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

MAR - 6 2003

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability ("Common Elements")

FROM: Susan E. Bromm, Director
Office of Site Remediation Enforcement

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

I. Introduction

The Small Business Liability Relief and Brownfields Revitalization Act, ("Brownfields Amendments"), Pub. L. No. 107-118, enacted in January 2002, amended the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), to provide important liability limitations for landowners that qualify as: (1) bona fide prospective purchasers, (2) contiguous property owners, or (3) innocent landowners (hereinafter, "landowner liability protections" or "landowner provisions").

To meet the statutory criteria for a landowner liability protection, a landowner must meet certain threshold criteria and satisfy certain continuing obligations.[1] Many of the conditions are the same or similar under the three landowner provisions ("common elements"). This memorandum is intended to provide Environmental Protection Agency personnel with some general guidance on the common elements of the landowner liability protections. Specifically, this memorandum first discusses the threshold criteria of performing "all appropriate inquiry" and demonstrating no "affiliation" with a liable party. The memorandum then discusses the continuing obligations:

- compliance with land use restrictions and not impeding the effectiveness or integrity of institutional controls;
- taking "reasonable steps" with respect to hazardous substances affecting a landowner's property;
- providing cooperation, assistance and access;
- complying with information requests and administrative subpoenas; and
- providing legally required notices.

A chart summarizing the common elements applicable to bona fide prospective purchasers, contiguous property owners, and innocent landowners is attached to this memorandum (Attachment A). In addition, two documents relating to reasonable steps are attached to this memorandum: (1) a "Questions and Answers" document (Attachment B); and (2) a sample site-specific Comfort/Status Letter (Attachment C).

This memorandum addresses only some of the criteria a landowner must meet in order to qualify under the statute as a bona fide prospective purchaser, contiguous property owner, or innocent landowner (i.e., the common elements described above). Other criteria (e.g., the criterion that a contiguous property owner "did not cause, contribute, or consent to the release or threatened release," found in CERCLA § 107(q)(1)(A)(i), and the criterion that a bona fide prospective purchaser and innocent landowner purchase the property after all disposal of hazardous substances at the facility, found in CERCLA §§ 101(40)(A), 101(35)(A)), are not addressed in this memorandum. In addition, this guidance does not address obligations landowners may have under state statutory or common law.

This memorandum is an interim guidance issued in the exercise of EPA's enforcement discretion. As EPA gains more experience implementing the Brownfields Amendments, the Agency may revise this guidance. EPA welcomes comments on this guidance and its implementation. Comments may be submitted to the contacts identified at the end of this memorandum.

---

[1] See CERCLA §§ 101(40)(B)-(H), 107(q)(1)(A), 101(35)(A)-(B).

II. Background

The bona fide prospective purchaser provision, CERCLA § 107(r), provides a new landowner liability protection and limits EPA's recourse for unrecovered response costs to a lien on property for the increase in fair market value attributable to EPA's response action. To qualify as a bona fide prospective purchaser, a person must meet the criteria set forth in CERCLA § 101(40), many of which are discussed in this memorandum. A purchaser of property must buy the property after January 11, 2002 (the date of enactment of the Brownfields Amendments), in order to qualify as a bona fide prospective purchaser. These parties may purchase property with knowledge of contamination after performing all appropriate inquiry, and still qualify for the landowner liability protection, provided they meet the other criteria set forth in CERCLA § 101(40).[2]

The new contiguous property owner provision, CERCLA § 107(q), excludes from the definition of "owner" or "operator" a person who owns property that is "contiguous" or otherwise similarly situated to, a facility that is the only source of contamination found on his property. To qualify as a contiguous property owner, a landowner must meet the criteria set forth in CERCLA § 107(q)(1)(A), many of which are common elements. This landowner provision "protects parties that are essentially victims of pollution incidents caused by their neighbor's actions." S. Rep. No. 107-2, at 10 (2001). Contiguous property owners must perform all appropriate inquiry prior to purchasing property. Persons who know, or have reason to know, prior to purchase, that the property is or could be contaminated, cannot qualify for the contiguous property owner liability protection.[3]

The Brownfields Amendments also clarified the CERCLA § 107(b)(3) innocent landowner affirmative defense. To qualify as an innocent landowner, a person must meet the criteria set forth in section 107(b)(3) and section 101(35). Many of the criteria in section 101(35) are common elements. CERCLA § 101(35)(A) distinguishes between three types of innocent landowners. Section 101(35)(A)(i) recognizes purchasers who acquire property without knowledge of the contamination. Section 101(35)(A)(ii) discusses governments acquiring contaminated property by escheat, other involuntary transfers or acquisitions, or the exercise of eminent domain authority by purchase or condemnation. Section 101(35)(A)(iii) covers inheritors of contaminated property. For purposes of this guidance, the term "innocent landowner" refers only to the unknowing purchasers as defined in section 101(35)(A)(i). Like

---

[2] For a discussion of when EPA will consider providing a prospective purchaser with a covenant not to sue in light of the Brownfields Amendments, see "Bona Fide Prospective Purchasers and the New Amendments to CERCLA," B. Breen (May 31, 2001).

[3] CERCLA § 107(q)(1)(C) provides that a person who does not qualify as a contiguous property owner because he had, or had reason to have, knowledge that the property was or could be contaminated when he bought the property, may still qualify for a landowner liability protection as a bona fide prospective purchaser, as long as he meets the criteria set forth in CERCLA § 101(40).

contiguous property owners, persons desiring to qualify as innocent landowners must perform all appropriate inquiry prior to purchase and cannot know, or have reason to know, of contamination in order to have a viable defense as an innocent landowner.

III. Discussion

A party claiming to be a bona fide prospective purchaser, contiguous property owner, or section 101(35)(A)(i) innocent landowner bears the burden of proving that it meets the conditions of the applicable landowner liability protection.[4] Ultimately, courts will determine whether landowners in specific cases have met the conditions of the landowner liability protections and may provide interpretations of the statutory conditions. EPA offers some general guidance below regarding the common elements. This guidance is intended to be used by Agency personnel in exercising enforcement discretion. Evaluating whether a party meets these conditions will require careful, fact-specific analysis.

A. Threshold Criteria

To qualify as a bona fide prospective purchaser, contiguous property owner, or innocent landowner, a person must perform "all appropriate inquiry" before acquiring the property. Bona fide prospective purchasers and contiguous property owners must, in addition, demonstrate that they are not potentially liable or "affiliated" with any other person that is potentially liable for response costs at the property.

1. *All Appropriate Inquiry*

To meet the statutory criteria of a bona fide prospective purchaser, contiguous property owner, or innocent landowner, a person must perform "all appropriate inquiry" into the previous ownership and uses of property before acquisition of the property. CERCLA §§ 101(40)(B), 107(q)(1)(A)(viii), 101(35)(A)(i),(B)(i). Purchasers of property wishing to avail themselves of a landowner liability protection cannot perform all appropriate inquiry after purchasing contaminated property. As discussed above, bona fide prospective purchasers may acquire property with knowledge of contamination, after performing all appropriate inquiry, and maintain their protection from liability. In contrast, knowledge, or reason to know, of contamination prior to purchase defeats the contiguous property owner liability protection and the innocent landowner liability protection.

The Brownfields Amendments specify the all appropriate inquiry standard to be applied. The Brownfields Amendments state that purchasers of property before May 31, 1997 shall take into account such things as commonly known information about the property, the value of the property if clean, the ability of the defendant to detect contamination, and other similar criteria. CERCLA § 101(35)(B)(iv)(I). For property purchased on or after May 31, 1997, the procedures

---

[4] CERCLA §§ 101(40), 107(q)(1)(B), 101(35).

of the American Society for Testing and Materials ("ASTM"), including the document known as Standard E1527 - 97, entitled "Standard Practice for Environmental Site Assessments: Phase 1 Environmental Site Assessment Process," are to be used. CERCLA § 101(35)(B)(iv)(II). The Brownfields Amendments require EPA, not later than January 2004, to promulgate a regulation containing standards and practices for all appropriate inquiry and set out criteria that must be addressed in EPA's regulation. CERCLA § 101(35)(B)(ii), (iii). The all appropriate inquiry standard will thus be the subject of future EPA regulation and guidance.

2. *Affiliation*

To meet the statutory criteria of a bona fide prospective purchaser or contiguous property owner, a party must not be potentially liable or affiliated with any other person who is potentially liable for response costs.[5] Neither the bona fide prospective purchaser/contiguous property owner provisions nor the legislative history define the phrase "affiliated with," but on its face the phrase has a broad definition, covering direct and indirect familial relationships, as well as many contractual, corporate, and financial relationships. It appears that Congress intended the affiliation language to prevent a potentially responsible party from contracting away its CERCLA liability through a transaction to a family member or related corporate entity. EPA recognizes that the potential breadth of the term "affiliation" could be taken to an extreme, and in exercising its enforcement discretion, EPA intends to be guided by Congress' intent of preventing transactions structured to avoid liability.

The innocent landowner provision does not contain this "affiliation" language. In order

---

[5] The bona fide prospective purchaser provision provides, in pertinent part:

> NO AFFILIATION—The person is not—(i) potentially liable, or affiliated with any other person that is potentially liable, for response costs at a facility through— (I) any direct or indirect familial relationship; or (II) any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by the instruments by which title to the facility is conveyed or financed or by a contract for the sale of goods or services); or (ii) the result of a reorganization of a business entity that was potentially liable. CERCLA § 101(40)(H).

The contiguous property owner provision provides, in pertinent part:

> NOT CONSIDERED TO BE AN OWNER OR OPERATOR— . . . (ii) the person is not— (I) potentially liable, or affiliated with any other person that is potentially liable, for response costs at a facility through any direct or indirect familial relationship or any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by a contract for the sale of goods or services); or (II) the result of a reorganization of a business entity that was potentially liable[.] CERCLA § 107(q)(1)(A)(ii).

to meet the statutory criteria of the innocent landowner liability protection, however, 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. Contractual relationship is defined in section 101(35)(A).

B. Continuing Obligations

Several of the conditions a landowner must meet in order to achieve and maintain a landowner liability protection are continuing obligations. This section discusses those continuing obligations: (1) complying with land use restrictions and institutional controls; (2) taking reasonable steps with respect to hazardous substance releases; (3) providing full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration; (4) complying with information requests and administrative subpoenas; and (5) providing legally required notices.

1. *Land Use Restrictions and Institutional Controls*

The bona fide prospective purchaser, contiguous property owner, and innocent landowner provisions all require compliance with the following ongoing obligations as a condition for maintaining a landowner liability protection:

- the person is in compliance with any land use restrictions established or relied on in connection with the response action and

- the person does not impede the effectiveness or integrity of any institutional control employed in connection with a response action.

CERCLA §§ 101(40)(F), 107(q)(1)(A)(V), 101(35)(A). Initially, there are two important points worth noting about these provisions. First, because institutional controls are often used to implement land use restrictions, failing to comply with a land use restriction may also impede the effectiveness or integrity of an institutional control, and vice versa. As explained below, however, these two provisions do set forth distinct requirements. Second, these are ongoing obligations and, therefore, EPA believes the statute requires bona fide prospective purchasers, contiguous property owners, and innocent landowners to comply with land use restrictions and to implement institutional controls even if the restrictions or institutional controls were not in place at the time the person purchased the property.

Institutional controls are administrative and legal controls that minimize the potential for human exposure to contamination and protect the integrity of remedies by limiting land or

resource use, providing information to modify behavior, or both.[6] For example, an institutional control might prohibit the drilling of a drinking water well in a contaminated aquifer or disturbing contaminated soils. EPA typically uses institutional controls whenever contamination precludes unlimited use and unrestricted exposure at the property. Institutional controls are often needed both before and after completion of the remedial action. Also, institutional controls may need to remain in place for an indefinite duration and, therefore, generally need to survive changes in property ownership (i.e., run with the land) to be legally and practically effective.

Generally, EPA places institutional controls into four categories:

(1) governmental controls (e.g., zoning);
(2) proprietary controls (e.g., covenants, easements);
(3) enforcement documents (e.g., orders, consent decrees); and
(4) informational devices (e.g., land record/deed notices).

Institutional controls often require a property owner to take steps to implement the controls, such as conveying a property interest (e.g., an easement or restrictive covenant) to another party such as a governmental entity, thus providing that party with the right to enforce a land use restriction; applying for a zoning change; or recording a notice in the land records.

Because institutional controls are tools used to limit exposure to contamination or protect a remedy by limiting land use, they are often used to implement or establish land use restrictions relied on in connection with the response action. However, the Brownfields Amendments require compliance with land use restrictions relied on in connection with the response action, even if those restrictions have not been properly implemented through the use of an enforceable institutional control. Generally, a land use restriction may be considered "relied on" when the restriction is identified as a component of the remedy. Land use restrictions relied on in connection with a response action may be documented in several places depending on the program under which the response action was conducted, including: a risk assessment; a remedy decision document; a remedy design document; a permit, order, or consent decree; under some state response programs, a statute (*e.g.*, no groundwater wells when relying on natural attenuation); or, in other documents developed in conjunction with a response action.

An institutional control may not serve the purpose of implementing a land use restriction for a variety of reasons, including: (1) the institutional control is never, or has yet to be, implemented; (2) the property owner or other persons using the property impede the effectiveness of the institutional controls in some way and the party responsible for enforcement of the institutional controls neglects to take sufficient measures to bring those persons into compliance; or (3) a court finds the controls to be unenforceable. For example, a chosen remedy might rely on an ordinance that prevents groundwater from being used as drinking water. If the local government failed to enact the ordinance, later changed the ordinance to allow for drinking

---

[6] For additional information on institutional controls, see "Institutional Controls: A Site Manager's Guide to Identifying, Evaluating, and Selecting Institutional Controls at Superfund and RCRA Corrective Action Cleanups," September 2000, (OSWER Directive 9355.0-74FS-P).

water use, or failed to enforce the ordinance, a landowner is still required to comply with the groundwater use restriction identified as part of the remedy to maintain its landowner liability protection. Unless authorized by the regulatory agency responsible for overseeing the remedy, if the landowner fails to comply with a land use restriction relied on in connection with a response action, the owner will forfeit the liability protection and EPA may use its CERCLA authorities to order the owner to remedy the violation, or EPA may remedy the violation itself and seek cost recovery from the noncompliant landowner.

In order to meet the statutory criteria of a bona fide prospective purchaser, contiguous property owner, or innocent landowner, a party may not impede the effectiveness or integrity of any institutional control employed in connection with a response action. See CERCLA §§ 101(40)(F)(ii), 107(q)(1)(A)(v)(II), 101(35)(A)(iii). Impeding the effectiveness or integrity of an institutional control does not require a physical disturbance or disruption of the land. A landowner could jeopardize the reliability of an institutional control through actions short of violating restrictions on land use. In fact, not all institutional controls actually restrict the use of land. For example, EPA and State programs often use notices to convey information regarding contamination on site rather than actually restricting the use. To do this, EPA or a State may require a notice to be placed in the land records. If a landowner removed the notice, the removal would impede the effectiveness of the institutional control. A similar requirement is for a landowner to give notice of any institutional controls on the property to a purchaser of the property. Failure to give this notice may impede the effectiveness of the control. Another example of impeding the effectiveness of an institutional control would be if a landowner applies for a zoning change or variance when the current designated use of the property was intended to act as an institutional control. Finally, EPA might also consider a landowner's refusal to assist in the implementation of an institutional control employed in connection with the response action, such as not recording a deed notice or not agreeing to an easement or covenant, to constitute a violation of the requirement not to impede the effectiveness or integrity of an institutional control.[7]

An owner may seek changes to land use restrictions and institutional controls relied on in connection with a response action by following procedures required by the regulatory agency responsible for overseeing the original response action. Certain restrictions and institutional controls may not need to remain in place in perpetuity. For example, changed site conditions, such as natural attenuation or additional cleanup, may alleviate the need for restrictions or institutional controls. If an owner believes changed site conditions warrant a change in land or resource use or is interested in performing additional response actions that would eliminate the need for particular restrictions and controls, the owner should review and follow the appropriate regulatory agency procedures prior to undertaking any action that may violate the requirements of this provision.

---

[7] This may also constitute a violation of the ongoing obligation to provide full cooperation, assistance, and access. CERCLA §§ 101(40)(E), 107(q)(1)(A)(iv), 101(35)(A).

2. *Reasonable Steps*

a. Overview

Congress, in enacting the landowner liability protections, included the condition that bona fide prospective purchasers, contiguous property owners, and innocent landowners take "reasonable steps" with respect to hazardous substance releases to do all of the following:

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

CERCLA §§ 101(40)(D), 107(q)(1)(A)(iii), 101(35)(B)(i)(II).[8] Congress included this condition as an incentive for certain owners of contaminated properties to avoid CERCLA liability by, among other things, acting responsibly where hazardous substances are present on their property. In adding this new requirement, Congress adopted an approach that is consonant with traditional common law principles and the existing CERCLA "due care" requirement.[9]

By making the landowner liability protections subject to the obligation to take "reasonable steps," EPA believes Congress intended to balance the desire to protect certain landowners from CERCLA liability with the need to ensure the protection of human health and the environment. In requiring reasonable steps from parties qualifying for landowner liability protections, EPA believes Congress did not intend to create, as a general matter, the same types of response obligations that exist for a CERCLA liable party (e.g., removal of contaminated soil,

---

[8] CERCLA § 101(40)(D), the bona fide prospective purchaser reasonable steps provision, provides: "[t]he person exercises appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to— (i) stop any continuing release; (ii) prevent any threatened future release; and (iii) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance."

CERCLA § 107(q)(1)(A), the contiguous property owner reasonable steps provision, provides: "the person takes reasonable steps to— (I) stop any continuing release; (II) prevent any threatened future release; and (III) prevent or limit human, environmental, or natural resource exposure to any hazardous substance released on or from property owned by that person."

CERCLA § 101(35)(B)(II), the innocent landowner reasonable steps provision, provides: "the defendant took reasonable steps to— (aa) stop any continuing release; (bb) prevent any threatened future release; and (cc) prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substance."

[9] See innocent landowner provision, CERCLA § 107(b)(3)(a).

extraction and treatment of contaminated groundwater).[10] Indeed, the contiguous property owner provision's legislative history states that absent "exceptional circumstances . . . , these persons are not expected to conduct ground water investigations or install remediation systems, or undertake other response actions that would be more properly paid for by the responsible parties who caused the contamination." S. Rep. No. 107-2, at 11 (2001). In addition, the Brownfields Amendments provide that contiguous property owners are generally not required to conduct groundwater investigations or to install ground water remediation systems. CERCLA § 107(q)(1)(D).[11] Nevertheless, it seems clear that Congress also did not intend to allow a landowner to ignore the potential dangers associated with hazardous substances on its property.

Although the reasonable steps legal standard is the same for the three landowner provisions, the obligations may differ to some extent because of other differences among the three statutory provisions. For example, as noted earlier, one of the conditions is that a person claiming the status of a bona fide prospective purchaser, contiguous property owner, or innocent landowner must have "carried out all appropriate inquiries" into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices. CERCLA §§ 101(40)(B), 107(q)(1)(A)(viii), 101(35)(B). However, for a contiguous property owner or innocent landowner, knowledge of contamination defeats eligibility for the liability protection. A bona fide prospective purchaser may purchase with knowledge of the contamination and still be eligible for the liability protection. Thus, only the bona fide prospective purchaser could purchase a contaminated property that is, for example, on CERCLA's National Priorities List[12] or is undergoing active cleanup under an EPA or State

---

[10] There could be unusual circumstances where the reasonable steps required of a bona fide prospective purchaser, contiguous property owner, or innocent landowner would be akin to the obligations of a potentially responsible party (e.g., the only remaining response action is institutional controls or monitoring, the benefit of the response action will inure primarily to the landowner, or the landowner is the only person in a position to prevent or limit an immediate hazard). This may be more likely to arise in the context of a bona fide prospective purchaser as the purchaser may buy the property with knowledge of the contamination.

[11] CERCLA § 107(q)(1)(D) provides:

> GROUND WATER. - With respect to a hazardous substance from one or more sources that are not on the property of a person that is a contiguous property owner that enters ground water beneath the property of the person solely as a result of subsurface migration in an aquifer, subparagraph (A)(iii) shall not require the person to conduct ground water investigations or to install ground water remediation systems, except in accordance with the policy of the Environmental Protection Agency concerning owners of property containing contaminated aquifers, dated May 24, 1995.

[12] The National Priorities List is "the list compiled by EPA pursuant to CERCLA § 105, of uncontrolled hazardous substance releases in the United States that are priorities for long-term remedial evaluation and response." 40 C.F.R. § 300.5 (2001).

cleanup program, and still maintain his liability protection.

The pre-purchase "appropriate inquiry" by the bona fide prospective purchaser will most likely inform the bona fide prospective purchaser as to the nature and extent of contamination on the property and what might be considered reasonable steps regarding the contamination - - how to stop continuing releases, prevent threatened future releases, and prevent or limit human, environmental, and natural resource exposures. Knowledge of contamination and the opportunity to plan prior to purchase should be factors in evaluating what are reasonable steps, and could result in greater reasonable steps obligations for a bona fide prospective purchaser.[13] Because the pre-purchase "appropriate inquiry" performed by a contiguous property owner or innocent landowner must result in no knowledge of the contamination for the landowner liability protection to apply, the context for evaluating reasonable steps for such parties is different. That is, reasonable steps in the context of a purchase by a bona fide prospective purchaser may differ from reasonable steps for the other protected landowner categories (who did not have knowledge or an opportunity to plan prior to purchase). Once a contiguous property owner or innocent landowner learns that contamination exists on his property, then he must take reasonable steps considering the available information about the property contamination.

The required reasonable steps relate only to responding to contamination for which the bona fide prospective purchaser, contiguous property owner, or innocent landowner is not responsible. Activities on the property subsequent to purchase that result in new contamination can give rise to full CERCLA liability. That is, more than reasonable steps will likely be required from the landowner if there is new hazardous substance contamination on the landowner's property for which the landowner is liable. See, e.g., CERCLA § 101(40)(A) (requiring a bona fide prospective purchaser to show "[a]ll disposal of hazardous substances at the facility occurred before the person acquired the facility").

As part of the third party defense that pre-dates the Brownfields Amendments and continues to be a distinct requirement for innocent landowners, CERCLA requires the exercise of "due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all the relevant facts and circumstances." CERCLA § 107(b)(3)(a). The due care language differs from the Brownfields Amendments' new reasonable steps language. However, the existing case law on due care provides a reference point for evaluating the reasonable steps requirement. When courts have examined the due care requirement in the context of the pre-existing innocent landowner defense, they have generally concluded that a landowner should take some positive or affirmative step(s) when confronted with hazardous substances on its property. Because the due care cases cited in Attachment B (see Section III.B.2.b "Questions and Answers," below) interpret the due care statutory language and not the reasonable steps statutory language, they are provided as a reference point for the reasonable steps analysis, but are not intended to define reasonable steps.

The reasonable steps determination will be a site-specific, fact-based inquiry. That

[13] As noted earlier, section 107(r)(2) provides EPA with a windfall lien on the property.

inquiry should take into account the different elements of the landowner liability protections and should reflect the balance that Congress sought between protecting certain landowners from CERCLA liability and assuring continued protection of human health and the environment. Although each site will have its own unique aspects involving individual site analysis, Attachment B provides some questions and answers intended as general guidance on the question of what actions may constitute reasonable steps.

b. Site-Specific Comfort/Status Letters Addressing Reasonable Steps

Consistent with its "Policy on the Issuance of Comfort/Status Letters," ("1997 Comfort/Status Letter Policy"), 62 Fed. Reg. 4,624 (1997), EPA may, in its discretion, provide a comfort/status letter addressing reasonable steps at a specific site, upon request. EPA anticipates that such letters will be limited to sites with significant federal involvement such that the Agency 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). In addition, as the 1997 Comfort/Status Letter Policy provides, "[i]t is not EPA's intent to become involved in typical real estate transactions. Rather, EPA intends to limit the use of . . . comfort to where it may facilitate the cleanup and redevelopment of brownfields, where there is the realistic perception or probability of incurring Superfund liability, and where there is no other mechanism available to adequately address the party's concerns." Id. In its discretion, a Region may conclude in a given case that it is not necessary to opine about reasonable steps because it is clear that the landowner does not or will not meet other elements of the relevant landowner liability protection. A sample reasonable steps comfort/status letter is attached to this memorandum (see Attachment C).

The 1997 Comfort/Status Letter Policy recognizes that, at some sites, the state has the lead for day-to-day activities and oversight of a response action, and the Policy includes a "Sample State Action Letter." For reasonable steps inquiries at such sites, Regions should handle responses consistent with the existing 1997 Comfort/Status Letter Policy. In addition, where appropriate, if EPA has had the lead at a site with respect to response actions (e.g., EPA has conducted a removal action at the site), but the state will be taking over the lead in the near future, EPA should coordinate with the state prior to issuing a comfort/status letter suggesting reasonable steps at the site.

3. *Cooperation, Assistance, and Access*

The Brownfields Amendments require that bona fide prospective purchasers, contiguous property owners, and innocent landowners provide full cooperation, assistance, and access to persons who are authorized to conduct response actions or natural resource restoration at the vessel or facility from which there has been a release or threatened release, including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action or natural resource restoration at the vessel or facility. CERCLA §§ 101(40)(E), 107(q)(1)(A)(iv), 101(35)(A).

4. *Compliance with Information Requests and Administrative Subpoenas*

The Brownfields Amendments require bona fide prospective purchasers and contiguous property owners to be in compliance with, or comply with, any request for information or administrative subpoena issued by the President under CERCLA. CERCLA §§ 101(40)(G), 107(q)(1)(A)(vi). In particular, EPA expects timely, accurate, and complete responses from all recipients of section 104(e) information requests. As an exercise of its enforcement discretion, EPA may consider a person who has made an inconsequential error in responding (e.g., the person sent the response to the wrong EPA address and missed the response deadline by a day), a bona fide prospective purchaser or contiguous property owner, as long as the landowner also meets the other conditions of the applicable landowner liability protection.

5. *Providing Legally Required Notices*

The Brownfields Amendments subject bona fide prospective purchasers and contiguous property owners to the same "notice" requirements. Both provisions mandate, in pertinent part, that "[t]he person provides all legally required notices with respect to the discovery or release of any hazardous substances at the facility." CERCLA §§ 101(40)(C), 107(q)(1)(A)(vii). EPA believes that Congress' intent in including this as an ongoing obligation was to ensure that EPA and other appropriate entities are made aware of hazardous substance releases in a timely manner.

"Legally required notices" may include those required under federal, state, and local laws. Examples of federal notices that may be required include, but are not limited to, those under: CERCLA § 103 (notification requirements regarding released substances); EPCRA § 304 ("emergency notification"); and RCRA § 9002 (notification provisions for underground storage tanks). The bona fide prospective purchaser and contiguous property owner have the burden of ascertaining what notices are legally required in a given instance and of complying with those notice requirements. Regions may require these landowners to self-certify that they *have provided* (in the case of contiguous property owners), or *will provide* within a certain number of days of purchasing the property (in the case of bona fide prospective purchasers), all legally required notices. Such self-certifications may be in the form of a letter signed by the landowner as long as the letter is sufficient to satisfy EPA that applicable notice requirements have been met. Like many of the other common elements discussed in this memorandum, providing legally required notices is an ongoing obligation of any landowner desiring to maintain its status as a bona fide prospective purchaser or contiguous property owner.

IV. Conclusion

Evaluating whether a landowner has met the criteria of a particular landowner provision will require careful, fact-specific analysis by the regions as part of their exercise of enforcement discretion. This memorandum is intended to provide EPA personnel with some general guidance on the common elements of the landowner liability protections. As EPA implements the Brownfields Amendments, it will be critical for the regions to share site-specific experiences and

information pertaining to the common elements amongst each other and with the Office of Site Remediation Enforcement, in order to ensure national consistency in the exercise of the Agency's enforcement discretion. EPA anticipates that its Landowner Liability Protection Subgroup, which is comprised of members from various headquarters offices, the Offices of Regional Counsel, the Office of General Counsel, and the Department of Justice, will remain intact for the foreseeable future and will be available to serve as a clearinghouse for information for the regions on the common elements.

Questions and comments regarding this memorandum or site-specific inquiries should be directed to Cate Tierney, in OSRE's Regional Support Division (202-564-4254, Tierney.Cate@EPA.gov), or Greg Madden, in OSRE's Policy & Program Evaluation Division (202-564-4229, Madden.Gregory@EPA.gov).

V. Disclaimer

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

Attachments

cc: Jewell Harper (OSRE)
Paul Connor (OSRE)
Sandra Connors (OSRE)
Thomas Dunne (OSWER)
Benjamin Fisherow (DOJ)
Linda Garczynski (OSWER)
Bruce Gelber (DOJ)
Steve Luftig (OSWER)
Earl Salo (OGC)
EPA Brownfields Landowner Liability Protection Subgroup

Attachment A

Chart Summarizing Applicability of "Common Elements" to Bona Fide Prospective Purchasers, Contiguous Property Owners, and Section 101(35)(A)(i) Innocent Landowners

Common Element among the Brownfields Amendments Landowner Provisions	**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 notice obligations under federal, state and local laws.

Attachment B

Reasonable Steps Questions and Answers

The "reasonable steps" required of a bona fide prospective purchaser, contiguous property owner, or section 101(35)(A)(i) innocent landowner under CERCLA §§ 101(40)(D), 107(q)(1)(A)(iii), and 101(35)(B)(i)(II), will be a site-specific, fact-based inquiry. Although each site will have its own unique aspects involving individual site analysis, below are some questions and answers intended to provide general guidance on the question of what actions may constitute reasonable steps. The answers provide a specific response to the question posed, without identifying additional actions that might be necessary as reasonable steps or actions that may be required under the other statutory conditions for each landowner provision (e.g., providing cooperation and access). In addition, the answers do not address actions that may be required under other federal statutes (e.g., the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq*.; the Clean Water Act, 33 U.S.C. § 1251, *et seq.*; and the Toxic Substances Control Act, 15 U.S.C. § 2601, *et seq*.), and do not address landowner obligations under state statutory or common law.[14]

Notification

Q1: If a person conducts "all appropriate inquiry" with respect to a property where EPA has conducted a removal action, discovers hazardous substance contamination on the property that is unknown to EPA, and then purchases the property, is notification to EPA or the state about the contamination a reasonable step?

A1: Yes. First, bona fide prospective purchasers may have an obligation to provide notice of the discovery or release of a hazardous substance under the legally required notice provision, CERCLA § 101(40)(C). Second, even if not squarely required by the notice conditions, providing notice of the contamination to appropriate governmental authorities would be a reasonable step in order to prevent a "threatened future release" and "prevent or limit . . . exposure." Congress specifically identified "notifying appropriate Federal, state, and local officials" as a typical reasonable step. S. Rep. No.107-2, at 11 (2001); see also, Bob's Beverage Inc. v. Acme, Inc., 169 F. Supp. 2d 695, 716 (N.D. Ohio 1999) (failure to timely notify EPA and Ohio EPA of groundwater contamination was factor in conclusion that party failed to exercise due care), *aff'd*, 264 F. 3d 692 (6th Cir. 2001). It should be noted that the bona fide prospective purchaser provision is the only one of the three landowner provisions where a person can purchase property with knowledge that it is contaminated and still qualify for the landowner liability protection.

[14] The Brownfields Amendments did not alter CERCLA § 114(a), which provides: "[n]othing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State."

Site Restrictions

Q2: Where a property owner discovers unauthorized dumping of hazardous substances on a portion of her property, are site access restrictions reasonable steps?

A2: Site restrictions are likely appropriate as a first step, once the dumping is known to the owner. Reasonable steps include preventing or limiting "human, environmental, or natural resource exposure" to hazardous substances. CERCLA §§ 101(40)(D)(iii), 107(q)(1)(A)(iii)(III), 101(35)(B)(i)(II)(cc). The legislative history for the contiguous property owner provision specifically notes that "erecting and maintaining signs or fences to prevent public exposure" may be typical reasonable steps. S. Rep. No. 107-2, at 11 (2001); see also, Idylwoods Assoc. v. Mader Capital, Inc., 915 F. Supp. 1290, 1301 (W.D.N.Y. 1996) (failure to restrict access by erecting signs or hiring security personnel was factor in evaluating due care), *aff'd on reh'g*, 956 F. Supp. 410, 419-20 (W.D.N.Y. 1997); New York v. Delmonte, No. 98-CV-0649E, 2000 WL 432838, *4 (W.D.N.Y. Mar. 31, 2000) (failure to limit access despite knowledge of trespassers was not due care).

Containing Releases or Threatened Releases

Q3: If a new property owner discovers some deteriorating 55 gallon drums containing unknown material among empty drums in an old warehouse on her property, would segregation of the drums and identification of the material in the drums constitute reasonable steps?

A3: Yes, segregation and identification of potential hazards would likely be appropriate first steps. Reasonable steps must be taken to "prevent any threatened future release." CERCLA §§ 101(40)(D)(ii), 107(q)(1)(A)(iii)(II), 101(35)(B)(i)(II)(bb). To the extent the drums have the potential to leak, segregation and containment (e.g., drum overpack) would prevent mishandling and releases to the environment. For storage and handling purposes, an identification of the potential hazards from the material will likely be necessary. Additional identification steps would likely be necessary for subsequent disposal or resale if the material had commercial value.

Q4: If a property owner discovers that the containment system for an on-site waste pile has been breached, do reasonable steps include repairing the breach?

A4: One of the reasonable steps obligations is to "stop any continuing release." CERCLA §§ 101(40)(D)(i), 107(q)(1)(A)(iii)(I), 101(35)(B)(i)(II)(aa). In general, the property owner should take actions to prevent contaminant migration where there is a breach from an existing containment system. Both Congress and the courts have identified maintenance of hazardous substance migration controls as relevant property owner obligations. For example, in discussing contiguous property owners' obligations for migrating groundwater plumes, Congress identified "maintaining any existing barrier or other elements of a response action on their property that

address the contaminated plume" as a typical reasonable step. S. Rep. No. 107-2, at 11 (2001); see also, Franklin County Convention Facilities Auth. v. American Premier Underwriters, Inc., 240 F.3d 534, 548 (6th Cir. 2001) (failure to promptly erect barrier that allowed migration was not due care); United States v. DiBiase Salem Realty Trust, No. Civ. A. 91-11028-MA, 1993 WL 729662, *7 (D. Mass. Nov. 19, 1993) (failure to reinforce waste pit berms was factor in concluding no due care), *aff'd*, 45 F.3d 541, 545 (1st Cir. 1995). In many instances, the current property owner will have responsibility for maintenance of the containment system. If the property owner has responsibility for maintenance of the system as part of her property purchase, then she should repair the breach. In other instances, someone other than the current landowner may have assumed that responsibility (e.g., a prior owner or other liable parties that signed a consent decree with EPA and/or a State). If someone other than the property owner has responsibility for maintenance of the containment system pursuant to a contract or other agreement, then the question is more complicated. At a minimum, the current owner should give notice to the person responsible for the containment system and to the government. Moreover, additional actions to prevent contaminant migration would likely be appropriate.

Q5: If a bona fide prospective purchaser buys property at a Superfund site where part of the approved remedy is an asphalt parking lot cap, but the entity or entities responsible for implementing the remedy (e.g., PRPs who signed a consent decree) are unable to repair the deteriorating cap (e.g., the PRPs are now defunct), should the bona fide prospective purchaser repair the deteriorating asphalt parking lot cap as reasonable steps?

A5: Taking "reasonable steps" includes steps to: "prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substances." CERCLA §§ 101(40)(D)(iii), 107(q)(1)(A)(iii)(III), 101(35)(B)(i)(II)(cc). In this instance, the current landowner may be in the best position to identify and quickly take steps to repair the asphalt cap and prevent additional exposures.

Remediation

Q6: If a property is underlain by contaminated groundwater emanating from a source on a contiguous or adjacent property, do reasonable steps include remediating the groundwater?

A6: Generally not. Absent exceptional circumstances, EPA will not look to a landowner whose property is not a source of a release to conduct groundwater investigations or install groundwater remediation systems. Since 1995, EPA's policy has been that, in the absence of exceptional circumstances, such a property owner did not have "to take any affirmative steps to investigate or prevent the activities that gave rise to the original release" in order to satisfy the innocent landowner due care requirement. See May 24, 1995 "Policy Toward Owners of Property Containing Contaminated Aquifers." ("1995 Contaminated Aquifers Policy"). In the Brownfields Amendments, Congress explicitly identified this policy in noting that reasonable

steps for a contiguous property owner "shall not require the person to conduct groundwater investigations or to install groundwater remediation systems," except in accordance with that policy. See CERCLA § 107(q)(1)(D). The policy does not apply "where the property contains a groundwater well, the existence or operation of which may affect the migration of contamination in the affected area." 1995 Contaminated Aquifers Policy, at 5. In such instances, a site-specific analysis should be used in order to determine reasonable steps. In some instances, reasonable steps may simply mean operation of the groundwater well consistent with the selected remedy. In other instances, more could be required.

Q7: If a protected landowner discovers a previously unknown release of a hazardous substance from a source on her property, must she remediate the release?

A7: Provided the landowner is not otherwise liable for the release from the source, she should take some affirmative steps to "stop the continuing release," but EPA would not, absent unusual circumstances, look to her for performance of complete remedial measures. However, notice to appropriate governmental officials and containment or other measures to mitigate the release would probably be considered appropriate. Compare Lincoln Properties, Ltd. v. Higgins, 823 F. Supp. 1528, 1543-44 (E.D. Calif. 1992) (sealing sewer lines and wells and subsequently destroying wells to protect against releases helped establish party exercised due care); Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1508 (11th Cir. 1996) (timely development of maintenance plan to remove tar seeps was factor in showing due care was exercised); New York v. Lashins Arcade Co., 91 F.3d 353 (2nd Cir. 1996) (instructing tenants not to discharge hazardous substances into waste and septic systems, making instructions part of tenancy requirements, and inspecting to assure compliance with this obligation, helped party establish due care); with Idylwoods Assoc. v. Mader Capital, Inc., 956 F. Supp. 410, 419-20 (W.D.N.Y. 1997) (property owner's decision to do nothing resulting in spread of contamination to neighboring creek was not due care); Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co., 14 F.3d 321, 325 (7th Cir. 1994) (party that "made no attempt to remove those substances or to take any other positive steps to reduce the threat posed" did not exercise due care). As noted earlier, if the release is the result of a disposal after the property owner's purchase, then she may be required to undertake full remedial measures as a CERCLA liable party. Also, if the source of the contamination is on the property, then the property owner will not qualify as a contiguous property owner but may still qualify as an innocent landowner or a bona fide prospective purchaser.

Site Investigation

Q8: If a landowner discovers contamination on her property, does the obligation to take reasonable steps require her to investigate the extent of the contamination?

A8: Generally, where the property owner is the first to discover the contamination, she should

take certain basic actions to assess the extent of contamination. Absent such an assessment, it will be very difficult to determine what reasonable steps will stop a continuing release, prevent a threatened future release, or prevent or limit exposure. While a full environmental investigation may not be required, doing nothing in the face of a known or suspected environmental hazard would likely be insufficient. See, e.g., United States v. DiBiase Salem Realty Trust, 1993 WL 729662, *7 (failure to investigate after becoming aware of dangerous sludge pits was factor in concluding party did not exercise due care), *aff'd*, 45 F.3d 541, 545 (1st Cir. 1995); United States v. A&N Cleaners and Launderers, Inc., 854 F. Supp. 229 (S.D.N.Y. 1994) (dictum) (failing to assess environmental threats after discovery of disposal would be part of due care analysis). Where the government is actively investigating the property, the need for investigation by the landowner may be lessened, but the landowner should be careful not to rely on the fact that the government has been notified of a hazard on her property as a shield to potential liability where she fails to conduct any investigation of a known hazard on her property. Compare New York v. Lashins Arcade Co., 91 F.3d 353, 361 (2nd Cir. 1996) (no obligation to investigate where RI/FS already commissioned) with DiBiase Salem Realty Trust, 1993 WL 729662, *7 (State Department of Environmental Quality knowledge of hazard did not remove owner's obligation to make some assessment of site conditions), *aff'd*, 45 F.3d 541, 545 (1st Cir. 1995).

Performance of EPA Approved Remedy

Q9: If a new purchaser agrees to assume the obligations of a prior owner PRP, as such obligations are defined in an order or consent decree issued or entered into by the prior owner and EPA, will compliance with those obligations satisfy the reasonable steps requirement?

A9: Yes, in most cases compliance with the obligations of an EPA order or consent decree will satisfy the reasonable steps requirement so long as the order or consent decree comprehensively addresses the obligations of the prior owner through completion of the remedy. It should be noted that not all orders or consent decrees identify obligations through completion of the remedy and some have open-ended cleanup obligations.

Attachment C

Sample Federal Superfund Interest Reasonable Steps Letter

The sample comfort/status letter below may be used in the exercise of enforcement discretion where EPA has sufficient information regarding the site to have assessed the hazardous substance contamination and has enough information about the property to make suggestions as to steps necessary to satisfy the "reasonable steps" requirement. In addition, like any comfort/status letter, the letters should be provided in accordance with EPA's "Comfort/Status Letter Policy." That is, they are not necessary or appropriate for purely private real estate transactions. Such letters may be issued when: (1) there is a realistic perception or probability of incurring Superfund liability, (2) such comfort will facilitate the cleanup and redevelopment of a brownfield property, (3) there is no other mechanism to adequately address the party's concerns, and (4) EPA has sufficient information about the property to provide a basis for suggesting reasonable steps.

[Insert Addressee]

Re: **[Insert Name or Description of Property]**

Dear **[insert name of requester]:**

I am writing in response to your letter dated **[insert date]** concerning the property referenced above. As you know, the **[insert name]** property is located within or near the **[insert name of CERCLIS site.]** EPA is currently **[insert description of action EPA is taking or plans to take and any contamination problem.]**

The **[bona fide prospective purchaser, contiguous property owner, or innocent landowner]** provision states that a person meeting the criteria of **[insert section]** is protected from CERCLA liability. **[For bona fide prospective purchaser only, it may be appropriate to insert following language: To the extent EPA's response action increases the fair market value of the property, EPA may have a windfall lien on the property. The windfall lien is limited to the increase in fair market value attributable to EPA's response action, capped by EPA's unrecovered response costs.]** (I am enclosing a copy of the relevant statutory provisions for your reference.) To qualify as a **[bona fide prospective purchaser, contiguous property owner, or section 101(35)(A)(i) innocent landowner]**, a person must (among other requirements) take "reasonable steps" with respect to stopping continuing releases, preventing threatened future releases, and preventing or limiting human, environmental, or natural resources exposure to earlier releases. You have asked what actions you must take, as the **[owner or prospective owner]** of the property, to satisfy the "reasonable steps" criterion.

As noted above, EPA has conducted a **[insert most recent/relevant action to "reasonable steps" inquiry taken by EPA]** at **[insert property name]** and has identified a

number of environmental concerns. Based on the information EPA has evaluated to date, EPA believes that, for an owner of the property, the following would be appropriate reasonable steps with respect to the hazardous substance contamination found at the property:

[insert paragraphs outlining reasonable steps with respect to each environmental concern]

This letter does not provide a release from CERCLA liability, but only provides information with respect to reasonable steps based on the information EPA has available to it. This letter is based on the nature and extent of contamination known to EPA at this time. If additional information regarding the nature and extent of hazardous substance contamination at **[insert property name]** becomes available, additional actions may be necessary to satisfy the reasonable steps criterion. In particular, if new areas of contamination are identified, you should ensure that reasonable steps are undertaken. As the property owner, you should ensure that you are aware of the condition of your property so that you are able to take reasonable steps with respect to any hazardous substance contamination at or on the property.

Please note that the **[bona fide prospective purchaser, contiguous property owner, or innocent landowner]** provision has a number of conditions in addition to those requiring the property owner to take reasonable steps. Taking reasonable steps and many of the other conditions are continuing obligations of the **[bona fide prospective purchaser, contiguous property owner, or section 101(35)(A)(i) innocent landowner]**. You will need to assess whether you satisfy each of the statutory conditions for the **[bona fide prospective purchaser, contiguous property owner, or innocent landowner]** provision and continue to meet the applicable conditions.

EPA hopes this information is useful to you. If you have any questions, or wish to discuss this letter, please feel free to contact **[insert EPA contact and address]**.

Sincerely,

[insert name of EPA contact]