
U.S. Environmental Protection Agency
“COMMON ELEMENTS” GUIDANCE
REFERENCE SHEET

INTRODUCTION

This reference sheet highlights the main points made in EPA’s March 6, 2003 guidance entitled “*Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for the Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability “Common Elements”*”), available at:

<http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf>

The “Common Elements” are the statutory threshold criteria and ongoing obligations landowners must meet to qualify as a:

- ▶ bona fide prospective purchaser,
- ▶ contiguous property owner, or
- ▶ innocent landowner.

The 2002 Brownfields Amendments to the Superfund law provide conditional CERCLA liability protection to landowners who qualify as bona fide prospective purchasers, contiguous property owners or innocent landowners. For purposes of EPA’s “Common Elements” Guidance and this reference sheet, “innocent landowner” refers only to unknowing purchasers as defined in CERCLA § 101(35)(A)(i).

Who are Bona Fide Prospective Purchasers (BFPPs)?

- ▶ Persons who meet the CERCLA § 101(40) criteria and the CERCLA § 107(r) criteria.
- ▶ Purchasers who buy property after January 11, 2002.
- ▶ BFPPs must perform all appropriate inquiry prior to purchase and may buy *knowing, or having reason to know*, of contamination on the property.

Who are Contiguous Property Owners (CPOs)?

- ▶ Persons who meet the CERCLA § 107(q)(1)(A) criteria.
- ▶ Owners of property that is *not* the source of the contamination. Such property is “contiguous” to, or otherwise similarly situated to, a facility that is the source of contamination found on their property.
- ▶ CPOs must perform all appropriate inquiry prior to purchase and buy *without*

knowing, or having reason to know, of contamination on the property.

Who are Innocent Landowners (ILOs)?

- ▶ Persons who meet the CERCLA § 107(b)(3) criteria (including due care) and the CERCLA § 101(35) criteria.
- ▶ ILO’s must perform all appropriate inquiry prior to purchase and must buy *without knowing, or having reason to know*, of contamination on the property.

THE COMMON ELEMENTS

A person asserting BFPP, CPO or ILO status has to prove that it meets the applicable criteria.

THRESHOLD CRITERIA

To qualify as a BFPP, CPO, or ILO, a person must perform “all appropriate inquiry” before buying the property.

BFPPs and CPOs must *also* demonstrate that they are not potentially liable nor “affiliated” with any other person who is potentially liable for response costs at the property.

All Appropriate Inquiry

BFPPs, CPOs, and ILOs must perform “all appropriate inquiry” into the previous ownership and uses of property before buying the property.

BFPPs may buy property with knowledge of contamination and maintain their protection from liability. The CPO and ILO liability protections, in contrast, do *not* apply if the purchaser knew, or had reason to know, of contamination prior to purchase.

EPA will publish regulations and guidance on the all appropriate inquiry standard in the future. For property purchased before May 1997, statutory factors are to be applied. CERCLA § 101(35)(B)(iv)(I). For property purchased after May 1997 and until EPA promulgates a regulation establishing the all appropriate inquiry standard, an ASTM Phase I report may satisfy the standard. CERCLA § 101(35)(B)(iv)(II). EPA is to promulgate a regulation establishing the all appropriate inquiry standard by 2004. CERCLA § 101(35)(B)(ii), (iii).

<p><i>Common Elements of the Brownfields Amendments Landowner Provisions</i></p> <hr/>
<p><i>Threshold Criteria:</i> < all appropriate inquiry < no affiliation with a liable party</p> <p><i>Continuing Obligations:</i> < compliance with land use restrictions and institutional controls < taking reasonable steps with respect to hazardous substances on property < cooperation, assistance and access < compliance with information requests and administrative subpoenas < providing legally required notices</p>

Affiliation

BFPPs or CPOs must not be potentially liable or affiliated with any other person who is potentially liable for the site response costs. “Affiliated with” includes direct and indirect familial relationships and many contractual, corporate, and financial relationships.

ILOs cannot have a contractual relationship with a liable party.

CONTINUING OBLIGATIONS CRITERIA

To maintain liability protection, landowners must meet the following continuing obligations during their property ownership.

Compliance with Land Use Restrictions and Institutional Controls

BFPPs, CPOs and ILO’s must:

- ▶ be in compliance with any land use restrictions established or relied on in connection with the response action;
- ▶ not impede the effectiveness or integrity of any institutional control employed in connection with a response action.

EPA believes the Brownfields Amendments require BFPPs, CPOs and ILOs to:

- ▶ comply with land use restrictions and implement institutional controls even if the restrictions/controls were not in place at the time of purchase; and
- ▶ comply with land use restrictions relied on in connection with the response action even if restrictions haven’t been implemented through an enforceable institutional control.

Reasonable Steps

BFPPs, CPOs and ILO’s are required to take reasonable steps to:

- ▶ Stop continuing releases;
- ▶ Prevent threatened future releases; and
- ▶ Prevent or limit human, environmental, or natural resource exposure to earlier hazardous substance releases.

The reasonable steps requirement balances Congress’ objectives of protecting certain landowners from CERCLA liability, and protecting human health and the environment.

As a general matter, EPA does not believe Congress intended BFPPs, CPOs and ILOs to have the same types of response obligations that CERCLA liable parties have (e.g., removal of contaminated soil, extraction and treatment of contaminated groundwater). The required reasonable steps relate only to responding to contamination for which the BFPP, CPO, or ILO is

not responsible. Activities on the property after purchase resulting in *new contamination* can give rise to full CERCLA liability. See Attachment B to EPA’s guidance for more on reasonable steps in a “question and answer” format.

EPA may provide a comfort/status letter suggesting reasonable steps at a specific site. EPA intends to limit these letters to sites where EPA has sufficient information to form a basis for suggesting reasonable steps (e.g., the site is on the National Priorities List or EPA has conducted or is conducting a removal action on the site). Providing such a letter is a matter of Regional discretion. See Attachment C to EPA’s guidance for a sample "reasonable steps" comfort/status letter.

Cooperation, Assistance, and Access

BFPPs, CPOs and ILOs must provide full cooperation, assistance, and access to persons authorized to conduct response actions or natural resource restoration, including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action or natural resource restoration.

Compliance with Information Requests and Administrative Subpoenas

BFPPs and CPOs must comply with CERCLA information requests and administrative subpoenas.

Provision of Legally Required Notices

BFPPs and CPOs must provide legally required notices related to the discovery or release of hazardous substances at the facility.

“Legally required notices” may include those required under federal, state, and local laws. Examples of federal notice requirements include: CERCLA § 103 (notification requirements regarding released substances); EPCRA § 304 (“emergency notification”); and RCRA § 9002 (underground storage tanks notification provisions).

<i>Summary: Common Element among the Brownfields Amendments Landowner Provisions</i>	Bona Fide Prospective Purchaser	Contiguous Property Owner	Section 101 (35)(A)(i) Innocent Landowner
All appropriate inquiry	U	U	U
No affiliation demonstration	U	U	u
Compliance with land use restrictions and institutional controls	U	U	U
Taking reasonable steps	U	U	U
Cooperation, assistance, access	U	U	U
Compliance with information requests and administrative subpoenas	U	U	u u
Providing legally required notices	U	U	u u u

U Although the innocent landowner provision does not contain this “affiliation” language, in order to meet the statutory criteria of the innocent landowner liability protection, a person must establish by a preponderance of the evidence that the act or omission that caused the release or threat of release of hazardous substances and the resulting damages were caused by a third party with whom the person does not have an employment, agency, or contractual relationship. CERCLA § 107(b)(3). Contractual relationship is defined in section 101(35)(A).

U U Compliance with information requests and administrative subpoenas is not specified as a statutory criterion for achieving and maintaining the section 101(35)(A)(i) innocent landowner liability protection. However, CERCLA requires compliance with administrative subpoenas from all persons, and timely, accurate, and complete responses from all recipients of EPA information requests.

U U U Provision of legally required notices is not specified as a statutory criterion for achieving and maintaining the section 101(35)(A)(i) innocent landowner liability protection. These landowners may, however, have independent notice obligations under federal, state and local laws.

QUESTIONS

Questions regarding this reference sheet or EPA’s Common Elements Guidance should be directed to Cate Tierney in OSRE’s Regional Support Division (202-564-4254, Tierney.Cate@EPA.gov), Greg Madden in OSRE’s Policy & Program Evaluation Division (202-564-4229, Madden.Gregory@EPA.gov) or to the Landowner Liability Protection Subgroup contacts listed by Region below.

Landowner Liability Protection Subgroup Regional Contacts

Region 1:	Joanna Jerison	617-918-1781
Region 2:	Michael Mintzer Paul Simon	212-637-3168 212-637-3152
Region 3:	Joe Donovan Leo Mullin Heather Gray Torres	215-814-2483 215-814-3172 215-814-2696
Region 4:	Kathleen Wright	404-562-9574
Region 5:	Peter Felitti Thomas Krueger Larry Kyte	312-886-5114 312-886-0562 312-886-4245
Region 6:	Mark Peycke	214-665-2135
Region 7:	Denise Roberts	913-551-7559
Region 8:	Suzanne Bohan Matthew Cohn Nancy Mangone	303-312-6925 303-312-6853 303-312-6903
Region 9:	Bill Keener	415-972-3940
Region 10:	Cyndy Mackey	206-553-2569

This reference sheet is intended for employees of EPA and the Department of Justice and it creates no substantive rights for any persons. It is not a regulation and does not impose legal obligations. This reference sheet provides some highlights of EPA’s “Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for the Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability” (“Common Elements”). It is not intended as a substitute for reading the statute or the guidance itself.