



Policy Toward Owners of Property Containing Contaminated Aquifers

Office of Site Remediation Enforcement
Policy and Program Evaluation Division 2273G

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)(1) of CERCLA (also found at 42, United States Code § 9607(a)(1)), 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

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/Internet, send to the following address:

orders @ ntis.fedworld.gov

For more information about the Contaminated Aquifer Policy, call Ellen Kandell at (703)603-8996.