businesses ranging from large manufacturing operations, universities, and hospitals to small businesses and laboratories. Because these different types of facilities generate different volumes of wastes resulting in varying degrees of environmental risk, RCRA regulates generators based on the amount of waste they generate in a calendar month. There are three categories of hazardous waste generators (see Table 2).

Transporters
A hazardous waste transporter is any person engaged in the off-site transportation of hazardous waste within the United States, if such transportation requires a manifest (generated by a small quantity generator or large quantity generator). Off-site transportation includes shipments from a hazardous waste generator's facility to another facility for treatment, storage, or disposal. Regulated off-site transportation includes shipments of hazardous waste by air, rail, highway, or water.

Treatment, Storage, and Disposal Facilities (TSDFs)
The requirements for treatment, storage, and disposal facilities (TSDFs) are more extensive than the standards for generators and transporters. They include general facility operating standards, as well as standards for the various types of units in which hazardous waste is managed. With some excep-

tions, a TSDF is a facility engaged in one or more of the following activities:

- Treatment - Any method, technique, or process designed to physically, chemically, or biologically change the nature of a hazardous waste
- Storage - Holding hazardous waste for a temporary period (greater than 90 days), after which that hazardous waste is treated, disposed of, or stored elsewhere
- Disposal - The discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid or hazardous waste on or in the land or water.

Identifying Hazardous Waste

Determining whether a material must be managed in accordance with subtitle C regulatory requirements involves three steps. The **first step** in the hazardous waste identification process is determining if a waste is a solid waste. With some exceptions, the regulations define solid waste as any material that is discarded, regardless of its physical state (i.e., solid, liquid, semi-solid, or contained gas). For more information on the exceptions see 40 CFR Part 261.4. Once a waste is classified as a solid waste, the **second step** is to determine whether the waste is hazardous as defined by the Subtitle C hazardous waste regulation.

According to EPA definitions, a material can be hazardous if it falls into one of the following categories:

- It exhibits a "characteristic" of hazardous waste (see 40 CFR Part 261, Subpart D).
- The Agency has specifically designated (or "listed") the material as hazardous (see 40 CFR Part 261, Subpart D).

Characteristic wastes are hazardous because their inherent properties exhibit one or more of the following: ignitability (some paints and cleaning agents are examples), corrosivity (such as waste sulfuric acid from car batteries), reactivity (e.g., discarded explosives), or toxicity (e.g., lead or arsenic). Regulations in Part 261 define

these properties.

Listed wastes are wastes from particular industrial processes, wastes from certain industry sectors, and certain unused chemical formulations when discarded or intended for discard.

The **third step** for determining whether RCRA Subtitle C requirements apply is what one does with the material: that is, how is the character-istic or listed material being handled.

RCRA as it Relates to Brownfields

Brownfields may come under RCRA jurisdiction in two ways. First, RCRA cleanup requirements apply at brownfields that are RCRA treatment, storage or disposal facilities (TSDF). All treatment storage or disposal facilities are required to obtain a RCRA permit. Unless the site becomes subject to

Table 2

Generator Categories

Large Quantity Generators

Large quantity generators (LQGs) - defined as those facilities that generate:

- 1,000 kg of hazardous waste per calendar month or greater

OR

- Greater than 1 kg of acutely hazardous waste per calendar month

+ A LQG may accumulate hazardous waste on site for 90 days or less without a RCRA permit

Small Quantity Generators

Small quantity generators (SQGs) - defined as those facilities that:

- Generate between 100 kg and 1,000 kg of hazardous waste per month

OR

- Accumulate less than 6,000 kg of hazardous waste at any time

+ A SQG may accumulate hazardous waste on site for 180 days or less

Conditionally Exempt Small Quantity Generators

Conditionally exempt small quantity generators (CESQGs) - defined as those facilities that generate:

- Less than 100 kg of hazardous waste per month

OR

- Less than 1 kg of acutely hazardous waste per month

+ May not accumulate more than 1,000 kg at one time

RCRA solely as a result of conducting cleanup, these RCRA permits are required to address the cleanup of releases from any unit where solid or hazardous wastes have been placed at any time. Pursuant to 3008(h), EPA, may through an administrative or judicial order, also compel cleanup at facilities that have, or should have had interim status, as well as some facilities that had interim status. Many states have similar authority.

Second, cleanups at brownfields that were not previously RCRA facilities can trigger RCRA requirements. In the course of a cleanup, hazardous waste may be generated, treated, stored, or disposed of on site. If this occurs, the property may become subject to RCRA. Applicable RCRA regulations may include the requirement to obtain a permit if certain treatment, storage, or disposal occurs on site. However, if the waste is promptly removed from the site (within 90 days), the remediator could be regulated as a hazardous waste generator, and would not be required to obtain a permit.

Cleanup Responsibilities Under RCRA

The State or Federal agency implementing the RCRA program where a site is located has the authority to compel Corrective Action (CA) at a treatment, storage, or disposal facility (TSDF). Generator-only sites are not subject to RCRA corrective action requirements. However, in certain circumstances, under RCRA §7003, where a condition at a site may present an imminent and substantial endangerment to human health and/or the environment, EPA has the authority to compel present and past owners and operators as well as generators to clean up a site.

HWIR-Media Rule and Brownfields

The recently promulgated Hazardous Remediation Waste Management Requirements (HWIR-Media) Final

Rule makes a number of changes that should address some concerns regarding the application of RCRA to brownfield sites. HWIR-Media encourages cleanup activities, particularly at sites that may not otherwise be subject to CA, such as brownfields, making requirements under RCRA for facilities handling only hazardous remediation wastes more flexible (i.e., those wastes managed as a result of cleaning-up a site). Among other things, the rule provides incentives for brownfield cleanup by no longer mandating facility-wide corrective action at cleanup only sites; reducing permitting requirements to streamline the administrative process; and by creating a new kind of unit called a "staging pile" that allows more flexibility in temporarily storing remediation waste during cleanup activities.

RCRA Brownfields Prevention

In June of 1998, EPA announced its RCRA Brownfields Prevention Initiative which included forming a national workgroup to identify ways, in appropriate situations, to facilitate the cleanup and reuse of previously used property which may have RCRA implications. EPA also plans to select a few regionally sponsored pilots in 2000 to help our goal of protective, expeditious cleanups that allow future reuse of the property.

While the RCRA Brownfields Prevention Initiative will not address large scale regulatory or legislative reform, it will build on the statutory and regulatory flexibility that currently exists. The goals for EPA's RCRA Brownfields Prevention Initiative are

1. To raise awareness by announcing and publicizing our intentions in undertaking this initiative to lenders, developers, community representatives and other stakeholders in brownfields cleanup and reuse.
2. To work with our partners on brownfields reuse to gather information, identify and address RCRA barriers, and develop solutions.

3. To develop tools such as fact sheets and pilot good ideas generated from dialogue with interested stakeholders.

Questions and Answers

Q: What is a RCRA Brownfield?

A: Brownfields are abandoned or underutilized industrial and commercial properties whose potential for redevelopment is complicated by real or perceived environmental contamination irrespective of whether the property is subject to Superfund, RCRA or another statute. RCRA brownfields are simply brownfields that may be or have been subject to RCRA requirements or may have RCRA statutory or regulatory implications.

Q: Does EPA have an established program for RCRA Brownfields?

A: In June of 1998, EPA announced its RCRA Brownfields Prevention Initiative which included forming a national workgroup to identify ways, in appropriate situations, to facilitate the cleanup and reuse of previously used property which may have been subject to RCRA requirements.

Q: How do I find out if a piece of property is regulated under RCRA?

A: You can find out whether a property is currently regulated under RCRA by contacting the state where the property is located or by calling the RCRA hotline at 800/424-9346.

Q: What is the difference between Superfund/CERCLA and RCRA?

A: In operation, RCRA primarily regulates active facilities and is focused on how wastes should be managed to avoid potential threats to human health and the environment although it does have a cleanup (i.e., corrective action) component. CERCLA, on the other hand,

comes into play primarily when a site has been abandoned or mismanagement has occurred (i.e., when there has been a release or a substantial threat of a release in the environment of a hazardous substance or of a pollutant or contaminant that presents an imminent and substantial threat to human health or the environment).

Q: How is a site or facility defined under RCRA?

A: For purposes of corrective action, RCRA defines a facility as all contiguous property under the control of the owner or operator seeking a permit under Subtitle C or subject to an order under § 3008(h) of RCRA.

Q: What activities may subject a person to RCRA corrective action (CA)?

A: Generally, treatment, storage or disposal of waste listed or identified as hazardous under Subtitle C subjects a facility to the corrective action requirements (unless it is a cleanup only site.)

Q: If I clean up my site under CERCLA, do I still have worry about RCRA requirements?

A: A cleanup under CERCLA should be adequate to meet the RCRA cleanup, or corrective action requirements. However, a CERCLA cleanup does not exempt you from RCRA regulations. Site-specific factors need to be evaluated by the implementing agency on a case-by-case basis; consult your State, EPA Regional office or the RCRA hotline.

Q: As a RCRA facility, are there any brownfield incentives that I can take advantage of?

A: At the federal level, EPA is exploring administrative options, within the existing statutory framework, to provide incentives. EPA plans to select a few regionally sponsored pilots in 2000 to help our goal of protective,

expeditious cleanups that allow future reuse of the property. Check with your respective state and/or local governments for incentives offered independently of the federal government.

Q: Will sampling trigger RCRA?

A: No, sampling should not generally trigger RCRA regulations.

Q: Who is responsible for cleanup at a RCRA site?

A: Unlike Superfund, under RCRA generally the current owner/operator of a facility is responsible for cleanup. However, under RCRA §7003 the implementing Agency has the authority to compel past owners and operators as well as generators to clean up a site in certain circumstances.

Q: How do I get more information?

A: Visit EPA's web site at: www.epa.gov/oswer or Call our RCRA hotline: 800/424-9346 or 703/412-9810

For more information on a specific site in your area you should contact your state because RCRA is primarily implemented by the states.

For further information contact:
Tessa Hendrickson - (202) 564-6052
Office of Site Remediation and Enforcement

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Fact Sheet

The Imminent and Substantial Endangerment Provision of Section 7003 of RCRA

United States Environmental Protection Agency
Office of Site Remediation Enforcement
Quick Reference Fact Sheet

Section 7003 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. Section 6973, provides EPA with a broad and effective enforcement tool that can be used to abate imminent and substantial endangerments to health or the environment. Designed for use by EPA staff, this fact sheet helps clarity the meaning of "imminent and substantial endangerment" and describes the usefulness of Section 7003.

Introduction

RCRA Section 7003 allows EPA to address situations where the handling, storage, treatment, transportation, or disposal of any solid or hazardous waste may present an imminent and substantial endangerment to health or the judicial action or issue an administrative order to any person who has conducted or is contributing to such handling, storage, treatment, transportation, or disposal to require the person to refrain from those activities or to take any necessary action.

Section 7003(a) is very similar to the imminent and substantial endangerment provision contained in CERCLA Section 106(a) of the Compensation, Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. Section 9606(a). In addition, it allows EPA to require some actions that can also be required under the corrective action provision set forth in Section 3008(h) of RCRA, 42 U.S.C. Section 6928(h). However, RCRA Section 7003 provides EPA with a very valuable enforcement tool by allowing EPA to address several types of situations that are beyond the scope of CERCLA Section 106(a) and RCRA Section

3008(h).

The Meaning of "Imminent and Substantial Endangerment"

Despite the dramatic sound of the term "imminent and substantial endangerment," it is not very difficult to meet the endangerment standard set forth in RCRA Section 7003. The "imminent and substantial endangerment" language and standard contained in CERCLA Section 106(a) and RCRA are very similar to the language and in Section 106(a) and RCRA Section 7002, 42 U.S.C. Section 6972, the RCRA citizen suit provided provisions which allows any person to commence a civil action to seek abatement of an imminent and substantial endangerment to heal or the environment. Thus far, the courts have not distinguished between the endangerment standards of these three provisions. The following principles have emerged from courts interpreting RCRA and CERCLA's imminent and substantial endangerment provisions:

- An "endangerment" is an actual, threatened, or potential harm to health or the environment.[l] As underscored by Congress use of the words "may present" in the endangerment standard of § 7003, neither certainty nor proof of actual harm is required.[2] Moreover, neither a release nor threatened release is required.[3] Endangerment to the environment does not require a risk to living organisms. Thus, a risk to groundwater in a populated area is sufficient even if the conditions may no present an endangerment to humans or other life forms.[4]
- An endangerment can be "imminent" if the present conditions indicate that there may be a future risk to health or the environment,[5] even though the harm may not be realized for years.[6] It is not necessary for the harm to be immediate.[7]
- An endangerment can be "substantial" if there is reasonable cause for concern that health or the environment may be at risk.[8] It is not necessary that the risk be quantified.[9]

Factors to consider when determining if conditions may present an imminent and substantial endangerment under RCRA Section 7003

include (1) the levels of contaminants in various media, (2) the existence of a connection between the solid or hazardous waste and air, soil, groundwater, or surface water, (3) the pathway of exposure from the solid or hazardous waste to the population at risk, (4) the sensitivity of the population, (5) bioaccumulation in living organisms, and (6) visual signs of stress on vegetation.[10] It is important to note, however, that in any given case, one or two factors may be so predominant as to be determinative of the issue.[11]

The following are some examples of situations where courts have determined that imminent and substantial endangerments have existed under RCRA:

- At a shooting range where lead from lead shot had accumulated in the tissues of nearby waterfowl and shellfish.[12]
- At a facility where oily waste containing hazardous constituents had leaked from tanks into surrounding soils.[13] EPA had determined that there was a potential for off-site migration of the contaminants through a drainage ditch leading toward a nearby river.[14] EPA also documented the death of several migratory birds and introduced evidence from the U.S. Fish and Wildlife Service indicating that there was a continuing threat to migratory birds.[15]
- At a municipal landfill that had leaked at least 10% of its leachate containing low levels of lead into an adjacent wetland.[16] Lead levels in test wells surrounding the landfill were generally below the maximum contaminant levels (MCLs) for drinking water,[17] and no actual harm was shown to the wetland.[18] However, an expert testified that cattails in the wetland would not show actual harm until they had been exposed to contamination for an extended period of time.[19]
- At a shopping center where dry cleaning solvents discharged from dry cleaning facilities had contaminated groundwater in a populated area.[20] Contaminant levels in the migrating plume exceeded MCLs.[21] Although some area wells had been closed at least in part because of the contaminated plume, the court found that the conditions may have presented an imminent and substantial endangerment to the environment, but not

necessarily to human health.[22]

The Usefulness of Section 7003

Section 7003 provides broad enforcement authority that can be used against a variety of parties to address endangerments resulting from various types of materials and to require a wide variety of abatement actions. Section 7003 is especially valuable because it allows EPA to address certain situations which cannot be addressed under either CERCLA Section 106(a) or RCRA Section 3008(h).

Two examples of the general usefulness of Section 7003 are the following:

- Under § 7003, "any person" includes any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility. EPA can therefore initiate actions under Section 7003 against parties including those falling into any of the four categories of potentially responsible parties (PRPs) under CERCLA.
- Section 7003 allows EPA to require the respondent or defendant to cease any activities contributing to the endangerment and/or take any necessary action. Possible abatement actions include investigations and studies, interim measures, comprehensive corrective action, controls on future operations, and discontinuance of operations.

Under CERCLA Section 106(a), EPA may initiate a judicial action or issue an administrative order to a PRP when there may be an imminent and substantial endangerment because of an actual or threatened release of a "hazardous substance". Advantages of RCRA Section 7003 over CERCLASection 106(a) include the following:

- Section 7003 can be used to issue administrative orders to any federal department or agency in an expeditious manner. Section 6001(a) of RCRA, 42 U.S.C. Section 6961 (a), contains an express waiver of sovereign immunity that allows administrative orders and civil and administrative penalties and fines to be issued and assessed against any federal department or agency.

Section 6001(b) of RCRA, 42 U.S.C. Section 6961(b), expressly grants the Administrator the authority to issue an administrative order to another federal department or agency pursuant to RCRA's enforcement authorities, including Section 7003. Although RCRA Section 6001provides that an administrative order issued to federal department or agency does not become final until the department or agency has had the opportunity to confer with the Administrator, concurrence from the Department of Justice (DOJ) is not required for orders issued under RCRA Section 7003. In contrast, Executive Order 12580 on Superfund Implementation (January 23,1987) requires EPA to obtain DOJ concurrence before issuing an order to federal department or agency under CERCLA Section 106(a). RCRA Section 7003 therefore allows for more expeditious issuance of orders to federal departments and agencies.

- Section 7003 can be used to address endangerments caused by waste which is "solid waste" as defined in Section 1004(27) of RCRA, 42 U.S.C. Section 6903(27), but which is not "hazardous waste" as defined in Section 1004(5) of RCRA, 42 U.S.C.Section 6903(5), or in the regulations promulgated pursuant to Section 3001 of RCRA 42 U.S.C.Section 6921. The definition of "hazardous substance" in Section 101(14) of CERCLA, 42 U.S.C.Section 9601(14), includes "hazardous waste" having characteristics identified under or listed pursuant to Section 3001 of RCRA. CERCLA's definition of "hazardous substance" does not include materials that qualify as "solid waste" under RCRA Section 1004(27), although it does encompass some materials, such as radionuclides, which are not "solid waste" and therefore cannot be addressed under RCRA Section 7003. Nevertheless, RCRA Section 7003 can be used to address a significant category of materials, "solid waste" under Section 1004(27), that cannot be addressed under CERCLA Section 106(a).
- Section 7003 can be used to address endangerments caused by "hazardous waste" that meets the broad definition of that term under Section 1004(5) of RCRA, but which does not meet the more narrow definitions of "hazardous waste" promulgated in 40 C.F.R. Part 261 pursuant to RCRA Section 3001. As noted above, CERCLA's definition of "hazardous substance" includes "hazardous waste" having characteristics identified under

or listed pursuant to RCRA Section 3001. The CERCLA definition of "hazardous substance" does not include all materials that qualify as "hazardous waste" as defined in RCRA Section 1004(5). Section 7003 can therefore be used to address some hazardous wastes that are beyond the scope of CERCLA Section 106(a).

- Section 7003 can be used to address endangerments caused by petroleum. Petroleum is excluded from the definition of "hazardous substance" in CERCLA Section 101(14). Petroleum is not excluded from the definitions of "solid waste" under RCRA Section 1004(27) or "hazardous waste" under RCRA Section 1004(5). RCRA Section 7003 can therefore be used to address a significant category of materials B petroleum and petroleum products B that cannot be addressed under CERCLA Section 106(a).

RCRA Section 3008(h) allows EPA to require corrective action to address the release of hazardous waste or hazardous constituents at any treatment, storage, or disposal facility authorized to operate under interim status pursuant to Section 3005(e) of RCRA, 42 U.S.C. Section 6925(e).

EPA interprets the term "authorized to operate" to include facilities currently operating under interim status, as well as those that lost interim status or should have obtained interim status but failed to do so. RCRA § 3008(h) does not require a finding of imminent and substantial endangerment. Nevertheless, advantages of RCRA Section 7003 over RCRA Section 3008(h) include the following:

- Section 7003 can be used to address endangerments caused by "solid waste" that meets the definition of that term under Section 1004(27) of RCRA, but which does not meet the definition of "hazardous waste" under RCRA Section 1004(5). At least one court has held that RCRA Section 3008(h) applies to the release of hazardous constituents listed by EPA in Appendix VII I of 40 C.F.R. Part 261 and not merely to the release of "hazardous waste" as stated in RCRA Section 3008(h).[23] Nevertheless, RCRA § 3008(h) does not appear to apply to the release of merely "solid waste" that is not a hazardous waste or a hazardous constituent. RCRA Section 7003 can therefore be used to address a significant

category of materials, "solid waste" under Section 1004(27), that cannot be addressed under RCRA Section 3008(h).

- Section 7003 can be used to address spills of solid or hazardous waste by generators at facilities that are not authorized (and not required to be authorized) for interim status under RCRA Section 3008(h). RCRA Section 3008(h) applies only to releases from treatment, storage, or disposal facilities that have, had, or should have had interim status. Section 7003 can therefore be used to address releases and other endangerments at a large category of facilities that are beyond the scope of Section 3008(h): facilities at which solid or hazardous waste is generated but which neither have, had, nor were required to have, interim status.

[1] See, e.g., Dague v. City of Burlington, 935 F.2d 1349,1356 (2d Cir. 1991).

[2] Id.

[3] United States v. Aceto Agricultural Chemicals Corp., 872 F.2d 1373, 1382 (8th Cir. 1989).

[4] See, e.g., Lincoln Properties. Ltd. v. Higgins, 23. Envtl. L. Rep. (Envtl. L. Inst.) 20665, 20671-672 (E.D. Cal. 1993)

[5] See, e.g., Dague, 935 F.2d at 1356.

[6] See, e.g., United States v. Conservation Chemical Co., 619 F. Supp. at 194 (W.D. Mo. 1985).

[7] Dague, 935 F.2d at 1356.

[8] See, e.g., Conservation Chemical Co., 619 F. Supp. at 194.

[9] Id.

[10] See, e.g., Dague v. City of Burlington, 732 F. Supp. 458 (D.Vt. 1989).

[11] Conservation chemical Co., 619 F. Supp. at 194.

[12] Connecticut Coastal Fishermen's Association v. Remington Arms Co., Inc., 989 F.2d 1305, 1317 (2d Cir. 1993).

[13] United States v. Valentine, 856 F. Supp. 621, 625 (D. Wyo. 1994).

[14] Id. at 624.

[15] Id. at 624-625.

[16] Dague, 935 F.2d at 1356.

[17] Dague, 732 F. Supp. at 463.

[18] Id. at 469.

[19] Id. at 468.

[20] Lincoln Properties, 23 Envtl. L. Rep. at 20671-672.

[21] Id. at 20671.

[22] Id. at 20672.

[23] United States v. Clow Water Systems, 701 F. Supp. 1345, 1356 (S.D. Ohio 1988).

For further information contact:
The Office of Site Remediation Enforcement, in conjunction with the Office of Regulatory Enforcement, is currently developing a guidance document to supersede EPA's 1984 guidance on the use and issuance of administrative orders under RCRA Section 7003. The 1984 guidance will remain in effect until the new guidance is issued.

If you have questions about this fact sheet or the project to develop new § 7003 guidance, please contact EPA's Office of Site Remediation Enforcement at (202) 564-5100.

RCRA CLEANUP REFORMS

Faster, Focused, More Flexible Cleanups

United States Environmental Protection Agency
Solid Waste and Emergency Response (5305W)
EPA530-F-99-018
Office of Solid Waste
July 1999

The U.S. Environmental Protection Agency (EPA) is implementing a set of administrative reforms, known as the RCRA Cleanup Reforms, to the Resource Conservation and Recovery Act (RCRA) Corrective Action program. The reforms are designed to achieve faster, more efficient cleanups at RCRA sites that treat, store, or dispose of hazardous waste and have potential environmental contamination. Although these reforms will emphasize flexibility and trying new approaches to clean up these facilities, EPA and the states will continue to ensure protection of human health and the environment.

Why Is EPA Doing the RCRA Cleanup Reforms?

When the RCRA law and regulations governing proper hazardous waste management went into effect around 1980, thousands of facilities became newly subject to these federal regulations. This RCRA regulatory structure has helped ensure that hazardous waste generated from ongoing industrial operations is properly managed and does not contribute to a future generation of toxic waste sites. However, many of these facilities had existing soil and groundwater contamination resulting from historical waste

National Cleanup Goals (Number of Facilities with Cleanup Measures Verified per Year)

Year	Current Human Exposures Controlled	Groundwater Contamination Controlled
1999	172	84
172	172	172
2001	172	172
2002	172	172
2003	257	172
2004	257	172
2005	*255*	172
Total By 2005	1629* (95%)	1200* (70%)

*Includes facilities verified prior to 1999

management practices. The RCRA Corrective Action program addresses cleanup of existing contamination at these operating industrial facilities.

Congress, the general public, EPA, and state agencies all believe the pace and progress of RCRA cleanups must be increased. In reviewing the program, EPA and other stakeholders identified several factors that were impeding timely and cost-effective RCRA cleanups. In some instances, RCRA cleanups have suffered from an emphasis on process steps and a lack of clarity in cleanup objectives. An additional complication is that the application of certain RCRA requirements, such as the land disposal restrictions (LDR), minimum technological requirements, and permitting, can create impediments to cleanup.

What Are the RCRA Cleanup Reforms?

The RCRA Cleanup Reforms are EPA's comprehensive effort to address the key impediments to cleanups, maximize program flexibility, and spur progress toward a set of ambitious national cleanup goals. The national cleanup goals focus on 1,712 RCRA facilities identified by EPA and the states warranting attention over the next several years because of the potential for unacceptable exposure to pollutants and/or for groundwater contamination. The goals, set by EPA under the Government Performance and Results Act (GPRA), are that by 2005, the states and EPA will verify and document that 95 percent of these 1,712 RCRA facilities will have "current human exposures under control," and 70 percent of these facilities will have "migration of contaminated groundwater under control." To ensure that these ambitious goals are achieved, the RCRA Cleanup Reforms outline aggressive national cleanup goals for each of the next several years. Implementation of the proposed reforms will help us achieve the national RCRA cleanup goals. Specifically, the RCRA Cleanup Reforms will:

- Provide new results-oriented cleanup guidance with clear objectives.
- Foster maximum use of program flexibility and practical approaches through training, outreach, and new uses of enforcement tools.
- Enhance community involvement including greater public access to information on cleanup progress.

These reforms are described in more detail at the end of this fact sheet. The reform efforts are intended to build on actions taken by EPA and the states in recent years to accelerate cleanups, such as:

- The May 1, 1996, Advance Notice of Proposed Rulemaking (ANPR, 61 FR 19432) which contains the Agency's latest guidance for the corrective action program and identifies a number of flexible cleanup approaches.
- Recent promulgation of the the Hazardous Remediation Waste Management Requirements ("HWIR-Media," 63 FR 65874, November 30, 1998) which, among other things, create streamlined RCRA permits for cleanup wastes, release "cleanup only" facilities from requirement to conduct facility-wide corrective action, and allow for temporary "staging piles" that have flexible design and operating requirements.
- Recent promulgation of the Post-Closure Regulation (63 FR 56710, October 22, 1998) which provides flexibility to EPA and authorized states by removing the requirement that interim status facilities obtain a permit for the post-closure care of a waste management unit when other enforcement documents are used, and harmonizing the sometimes duplicative closure and corrective action requirements.
- The Land Disposal Restrictions Standards for Contaminated Soils (63 FR 28617, May 26, 1998) which better tailor RCRA's LDRs to contaminated soils managed during cleanups.

How Will the Success of the Reforms Be Measured?

While the ultimate goal of RCRA Corrective Action is to achieve completed cleanups, we will measure the near-term success of the program and reforms against the GPRA goals and annual cleanup targets for verifying that current human exposures are under control and migration of contaminated groundwater

is under control (see table on preceding page). Measuring and recording our progress toward these goals will be a top priority for EPA and the states over the next several years.

How Will EPA Involve Stakeholders In the Reforms?

We will provide periodic updates on the RCRA Cleanup Reforms and solicit input from stakeholders through several means including focus meetings, *Federal Register* notices, the new RCRA Corrective Action newsletter, Internet postings, and press releases. EPA seeks continuous feedback from all stakeholders on the need for additional reforms beyond those already underway. While the Agency values and appreciates the feedback and interest of all stakeholders, limited resources will not allow us to respond individually to those who provide input on the RCRA Cleanup Reforms. All input will be seriously considered by EPA, however. Based on stakeholder input and our ongoing assessment of the program, we will continue to refine the RCRA Cleanup Reforms, add reforms as needed, and communicate program changes including those resulting from stakeholder input.

For further information contact:
the RCRA Hotline at 800-424-9346. You may also e-mail your questions via our Web site at http://www.epa.gov/epaoswer/hotline/index.htm.
If you would like to provide written feedback on the Reforms, please mail them to the RCRA Information Center (5305W), USEPA, 401 M St., SW, Washington, DC 20460 or, e-mail to rcra-docket@epa.gov. Please include the following number on all correspondence, written or e-mailed, to the RCRA Information Center: F-1999-CURA-FFFFF.

The RCRA Corrective Action program is run jointly by EPA and the states, with 33 states and territories authorized to implement the program. Corrective action is conducted under RCRA permits, orders and other approaches.

RCRA Cleanup Reforms

EPA is Implementing the following reforms to help streamline RCRA cleanups and meet the national cleanup goals

I. Provide new results-oriented cleanup guidance with clear objectives

EPA will issue a *Federal Register* notice concerning the operating guidance for the corrective action program. EPA also will issue several guidance documents to emphasize use of flexibility in the corrective action process, consistent measures for determining when a site has met corrective action goals, and to provide a more consistent basis for groundwater use decisions.

a. Notice Concerning 1990 Subparr S Proposal

In an upcoming *Federal Register* notice, EPA plans to announce its intention not to take final action on most of the provisions of the July 27, 1990, proposed Subpart S rule. Provisions of Subpart S which have been finalized (e.g., Corrective Action Management Units) will remain in effect. This notice is intended to eliminate uncertainty for states and owner/operators created by the potential promulgation of detailed federal regulations, thereby clearing the way for implementation of more flexible corrective action approaches. In the notice, EPA plans to clarify that the Agency does not intend to finalize a process-oriented corrective action approach, and to confirm that the 1996 Advanced Notice of Proposed Rulemaking remains the primary corrective action program guidance.

b. Corrective Action Guidance

1. Environmental Indicators Guidance and Implementation

The two corrective action Environmental Indicators-*Current Human Exposures under Control* and *Migration of Contaminated Groundwater under Control*-are measures of program progress and are being used to meet the goals set under the Government Performance and Results Act. This guidance, issued in February 1999, describes how to determine if these measures have been met.

These Environmental Indicators are designed to aid site decision makers by clearly showing where risk reduction is necessary, thereby helping regulators and

facility owner/operators reach agreement earlier on stabilization measures or cleanup remedies that must be implemented. Focusing on the Environmental Indicators should also help reduce delays in the review of cleanup work plans and allow owner/operators and regulators to concentrate on those problems that potentially pose significant risks.

2. Results-Based Approaches for RCRA Corrective Action

   This guidance will stress that results-based approaches which emphasize outcomes and eliminate unnecessary process steps, should be a significant part of state/regional corrective action programs in order to meet the GPRA goals and to move facilities toward the longer-term goal of final facility cleanup. Results-based approaches include setting cleanup goals, providing procedural flexibility in how goals are met, inviting innovative technical approaches, focusing data collection, and letting owner/operators undertake cleanup action with reduced Agency oversight, where appropriate. Under such approaches, owner/operators focus on environmental results and the most technologically efficient means of achieving them while still being held fully accountable.

3. Corrective Action Completion Guidance

   This guidance will discuss how to document completion of corrective action at facilities. It will address: termination of permits and interim status where corrective action is complete; how to determine that corrective action is complete at part of a facility; and the importance of public involvement in corrective action. This guidance will provide for a more predictable completion process and provide facility owner/operators with reasonable assurance that regulatory activities can be completed at their facility.

4. The Role of Groundwater Use in RCRA Corrective Action

   This guidance is intended to provide more certainty about cleanup objectives and expectations with respect to groundwater remediarion. It will include recommendations on how to account for current and reasonably expected uses of groundwater when imple-menting interim and final RCRA corrective action remedies.

II. Foster Maximum Use of Program Flexibility and Practical Approaches throughTraining, Outreach, And New Uses of Enforcement Tools

Through outreach and training, EPA will encourage maximum appropriate use of the existing flexibility in the corrective action program and prompt implementation of recent rules offering regulatory flexibility.

a. Prompt Implementation of the HWIR-Media and Post-Closure Rules

EPA will strongly encourage states to expeditiously incorporate the Hazardous Remediation Waste Management Requirements (HWIR-Media) and Post-Closure regulations into their programs. As more states adopt and implement the flexibility in the HWIR Media rule, Post Closure rule, and the alternative soil treatment standards promulgated under LDR Phase IV, impediments to cleanup will be reduced. This is because these rules limit the applicability in certain cleanup situations of some RCRA requirements such as land disposal restrictions, minimum technological requirements, and permitting, or provide alternative requirements more tailored to cleanup situations.

b. Maximize Practical Approaches and Use All Appropriate Authorities to Expedite Cleanup

The national EPA program office will reach out to the EPA regions, states, and external stakeholders to emphasize the importance of environmental results in the corrective action program. EPA will place a priority on authorizing additional states to implement corrective action or enhancing work sharing arrangements with states that are not authorized for the program. With the RCRA Cleanup Reforms we hope to develop a new atmosphere of partnership and cooperation among regulatory authorities, industry, and stakeholders

We will encourage regulators to use a broad spectrum of approaches to expedite corrective action and achieve GPRA goals. These approaches include new uses of enforcement tools to create incentives for cleanup at facilities with cooperative owners as well as to compel cleanups at facilities where collaborative approaches have not yielded results.

c. Provide Comprehensive Training on Successful Cleanup Approaches

EPA has launched a comprehensive training effort on Results-Based Corrective Action, which features a three-day workshop offered to EPA Regions and states in 1999 and 2000. An Internet version of this training is also being developed for release. The training will emphasize to corrective action regulators the flexibility in existing policies and regulations. EPA and State regulators will learn from their peers about innovative, successful approaches that are speeding cleanups now at corrective action sites. The training emphasizes using a Conceptual Site Model and Environmental Indicators to help focus corrective action activity at sites. This comprehensive training effort will help EPA and State regulators make maximum use of the flexibility inherent in the corrective action program and to adopt more streamlined approaches for accelerating cleanups.

III. **Enhance Community Involvement Including, Greater Public Access to Information on Cleanup Progress**

a. Emphasize Public Involvement in RCRA Cleanups

Some of the clear benefits of meaningful public involvement include: letting the public know from the onset that their opinions are valued and can influence decision making; learning from the public about past environmental problems associated with the facility; gaining an understanding of current as well as future land use plans; and avoiding delays which can arise late in the remedy selection process when the public has not been adequately engaged.

EPA will continue to emphasize the importance of meaningful public involvement throughout RCRA cleanups. EPA's commitment to meaningful public involvement was described in the 1996 Advance Notice of Proposed Rulemaking and is part of the central theme of effective communication that is interwoven throughout the corrective action training effort. In addition, public involvement is the focus of the RCRA Public Participation Training which is now under development and will be offered to regions and states. EPA will also convene workshops with stakeholders later this year. Through these workshops we hope to better

understand the public's concerns as well as gather suggestions for further improvements to the corrective action program.

b. Provide Detailed Information on Cleanup Progress

EPA will post information on cleanup progress for individual facilities on the Internet. With this information, we hope to generate greater public interest and awareness in corrective action at individual facilities, thereby enhancing the ability of the community to become more involved in decisions about the cleanup. This information will allow stakeholders to monitor progress at facilities in their area as well as overall progress in the corrective action program. Information is available at: www.epa.gov/epaoswer/osw/cleanup.htm.

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Fact Sheet

RCRA CLEANUP REFORMS

Reforms II: Fostering Creative Solutions

United States Environmental Protection Agency
Solid Waste and Emergency Response (5305W)
EPA530-F-01-001
Office of Solid Waste
January 2001
www.epa.gov/osw

The U.S. Environmental Protection Agency (EPA) is implementing a second set of administrative reforms to accelerate the cleanup of hazardous waste facilities regulated under the Resource Conservation and Recovery Act (RCRA). EPA's 1999 Reforms promoted faster, focused, more flexible cleanups. The 2001 Reforms reinforce and build upon the 1999 Reforms and will pilot innovative approaches, accelerate changes in culture, connect communities to cleanup, and capitalize on redevelopment potential, while maintaining protection of human health and the environment.

Why Is EPA Reforming the RCRA Corrective Action Program?

The goals for the RCRA Corrective Action program remain very challenging. To more effectively meet these goals and speed up the pace of cleanups, EPA introduced RCRA Cleanup Reforms in 1999 and is implementing additional Reforms in 2001. The 1999 and 2001 Reforms build upon actions taken by EPA and the states in recent years to accelerate cleanups.

EPA believes that the 1999 Reforms remain central to successful implementation of the program. The 1999 Reforms were designed to:

- Focus the program more effectively on achievement of environmental results, rather than fulfillment of unnecessary steps in a bureaucratic process;
- Foster maximum use of program flexibility and practical approaches to achieve program goals;
- Enhance public access to cleanup information and improve opportunity for public involvement in the cleanup process.

The 1999 Reforms set the near-term focus of the program on attainment of the two Environmental Indicators and established an environment for program implementors to be innovative and results-oriented. The 1999 Reforms have successfully led the program toward *faster, focused, more flexible cleanups*. An example of progress since 1997 is the increase in the number of RCRA cleanup facilities meeting both Environmental Indicatorse, (from 47 to 504).

In 2000, EPA held a series of meetings with program implementors and stakeholders, including representatives from tribes, federal and state agencies, regulated industry, and environmental and community groups, to discuss program impediments, successful approaches and ideas for 2001 Cleanup Reforms. Central ideas that emerged include the importance of: (1) reinforcing and building upon the 1999 Reforms; (2) empowering program implementors to try new approaches at the site level; and (3) using frequent, informal communication throughout the cleanup process.

What Are the Goals of the RCRA Corrective Action Program?

EPA has established two near-term goals, termed "Environmental Indicators," for the RCRA Corrective Action program. These goals, developed under the Government Performance and Results Act (GPRA), are that by 2005, the states and EPA will verify and document that 95 percent of the 1,714 RCRA cleanup facilities under GPRA focus will have "current human exposures under control," and 70 percent of these facilities will have "migration of contaminated groundwater under control." The long-term goal of the program is to achieve final cleanup at all RCRA corrective action facilities.

What Are the RCRA Cleanup Reforms of 2001?

The RCRA Cleanup Reforms of 2001 highlight those activities that EPA believes would best accelerate program progress and foster creative solutions. The 2001 Reforms reflect the ideas EPA heard from program implementors and stakeholders and introduce new initiatives to reinforce and build upon the 1999 Reforms. Specifically, the 2001 Reforms will:

- Pilot innovative approaches;
- Accelerate changes in culture;
- Connect communities to cleanups;
- Capitalize on redevelopment potential.

The 2001 Reforms include just some of the innovative approaches that have been identified by program implementors and stakeholders. EPA intends to continue work in other areas critical to meeting program goals. In particular, we seek to: continue a dialogue with interested parties on groundwater cleanup and other issues relating to final cleanup; provide guidance tailored to cleanup at facilities with limited resources to pay for cleanup; and, continue to work with federally-owned facilities to help them meet their Environmental Indicator goals. Similarly, we encourage program implementors and stakeholders to use approaches that improve the program yet are not specifically included in the RCRA Cleanup Reforms.

I. Pilot innovative approaches.

The RCRA Cleanup Reforms Pilot Program will support state and EPA Regional Offices in their efforts to use innovative, results-orientated and protective approaches to speed achievement of Environmental Indicator goals and final cleanup. Stakeholders are encouraged to contact state and EPA Regional Offices with their pilot ideas. EPA has set a target of 25 pilot projects to be launched in 2001. EPA expects at least one pilot project in each EPA Region, administered by the state or EPA. EPA will showcase pilot projects to share

successes and lessons learned and to promote use of similar approaches at other facilities. EPA recommends that stakeholders consider pilot projects in one or more areas. Examples include pilots that:

- Achieve program goals most effectively at companies with multiple facilities;
- Improve stakeholder involvement and communication to resolve issues where cleanup progress is slow;
- Use site characterization technologies or strategies that efficiently assess Environmental Indicators;
- Enhance the use of protective and accountable state non-RCRA Cleanup programs to achieve program goals;
- Establish EPA Regional or state "corrective action expediters" to focus on cleanups that are stalled or delayed;
- Expedite achievement of program goals at federally-owned facilities;
- Use Superfund or emergency authorities at RCRA sites for bankrupt or unwilling facilities.

II. Accelerate changes in culture.

EPA will help program implementors and stakeholders accelerate changes in the culture in which they imple-

What is the RCRA Corrective Action Program?

In 1980, when the RCRA law and regulations went into effect, thousands of facilities became subject to hazardous waste management regulations. These regulations helped ensure that hazardous waste generated from ongoing industrial operations is properly managed and does not contribute to a future generation of toxic waste sites. However, many of these facilities had soil and groundwater contamination resulting from their waste management practices prior to 1980. The RCRA Corrective Action program addresses cleanup of past and present contamination at these operating industrial facilities.

Who Runs the RCRA Corrective Action Program?

The RCRA Corrective Action program is run by both EPA and the states, with 38 states and territories authorized to implement the program. Corrective action is conducted under RCRA permits, orders and other approaches.

ment the program by: focusing on results over process; encouraging frequent, informal communication among stakeholders; encouraging partnerships in training; promoting methods of information exchange; and, using new approaches to meet Environmental Indicator and long-term cleanup goals. EPA will:

- *Promote nationwide dialogue among program implementors and stakeholders on RCRA cleanups.* EPA Regional Offices will work with states in an effort to hold at least one meeting in 2001 in each EPA Region, open to all stakeholders who wish to interact, provide input, or learn more about the RCRA Corrective Action program. Discussion topics could cover local, regional or national topics relevant to corrective action.
- *Conduct targeted training in partnership with program implementors and stakeholders.* EPA will work with interested parties to deliver targeted training, depending upon the needs of those requesting the training and available resources. Training topics could cover, for example: innovative technical and administrative approaches to cleanup; success stories and lessons learned from implementation of the 1999 Cleanup Reforms; Corrective Action program basics; and use

Focus on Results

The RCRA Cleanup Reforms foster creative, practical, results-based approaches to corrective action. In the field, this means:

- *Providing tailored oversight.* Eliminate administrative or technical steps where not needed to assure effective performance.
- *Using holistic approaches.* Evaluate facilities for overall risk and apply appropriate facility-wide corrective action measures.
- *Exercising procedural flexibility.* Emphasize results over mechanistic process steps and eliminate unproductive activities.
- *Setting performance standards,* Establish clear protective standards the owner/operator must fulfill to complete corrective action.
- *Targeting data collection.* Examine actual conditions at each facility to design data requirements as needed to support corrective action decisions.

of performance-based approaches to corrective action.

- *Use web-based communication to share successes and lessons learned and promote innovative approaches.* EPA will support the establishment of a web-based interactive tool to promote sharing of successes and lessons learned and to provide for frequent exchange of ideas among all stakeholders on any corrective action topic, including those that are technical, policy-oriented or site-specific.
- *Overcome barriers to achieving Environmental Indicators.* EPA will clarify the relationship between Environmental Indicators and final cleanups and how Environmental Indicators can be met within the context of existing orders and permits. EPA will answer "Frequently Asked Questions" about Environmental Indicators, and issue technical guidance on ways to assess the impacts of contaminated groundwater on surface water and indoor air quality. In addition, EPA will demonstrate new uses of enforcement tools to achieve Environmental Indicators.

III. Connect communities to cleanups.

EPA will provide the public with more effective access to cleanup information. EPA seeks to increase public interest in and awareness of cleanup activities, and to further enhance the public's ability to become more involved in decisions about cleanups in communities. EPA will:

- *Clarify principles and expectations for public involvement in corrective action cleanups.* EPA will set out general principles and expectations for providing the public with the opportunity to become involved at corrective action sites. EPA also will share examples of successful public involvement approaches that have been used at RCRA cleanup sites and lessons learned.
- *Increase support of Technical Outreach Services for Communities (TOSC).* The TOSC program provides communities with technical and educational assistance from universities on issues associated with cleanup of hazardous sites. EPA will provide resources to the TOSC program for community involvement at RCRA cleanup sites and advertise the availability of this program.
- *Place Environmental Indicator evaluation forms and cleanup summaries on EPA web sites.*

EPA will place Environmental Indicator evaluation forms and summaries of cleanup activities of 1,714 RCRA facilities on the web sites of EPA Regional Offices. The evaluation forms and summaries will provide readily available information on the status of cleanup at these sites.

- *Publicize and promote the use of readily accessible cleanup information sources.* EPA will produce and distribute a pamphlet for the general public that explains how to access RCRA Corrective Action program information and site-specific cleanup information.

IV. Capitalize on redevelopment potential.

EPA encourages program implementors and stakeholders to capitalize on the redevelopment potential of RCRA cleanup sites. Many of these sites are located in areas that are attractive for redevelopment and are poised for community revitalization. These factors can motivate interested parties to pursue an expedited cleanup, sometimes with additional resources. EPA will:

- *Initiate Additional R CRA Brownfields Pilots.* EPA will launch 4-6 additional RCRA Brownfields pilot projects in 2001. These pilots will be designed to showcase the flexibility of RCRA and the use of redevelopment potential to expedite or enhance cleanups. Pilot applicants could be program implementors or stakeholders. Pilot participants also benefit from RCRA brownfields expertise. Limited funding may become available for EPA to conduct public meetings and related activities.
- *Initiate the Targeted Site Effort (TSE) Program to spur cleanup at RCRA sites with significant redevelopment/reuse potential.* EPA will ask each Regional Office to identify two sites for the TSE in 2001. The TSE program will apply to sites that have significant redevelopment/reuse potential, and require a limited amount of extra EPA support to help spur cleanup. The TSE program will provide participants with focused attention and access to RCRA brownfields expertise. Limited funding may be available for EPA to conduct public meetings and related activities.
- *Provide training and outreach to program implementors on using redevelopment potential to meet program goals.* EPA will provide training and outreach to program implementors and stakeholders to promote the environmental and community benefits that

can be gained by integrating brownfields redevelopment opportiunities and RCRA facility cleanups.

- *Promote cleanup and redevelopment with R CRA "Comfort/Status" Letters.* " Comfort/status" letters provide information regarding EPA's intent to exercise its RCRA corrective action response and enforcement authorities at a cleanup site. EPA will issue examples of letters that have been used to spur cleanup and redevelopment at RCRA facilities.

How Will EPA Measure the Results of the Reforms?

Measuring and recording the results of the RCRA Cleanup Reforms is a priority for EPA and the states to ensure continued improvement of the Corrective Action program. EPA will measure progress in putting the reforms into practice. EPA recognizes program implementors are using new approaches that may or may not be highlighted in the Cleanup Reforms, and will measure progress under these approaches as well. While the ultimate goal of the Corrective Action program is to achieve final cleanups, EPA will continue to measure the near-term success of the program against its Environmental Indicator goals for controlling human exposure and migration of contaminated groundwater.

How Will EPA Involve Stakeholders in Implementing the Reforms?

EPA will provide periodic updates on the RCRA Cleanup Reforms and solicit input from stakeholders through several means, including focus meetings, Federal Register notices, the RCRA Corrective Action Newsletter, Internet postings, and press releases.
EPA seeks continuous feedback from all stakeholders on the need for additional reforms beyond those already underway. EPA values and appreciates the feedback and interest of all stakeholders. However, limited resources may not allow us to respond individually. Based on stakeholder input and our ongoing assessment of the program,

we will continue to refine and add to the RCRA Cleanup Reforms, as needed, and will communicate program changes.

If you would like to provide written comments on the RCRA Cleanup Reforms, please mail your comments to:

RCRA Information Center (5305W),U.S. Environmental Protection Agenry, Ariel Rios Building, 1200 Pennsylvania Avenue, NW, Washington, DC, 20460-0002, or send an email to the RCRA docket at rcra-docket@epa.gov. Please include the following number on all correspondence, written or e-mailed, to the RCRA Information Center: F-2001-CRII-FFFFF.

For further information on corrective action cleanups, please visit state and EPA Regional web sites, which can be linked via the EPA corrective action web site at http://www.epa.gov/correctiveaction. The EPA corrective action web site has the latest and more detailed information on the RCRA Cleanup Reforms.

If you have questions regarding the RCRA Cleanup Reforms, please call the RCRA Hotline at 800-424-9346 or TDD 800-553-7672, or visit their web site at http://www.epa.gov/epaoswer/hotline/index.htm.

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Environmental Fact Sheet

TREATMENT STANDARDS SET FOR TOXICITY CHARACTERISTIC (TC) METAL WASTES, MINERAL PROCESSING WASTES, AND CONTAMINATED SOIL

United States Environmental Protection Agency
Solid Waste and Emergency Response (5305W)
EPA530-F-98-010
Office of Solid Waste
April 1998
www.epa.gov/osw

The Environmental Protection Agency (EPA) is publishing regulatory controls that encourage the safe recycling and disposal of hazardous metal waste and newly identified waste from mineral processing.

Background

The widespread practice of disposing of hazardous waste in units located directly on the land has been regulated by EPA's Land Disposal Restrictions (LDR) program for many years. A major part of the LDR program is to adequately protect public health and safety by establishing treatment standards for hazardous wastes before they can be disposed of in land disposal units. These treatment standards either specify that the waste be treated by a specified technology, or that they be treated by any technology as long as the concentration of hazardous constituents is below a certain level. Universal Treatment Standards specify the concentration levels for hazardous constituents. In addition to setting new treatment standards, another continuing task of the EPA is to better define which industrial materials are wastes, thus subject to regulation, and which should be excluded from regulation.

Action

LDR treatment standards are established for metal-bearing

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APPENDIX C

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Report on U.S. EPA's Prospective Purchaser Agreements and Comfort/Status Letters: How Effective Are They?

September 29, 2000

Background

To quell the growing concern that some parties may incur Superfund liability although they did not cause the hazardous waste contamination, EPA developed two mechanisms - PPAs and comfort/status letters.

Over the years, EPA had heard that these tools were very effective in allaying those concerns although the Agencies had not collected data.

In order to substantiate the anecdotal claims that PPAs and comfort/status letters enabled parties to reuse formerly contaminated property, OSRE undertook a survey analysis of regional staff and private parties. OSRE used the surveys to collect general information on the use of these tools, obtain specific data on property cleanup and reuse, and determine the effectiveness of these tools in meeting the needs of private parties and regional staff to cleanup and reuse contaminated property.

OSRE evaluated the survey responses according to the following criteria:

- How instrumental PPAs and comfort/status letters have been in accelerating site cleanup and revitalization of blighted properties;
- How effective PPAs and comfort/status letters have been in meeting the needs of the requesters;The timeliness of the PPA and comfort/status letter process, and whether they have satisfied the affected parties;

- What affected parties consider the most important elements of PPAs or comfort/status letters;
- The types of property cleanups and reuse situations in which PPAs or comfort/status letters have been most useful;
- The problems parties have encountered while going through the PPA or comfort/status letter process and recommendations for addressing those problems; and,
- Alternatives to PPAs and comfort/status letters.

Survey Results Comfort/Status Letters

Regional and private party respondents were given the opportunity to provide comments on their experiences in negotiating a comfort/status letter and provide suggestions for improving the process. The majority of private parties were satisfied with EPA's comfort/status letter process. The following is a summation of the most consistent and significant suggestions offered by regional and private party respondents.

Benefits:

- Comfort/status letters, enable the return of properties to more environmentally beneficial uses.
- Comfort/status letters help local communities revive their neighborhoods.
- Comfort/status letters enhance the economic viability of reuse projects.
- Comfort/status letters are a relatively fast and inexpensive tool to facilitate brownfield redevelopment.

Improvements:

- Accelerate the comfort/status letter process.
- Ensure that EPA and private parties explore other options that could alleviate concerns over Federal Superfund liability.
- Strengthen assurance and reduce caveats in comfort/status letters.
- Archive sites that are eligible for comfort/status letters whenever possible.

The comfort/status letter survey findings indicate that regional offices are effectively implementing the policy and that the letters have facilitated property reuse. Respondents also reported that comfort/status letters, for the most part, are relatively easy to obtain. EPA has already made progress towards facilitating property reuse and addressing some of the challenges presented by survey respondents.

Survey Results
PPAs

The majority of private parties were satisfied with EPA's PPA process. Although respondents provided relatively few comments, there were consistent themes that underscore the benefits and areas that EPA had already identified for improvement. Other factors also came to light. For example, the more fully characterized a site, the faster EPA and purchasers finalize the PPA.

Benefits:

- PPAs help local communities revive their neighborhoods.
- PPAs support diverse uses at properties of varying sizes.
- PPAs enhance the economic viability of reuse projects.
- PPAs allow property reuse and site cleanup to coincide.
- PPAs preserve the Superfund Trust Fund, thus allowing EPA to clean up other hazardous waste sites.

Improvements:

- Streamline the PPA process.
- Ensure that EPA and private parties explore other options that could alleviate concerns over Federal Superfund liability.
- Provide guidelines on appropriate consideration.
- Improve communication with states, local governments, and local communities.

The PPA survey findings indicate that EPA is effectively implementing its PPA guidance to encourage and facilitate the cleanup and reuse of Superfund sites and that the number of successful agreements has increased significantly in recent years. Respondents also reported that EPA, for the most part, has been responsive to purchasers in meeting their needs in a timely manner. At the same time, the respondents commented that EPA still could improve the process of obtaining PPAs. As outlined on pages 50-51 of the Final Report, EPA has already made progress towards its goals of improving the PPA process and addressing the difficulties private parties encountered while obtaining a PPA.

For further information contact:
Elisabeth Freed - (202) 564-5117
Office of Site Remediation Enforcement

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APPENDIX D

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Sample No Previous Superfund Interest Letter

Addressee

Re: [Insert name or description of property/site]

Dear [Insert name of party]:

I am writing in response to your letter dated --/--/-- concerning the property referenced above. My response is based upon the facts presently known to the U.S. Environmental Protection Agency (EPA) and is provided solely for informational purposes.

The federal Superfund Program, established to cleanup hazardous waste sites, is administered by EPA in cooperation with individual states and local and tribal governments. Sites are discovered by citizens, businesses, and local, state or federal agencies. When a potential hazardous waste site is reported, EPA records the available information in its database, the Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS). [NOTE: if a region practices pre-CERCLIS screening procedures, please include language indicating that the procedures exists, whether or not the property is in the process of being "pre-screened", and what this means to the inquirer. Adjustments may be needed to the sample language contained in this letter.] The fact that a site is listed in CERCLIS, however, does not mean that an EPA response action will occur at the site or that ownership or operation of the site is restricted or may be associated with liability. The fact that a property is not listed in CERCLIS does mean that EPA is not currently planning to take any action under the federal Superfund program to evaluate the site for inclusion on the National Priorities List (NPL) or to conduct removal or remediation activities.

The above-referenced property was not identified in a search of the active and archived records in the CERCLIS database. Please note that its absence from CERCLIS does not represent a finding that there are no environmental conditions at this property that require action or that are being addressed under another federal or state program. The absence of the property from CERCLIS means that, at this time, EPA is not aware of any information indicating that there has been a release or threat of release of hazardous substances at or from the facility that needs to be assessed by the federal Superfund program and that no such assessment has been performed by EPA in the past. I encourage you to contact [insert name of state or local agency] to determine if they have information regarding the property and its environmental condition. [Regions also are encouraged to check with other program offices to determine whether EPA is addressing this site under another statute such as RCRA].

If you would like more comprehensive information on current or historical CERCLIS data or to request an additional search, please contact the National Technical Information Service (NTIS), a publishing clearinghouse for government information. The address is: U.S. Department of Commerce, 5285 Port Royal Road, Springfield, VA 22161 (telephone: (703) 487-4650; fax: (703) 321-8547.) CERCLIS information is also avaliable on the Internet at http://www.epa.gov/superfund/index.html#Products. Should you have any further questions about Superfund, please feel free to contact me at [insert phone number/address.]

Sincerely,

Regional Contact

cc: State contact

Sample No Current Superfund Interest Letter

Addressee

Re: [Insert name or description of property]

Dear [Insert name of party]:

I am writing in response to your letter dated --/--/-- concerning the property referenced above. My response is based upon the facts presently known to the United States Environmental Protection Agency (EPA) and is provided solely for informational purposes. For the reasons stated below, EPA does not presently contemplate additional Superfund action for this property.

In response to growing concern over health and environmental risks posed by hazardous waste sites, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA), establishing the Superfund program to clean up these sites. The Superfund program is implemented by EPA in cooperation with individual states and local and tribal governments. Sites are discovered by citizens, businesses, and local, state, or federal agencies. After a potential hazardous waste site is reported to EPA, the available information is recorded in the Comprehensive Environmental Response and Liability Information System (CERCLIS), EPA's data management system for Superfund. Sites are added to CERCLIS when EPA believes that there may be contamination that warrants action under Superfund.

I. [FOR ARCHIVED SITES]
If, after an initial investigation, EPA determines that the contamination does not warrant Superfund action, or if an appropriate Superfund response action has been completed, EPA will archive that site from CERCLIS. This means that EPA believes no further federal response is appropriate. Archived sites may be returned to the CERCLIS site inventory if new information necessitating further Superfund consideration is discovered.

EPA has archived the above-referenced property from the CERCLIS site inventory because [choose one of the following (a, b, or c) to complete the sentence]

[a.], following site evaluation activities, EPA determined that either no contamination was found or conditions at the property did not warrant further federal Superfund involvement.

[b.] a federal removal action was completed and no further Superfund action is planned for this property.

[c.] environmental conditions at the property are subject to requirements of [RCRA, UST, OPA, etc.], however, no further interest under the federal Superfund program is warranted. For further information concerning these requirements, please contact [name and telephone number].

[Add to previous sentence] EPA, therefore, anticipates no need to take additional Superfund enforcement, investigatory, cost recovery, or cleanup action at this archived site unless new information warranting further Superfund consideration or conditions not previously known to EPA regarding the site are discovered. EPA will maintain a dialogue with the states and will continue to refer archived sites to the states for their review and consideration. You may want to contact [insert state contact, address and telephone number] for further information.
II. [FOR PARTIAL OR FULL DELETIONS FROM NPL OR FOR A SITE BOUNDARY SITUATION]

CERCLIS does not describe sites in precise geographical terms primarily because the boundaries of the contamination and available information on those boundaries can be expected to change over time. Once enough information regarding the nature and extent of the release of the hazardous substances is gathered, EPA can more accurately delineate the boundaries of a site. [Choose either (a), (b) or (c)].

(a) [If the property was included in a partial deletion from the NPL]
The above-referenced property [is/appears to be] situated within the [name of NPL site] which is included on EPA's list of high priority hazardous waste CERCLIS sites known as the National Priorities List (NPL). EPA, however, has determined that no further investigatory or cleanup action is appropriate at the property under the federal Superfund program. With the [insert State Agency] concurrence, EPA has decided to delete the portion of the NPL site which contains the above-referenced property in accordance with the Agency's A Procedures for Partial Deletions at NPL Sites" (OERR Directive Number 9320.2-11, August 30, 1996).

(b) [If the property is contained within the NPL site or is defined as the NPL site and the site has been deleted from the NPL]
The identified property [is/appears to be] [select one: situated within the defined geographical borders of the [name of NPL site] or defined as the [name of the NPL site]] which is included on EPA's list of high priority hazardous waste CERCLIS sites known as the National Priorities List (NPL). EPA, however, has determined that no further investigatory or cleanup action is appropriate at the property. In consultation with the [insert State Agency], EPA has decided to delete this property from the NPL in accordance with "Deletion from the NPL" 40CFR 300.425(e).

(c) [If the property is not part of the CERCLIS site but is nearby]
The above-referenced property is located [near or adjacent to] the [name of CERCLIS Site]. At this time, [statement as to the status of the site at present time: e.g., preliminary assessment, site investigation, removal, remedial investigation or feasibility study is underway or is completed]. Based upon available information, the property is not presently considered by EPA to be a part of the [name of the CERCLIS site].

[Add to end of paragraph (a), (b), or (c)]
EPA, therefore, anticipates no need to take [any/additional] [Superfund enforcement--include if PRP search and cost recovery are complete] investigatory or cleanup action at this property unless new information warranting further Superfund consideration or conditions not previously known to EPA regarding the property are discovered. You may want to contact [insert state agency information] for further information. [If appropriate, enclose a copy of the fact sheet on the CERCLIS site].

III. [IF ADMINISTRATIVE RECORD HAS BEEN COMPILED]
EPA has compiled an administrative record for the [name of CERCLIS or NPL Site] which provides information on the nature and extent of the contamination found at the site. This record is available at EPA Region -- and at [location nearby to the site].

If you have any additional questions, or wish to discuss this information, please feel free to contact [insert EPA contact and address].

Sincerely yours,
Regional Contact

cc: State contact

Sample Federal Superfund Interest Letter

Addressee

Re: [insert name or description of property/site] [COMMENT1]

Dear [Insert name of party]:

I am writing in response to your letter dated --/--/-- concerning the property referenced above. My response is based upon the facts presently known to the United States Environmental Protection Agency (EPA) and is provided solely for informational purposes.

In response to growing concern over health and environmental risks posed by hazardous waste sites, Congress passed the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) and established the Superfund program to clean up these sites. The Superfund program is implemented by EPA in cooperation with individual states and local and tribal governments. Sites are discovered by citizens, businesses, and local, state and federal agencies. After a potential hazardous waste site is reported to EPA, the site-specific information is recorded in the Superfund database, the Comprehensive Environmental Response and Liability Information System (CERCLIS). Sites are added to CERCLIS when EPA believes that there may be contamination that warrants action under Superfund.

EPA initially screens a potential hazardous waste site to determine what type of action, if any, is necessary. The Superfund program may then perform a preliminary assessment and site investigation to determine whether contamination at a property is likely to require a federal cleanup response, an evaluation to determine if a short term response action to eliminate or reduce contamination is needed, and add the site to EPA's list of high priority hazardous waste sites known as the National Priorities List (NPL).

EPA is examining [and/or addressing] the property referenced above in connection with the [insert name of CERCLIS/NPL site] under the authority of CERCLA. [Insert appropriate paragraphs from Sections I and/or II below. Use III for requests regarding the applicability of a specific policy. Section IV represents the closing paragraph for all the Federal Superfund Interest letters].

I. STATUS OF THE IDENTIFIED PROPERTY:

a. The above-referenced property is presently part of [or is] the [insert name of site.] [Add paragraph from Section II for further information concerning the site.]

b. The above-referenced property may be part of the [insert name of site.] [Add paragraph from Section II for further information concerning the site.]

II. STATUS OF EPA ACTIVITIES

a. The site has been placed in the Comprehensive Environmental Response, Compensation and Liability Information System ("CERCLIS") site inventory, but no studies or investigations have been performed to date. Accordingly, EPA has not developed sufficient information relating to the nature and extent of contamination to presently determine whether further federal action is appropriate under Superfund. Additionally, EPA has not yet determined which properties may be considered part of the site.

b. A Superfund site evaluation is planned at the [insert name of site] to investigate possible contamination, and where it may be located. Accordingly, EPA has not yet determined which properties may be considered part of the [insert name of site.] [Add description of site evaluation activity or attach relevant documents, if available.]

c. A Superfund site evaluation activity is underway at the [insert name of site] to investigate possible contamination, and where it may be located. Accordingly, EPA has not yet determined which properties may be considered part of the [insert name of site.] [Add description of site evaluation activity or attach relevant documents, if available.]

d. The [insert name of site] has been proposed to [or placed on] the Superfund National Priorities List ("NPL"). [Refer to and/or attach Federal Register notice.] The description of [insert name of site] contains EPA's preliminary evaluation of which properties are affected, although the actual borders of the Superfund site could change based on further information regarding the extent of contamination and appropriate remedy.

e. A Superfund Remedial Investigation/Feasibility Study (RI/FS) is planned at [insert name of site.] [Add description of RI/FS and ensuing activities or attach relevant documents, if available].

f. A Superfund Remedial Investigation/Feasibility Study (RI/FS) is underway at [insert name of site.] [Add description of RI/FS and ensuing activities or attach relevant documents, if available].

g. A Superfund Remedial Investigation/Feasibility Study (RI/FS) has been completed at [insert name of site.] [Add description of RI/FS and ensuing activities or attach relevant documents, if available].

h. EPA is planning a Superfund Remedial Design/Remedial Action (RD/RA) at [insert name of site.] [Insert pertinent information such as a description of the ROD and RD/RA, such as date of issuance of the ROD, schedule for cleanup; Fund lead or PRP implementation, cleanup progress to date; a schedule for future cleanup, especially a final completion date, cleanup levels to be achieved, and anticipated future land use of the Site, or attach relevant informational documents].

i. EPA has commenced a Superfund Remedial Design/Remedial Action (RD/RA) at [insert name of site.] [Insert pertinent information such as a description of the ROD and RD/RA, such as date of issuance of the ROD, schedule for cleanup; Fund lead or PRP implementation, cleanup progress to date; a schedule for future cleanup, especially a final completion date, cleanup levels to be achieved, and anticipated future land use of the Site, or attach relevant informational documents].

j. Superfund Remedial Design/Remedial Action (RD/RA) has been completed at insert name of site.] [If possible provide information on cleanup achievements, whether it was PRP or Fund-lead, etc., or attach relevant informational documents, if available] A Five-year Review will [will not] be necessary at [insert name of site.] [Also, describe status with respect to deletion from the NPL.]

k. A removal action is planned at [insert name of site.] [provide information on cleanup achievements, whether it was PRP or Fund-lead, and contact number for On-Scene Coordinator, cost recovery staff, or ORC attorney, or attach relevant informational documents, if available.]

l. A removal action is ongoing at [insert name of site.] [provide information on cleanup achievements, whether it was PRP or Fund-lead, and contact number for On-Scene Coordinator, cost recovery staff, or ORC attorney, or attach relevant informational documents, if available.]

m. A removal action has been completed at [insert name of site.] [provide information on cleanup achievements, whether it was PRP or Fund-lead, and contact number for On-Scene Coordinator, cost recovery staff, or ORC attorney, or attach relevant informational documents, if available.]

III. FOR PARTIES OR SITES COVERED BY AN EPA POLICY/STATUTE/REGULATION

Dear [Insert name of party]:

I am writing in response to your letter dated --/--/-- 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.]

[Choose either paragraph [a] or [b]]:

[a. 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 Superfund liability, and 2) there is no other mechanism available to adequately address the party's concerns.]

The [insert policy citation/statutory/regulatory provision], provides that EPA, in an exercise of its enforcement discretion, will not take an enforcement action against parties who meet the conditions and criteria described in the [insert policy/statute/regulation]. Based upon the information currently available to EPA, EPA believes that the [policy/statutory/regulatory provision] applies to [you/your] situation. I am enclosing a copy of the [policy/statutory or regulatory provision and fact sheet, if appropriate] for your review.

[b. For situations when a party does not provide 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 Superfund liability, and 2) there is no other mechanism available to adequately address the party's concerns, attach the appropriate policy/statutory or regulatory language and insert the following language]:

The [insert policy citation/statutory/regulatory provision], provides that EPA, in an exercise of its enforcement discretion, will not take an enforcement action against parties who meet the conditions and criteria described in the [insert policy/statute/regulation]. [EPA currently does not have enough information available to determine whether the [insert policy/statutory/regulatory citation] applies to your situation OR EPA, based upon the current information available, believes that you/your circumstances do not meet the criteria/provisions of the [policy/statute/regulation]. I, however, have enclosed a copy of the [policy/statutory or regulatory language] for your own review and determination of its applicability to you [or your situation].

IV. CLOSING PARAGRAPH

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. [Include for section III letters only: 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

Sample State Action Letter

Addressee

Re: [Insert name or description of site/property]

Dear [Insert name of party]:

I am writing in response to your letter dated --/--/-- concerning the property referenced above. My response is based upon the facts presently known to the United States Environmental Protection Agency (EPA) and is provided solely for informational purposes.

The problem of investigating, responding to, and cleaning property contaminated by hazardous substances is a complex one. In an effort to maximize resources and ensure timely responses, EPA and the states work together in responding to properties posing threats of environmental contamination. Although the Comprehensive Environmental Response Compensation and Liability Act (CERCLA, also known as "Superfund") is a federal law that establishes a federal program, the law also envisions and provides for state involvement at sites handled under the Superfund program. CERCLA explicitly describes scenarios under which a state may have a significant and prominent role in site activities.

I. [INSERT THIS SECTION FOR SITES DESIGNATED STATE-LEAD IN CERCLIS]

The site about which you have inquired, [site name], is a site that falls under the federal Superfund program, but has been designated a state-lead. A state-lead designation means that although the site remains in EPA's inventory of sites and may be on EPA's list of highest priority sites, the National Priorities List (NPL), implementing responsibilities to investigate and cleanup that site rest with the state of [insert name of state]. Specifically, [insert name of state] is responsible for the day-to-day activities at the site and will ultimately recommend the cleanup for the site. EPA's role is to review some of [insert name of state]'s milestone documents, if appropriate, provide technical assistance if needed, and, in most cases, approve the final cleanup method recommended by the state. The state and EPA work together closely, pursuant to the terms of a Memorandum of Agreement (MOA) to ensure that site responses are conducted in a timely manner and that interested parties are included in site activities.

Because EPA's day-to-day role at the [insert name of site] is somewhat limited, you should check with the [your state or state's environmental program] for more detailed information on site activities. [insert name of state] is best able to provide you with detailed information about the site and public documents regarding site activity. [Regions should include the state RPM name and number, or at least the state's applicable department name and number].

II. [INSERT THIS SECTION FOR SITES DESIGNATED ADEFERRED TO STATE AUTHORITIES PURSUANT TO EPA'S SUPERFUND DEFERRAL POLICY]

The site about which you have inquired, [site name], is a site that falls under the federal Superfund program, but for which EPA does not have the day-to-day responsibility. Specifically, the [site name] site is not proposed for or listed on the NPL. EPA has agreed not to propose or list the [site name] site on the NPL while the state of [name of state] addresses the environmental conditions at the property under its own state authorities. While the [site name] cleanup is being conducted, EPA intends to act in accordance with "Guidance on Deferral of NPL Listing Determinations While States Oversee Response Actions" (OSWER Dir. 9375.6-11, May 3, 1995). A copy of this guidance is enclosed for your review and should help you to better understand EPA's role and intentions at sites for which activities are deferred to state authorities.

III. [INSERT FOR A SITE DESIGNATED "DEFERRED" THAT NOW HAS BEEN ARCHIVED]

The conditions at the above-referenced property were addressed by [name of state] pursuant to EPA's "Guidance on Deferral of NPL Listing Determinations While States Oversee Response Actions" (OSWER Dir. 9375.6-11, May 3, 1995). Upon completion of cleanup activities at the [site name], the property has been removed from EPA's inventory of hazardous waste sites, the Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS). Consistent with EPA's state deferral guidance, EPA does not intend to further consider the property for listing on the NPL [or to take additional Superfund enforcement, investigatory, cost recovery, or clean up action at the property] unless EPA receives new information about site conditions that warrants reconsideration.

A copy of EPA's "A Guidance on Deferral of NPL Listing Determinations While States Oversee Response Actions" is enclosed for your review, so that you may better understand the nature of EPA's role at the [site name]. For detailed information about site activities and conditions, you may wish to contact [insert name of state or state's environmental department], the agency responsible for overseeing activities on the property.

IV. [INSERT FOR A SITE ADDRESSED UNDER A STATE VCP THAT HAS AN MOA IN PLACE]

The site about which you have inquired, [site name], is a site contained in EPA's inventory of hazardous waste sites, the Comprehensive Environmental Response, Compensation, and Liability Information System. The [site name] site is not, however, proposed for or listed on EPA's list of highest priority sites, the National Priorities List (NPL). EPA and the state of [insert name of state] have agreed, pursuant to a memorandum of agreement (MOA) between the two agencies, to place the site under the authorities of [insert name of state]'s Voluntary Cleanup Program. For specific details regarding the activities at [site name] or the MOA, you may wish to contact the [state name or department responsible for implementing the MOA].

If you have any additional questions, or wish to discuss this information, please feel free to contact [insert EPA contact and address].

Sincerely yours,
Regional Contact

cc: State contact

[COMMENT1](Insert name of Site and identification of property identified in the initial request letter)
[COMMENT2]Select the following paragraph(s) under (A) which apply. Add property-specific information as appropriate.
[COMMENT3] [If appropriate, attach and refer to depiction of Site to illustrate]

APPENDIX E

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