



Office of Enforcement and Compliance Assurance
Office of Site Remediation Enforcement
Office of Solid Waste and Emergency Response
Center for Program Analysis

Siting Renewable Energy on Contaminated Properties: Addressing Liability Concerns

The U.S. Environmental Protection Agency (EPA) recognizes the overall environmental benefits of siting renewable energy projects on contaminated properties and has developed this fact sheet to help clarify potential liability issues, summarize available resources and policy tools, and facilitate the implementation of these types of projects. This fact sheet provides answers to some common questions that developers¹ of renewable energy projects on contaminated properties may have regarding potential liability for cleaning up contaminated properties. *It also includes a Reference Section listing key EPA documents and websites and endnotes citing specific provisions discussed in the fact sheet that provide additional information.*

Key Messages for Renewable Energy Developers

The vast majority of contaminated properties requiring cleanup are most likely to be addressed by state cleanup programs. Generally, only contaminated properties with significant actual or potential public health and/or environmental impacts or those needing immediate attention are likely to warrant federal cleanup or enforcement under CERCLA or RCRA.

CERCLA includes a number of liability protections and generally prohibits federal CERCLA enforcement against parties who are cleaning up certain lower risk contaminated properties in compliance with a state response program that specifically governs cleanups.

EPA has developed a variety of property-specific documents designed to encourage cleanups and facilitate contaminated property transactions and revitalization by parties not responsible for the contamination.

Not all leases trigger CERCLA liability for lessees and EPA has issued general guidance regarding a lessee's potential CERCLA liability. EPA will work with parties on a renewable energy project to address potential lessee liability issues and to determine whether a property-specific document from EPA may be needed.

EPA encourages renewable energy developers to consult with legal counsel and the appropriate state, tribal or local environmental protection agency before taking any action to acquire, cleanup, or redevelop contaminated property.

Please see the questions and answers below for a more complete explanation.

What is EPA's RE-Powering America's Land Initiative?

The *RE-Powering America's Land: Siting Renewable Energy on Potentially Contaminated Land and Mine Sites Initiative*² is an effort by EPA to identify the renewable energy potential of contaminated properties and provide other useful resources for communities, developers, industry, state and local governments, or anyone interested in reusing these properties for renewable energy development.

Utility-scale renewable energy facilities often require large amounts of land that may displace or otherwise impact valuable open space, agricultural lands, or other uncontaminated “greenspace.” Meanwhile, thousands of former commercial and industrial properties across the country remain unused because of concerns about potential liability and contamination. These unused properties may not be well suited for residential or light commercial use. EPA’s Initiative seeks to address both the contamination and liability issues in order to place these properties back into productive use. EPA has identified more than 11,000 EPA- and state-tracked contaminated properties and mine sites (comprising nearly 15 million acres) that have potential for development as solar, wind, biomass, and/or geothermal facilities.³

Using potentially contaminated property and mine sites for renewable energy development offers many potential benefits. For example, it may:

- preserve “greenspace”;
- provide developers with access to existing grid connection and other infrastructure;
- allow the location of generation facilities to be closer to the electrical load;
- create jobs;
- garner support from local communities; and
- enable potentially contaminated properties to return to productive and sustainable use.

Will I be held liable by EPA (or a state) if I develop a renewable energy project on a contaminated property?

State and federal cleanup laws have led to the cleanup and reuse of thousands of contaminated properties, in part by ensuring that those actually responsible for pollution are held responsible for cleanups. However, these same laws have sometimes created uncertainty regarding who will pay the costs of cleaning up such properties. Recognizing the numerous environmental, public health, and economic benefits associated with cleaning up and reusing previously developed property, brownfields and land revitalization programs were developed. Many state and federal laws and policies were changed to clarify, and in certain situations provide protection against, the liability risk associated with the reuse of contaminated properties, particularly for parties who wish to reuse property that they did not contaminate. Today, state and federal governments are using a wide variety of mechanisms, including liability protections, policy guidance, and site-specific revitalization tools, to clarify potential liability and address uncertainty, some of which are discussed in this fact sheet.

Notwithstanding these statutory changes and efforts by the federal and state governments, many prospective purchasers, developers, and lenders report hesitation about involvement with contaminated properties because of fear they might be held liable under federal or state cleanup laws. However, relatively few contaminated properties involve cleanup or enforcement under the two principal federal cleanup laws, the *Comprehensive Environmental Response, Compensation, and Liability Act* (CERCLA, also known as the Superfund law) and the *Resource Conservation and Recovery Act* (RCRA).⁴ Generally, only contaminated properties with significant actual or potential public health and/or environmental impacts or those needing immediate attention are likely to warrant federal cleanup or enforcement under CERCLA or RCRA.⁵ Such properties⁶ could include:

- sites on the Superfund National Priorities List (NPL);

- sites where EPA has completed or is undertaking CERCLA cleanup activities;
- facilities subject to RCRA corrective action or post-closure care;
- contaminated sites, including underground storage tanks (USTs), in Indian country; and
- federally-owned sites undergoing CERCLA or RCRA cleanups.

The vast majority of properties requiring cleanup are most likely to be addressed by state cleanup programs, such as state Superfund, brownfields, voluntary cleanup (VCP), or UST programs. Depending on the state, laws may provide liability protections for new owners or lessees who were not responsible for the past contamination. Since 2008, all states have programs or policies to provide some level of liability protection to new owners or lessees in specific situations. While individual states are the best source of information about their land cleanup and revitalization laws and programs, EPA will work with parties on a renewable energy project to determine which agency has oversight responsibility for the property.

The 2002 Brownfield Amendments to CERCLA⁷ (Brownfield Amendments) generally prohibit federal CERCLA enforcement against parties who are cleaning up certain lower risk contaminated properties called “eligible response sites” in compliance with a state response program that specifically governs cleanups.⁸ This is commonly referred to as the “enforcement bar.” CERCLA does include exceptions to this enforcement bar under specific circumstances.⁹ In addition, many states are parties to a memorandum of agreement (MOA) with EPA regarding the appropriate use of their VCPs.¹⁰ These MOAs do not alter legal rights or responsibilities, but often include general enforcement assurances from EPA that it does not intend to initiate enforcement actions related to properties assessed and cleaned up under VCPs and in accordance with the terms of the MOA.

Of course, whether a purchaser or lessee will qualify for liability protection under federal or state law or policy depends on the facts and circumstances of each case, including, among other things, the developer’s conduct with respect to any hazardous substances on the property. The remainder of this fact sheet will address issues associated with CERCLA and RCRA liability.

What CERCLA liability protections are available for purchasers of contaminated property?

CERCLA’s “polluter pays” liability scheme ensures that parties who are responsible for contamination, often referred to as potentially responsible parties (PRPs), rather than the general public, pay to clean up the contamination. As described in CERCLA § 107(a), the following categories of persons can be held liable for the costs or performance of a cleanup under CERCLA:

- the current owner or operator of a facility;
- an owner or operator at the time of disposal;
- a person who arranged for the disposal or treatment of hazardous substances (“generator” or “arranger”); and
- a person who accepted hazardous substances for transport and selected the site to which the substances were transported (“transporter”).

CERCLA includes several self-implementing liability protections for parties who own or acquire contaminated property but did not cause or contribute to the contamination. The Brownfield Amendments created new liability protections for “bona fide prospective purchasers” (BFPPs)¹¹ and “contiguous property owners,”¹² and also modified CERCLA’s existing liability defense provision for “innocent landowners.”¹³ For landowners who meet the statutory requirements, EPA approval is not required for these liability protections to take effect, as discussed below. These protections also may apply to properties acquired from the federal government.

The CERCLA liability protection for BFPPs is an important and widely-applicable provision because it applies to parties who purchase contaminated property with or without knowledge of the contamination (see below for discussion of lessees). To remain protected from CERCLA liability for existing contamination at the property, a new purchaser must achieve and maintain BFPP status.

The statutory requirements¹⁴ for BFPP liability protection are:

- the property must have been acquired after January 11, 2002;
- all disposal of hazardous substances must have taken place before acquisition;
- “All Appropriate Inquiries” (AAI) must have been conducted in compliance with federal regulations¹⁵ before acquiring the property;
- the party seeking to become a BFPP cannot otherwise be liable or affiliated with any other person that is potentially liable for the property’s cleanup costs; and
- after acquiring the property, the BFPP must:
 - take reasonable steps¹⁶ to prevent releases of hazardous substances found at the property;
 - provide cooperation, assistance, and access to the property for EPA or others undertaking cleanup work;
 - comply with CERCLA information requests and subpoenas;
 - provide all legally required notices;
 - not impede any cleanup work or natural resource restoration; and
 - comply with land use restrictions and not impede the effectiveness or integrity of institutional controls placed on the property to prevent the spread or release of contaminants.

CERCLA also includes liability exemptions for certain lenders and others who hold secured interests in property¹⁷ and state or local governments that involuntarily acquire contaminated property (for example, through bankruptcy, foreclosure, or abandonment) and did not cause or contribute to the contamination. CERCLA § 101(20)(D) provides that a unit of state or local government will not be considered an owner or operator of contaminated property (and thus is exempt from potential CERCLA liability as a PRP) if the state or local government acquired ownership or control involuntarily. CERCLA § 101(35)(A)(ii), in conjunction with CERCLA § 107(b)(3), provides an innocent landowner defense for state and local governments that have acquired contaminated property “involuntarily” or through certain other mechanisms.¹⁸

With respect to federal facilities, CERCLA provides transferees of federally-owned property additional statutory protections.¹⁹ Federal law provides that the Secretary of Defense shall hold harmless and indemnify persons (including lessees) that acquire ownership or control of any

facility at a military installation that is closing or closed pursuant to a base closure law from any claim for personal injury or property damage that results from the release or threatened release of hazardous substances, petroleum, or petroleum derivatives. The indemnification does not apply to persons and entities that contributed to any release or threatened release or with respect to contamination disposed of at the property after the period of federal ownership.²⁰

What RCRA liability protections are available for purchasers of contaminated property?

RCRA does not contain a BFPP or similar liability protection for purchasers of contaminated property. However, subject to enforcement discretion and resources, EPA may be able to use some of its property-specific documents (see discussion below) to clarify potential RCRA liability for those developing renewable energy projects on contaminated properties. Further, interested parties also may be able to work with their respective states or EPA to separate the ownership of an UST from the ownership/lease of the land. RCRA Subtitle I (addressing USTs) does contain a “security interest exemption” that provides secured creditors (*i.e.*, lenders) a limited statutory exemption from corrective action liability for releases from petroleum USTs.²¹ EPA’s 1995 UST Lender Liability Rule lays out the specific conditions under which certain secured lenders may be exempted from RCRA Subtitle I regulatory requirements including corrective action, technical requirements, and financial responsibility.²²

Are there liability protections for lessees of contaminated property?

Yes, in certain circumstances. A common scenario for renewable energy facilities involves a developer leasing property on which it builds and operates a generation facility, leading to questions regarding a lessee’s potential liability risks. Not all leases trigger CERCLA liability for lessees. However, given the factors some courts have used to decide whether a particular lessee is an “operator” (or “owner”) under CERCLA, EPA recognizes that there may be uncertainty regarding potential liability of lessees under CERCLA. Due in part to CERCLA’s explicit reference to “tenants” in the definition of a BFPP,²³ EPA has issued general guidance (discussed below) as to how EPA intends to exercise its enforcement discretion regarding a tenant’s potential CERCLA liability.²⁴ EPA will work with parties on a renewable energy project to address potential lessee liability issues as discussed below.

Lessees and Indicia of Ownership under CERCLA

EPA’s guidance regarding a tenant’s potential CERCLA liability describes how EPA intends to exercise its enforcement discretion on a site-specific basis regarding a lessee with sufficient “indicia of ownership” to establish “owner” liability under CERCLA.²⁵ Specifically, if a lessee has sufficient indicia of ownership to be an owner, EPA intends to exercise its enforcement discretion and consider the lessee to be a BFPP so long as the lessee complies with the statutory requirements for the BFPP liability protection discussed above.²⁶

The concept of “indicia of ownership” has been used by some courts to hold lessees liable as owners under CERCLA in certain circumstances, including where particular lease terms are such to make the lessee the functional equivalent of an owner. These courts have engaged in a fact-

specific inquiry as to whether the terms of the lease for the contaminated property included sufficient indicia of ownership. One court looked closely at a lease to determine the extent of the lessee's responsibilities at the property, the autonomy of the lessee in making decisions regarding the property, and the authorization given by the owner for the lessee's use of the property.²⁷ The court looked at certain factors to evaluate indicia of ownership for purposes of CERCLA liability, including, whether the term of the lease was lengthy; whether the owner relinquished control over a lessee's ability to sublet the property or to use the property; and whether the lessee was responsible for taxes, insurance, and repairs. Where a lease provides more limited rights to a lessee, courts applying a similar analysis could find that the lease does not provide sufficient indicia of ownership to establish liability under CERCLA. If a prospective lessee is uncertain whether the terms of a lease create CERCLA liability, as a precautionary measure, the lessee nonetheless could opt to follow the requirements for BFPP protection, as if it intended to be an owner.

Lessees with "Derivative" BFPP Status

In addition to purchasers of contaminated property, CERCLA's BFPP protection applies to lessees who have entered into a lease with an owner who is itself a BFPP. CERCLA provides that a lessee may derive BFPP status from an owner so long as the owner achieves and maintains its BFPP status and the lessee does not dispose of hazardous substances at the property or impede any cleanup work or natural resource restoration. As explained in more detail in EPA's guidance regarding a tenant's potential CERCLA liability, if the owner loses its own BFPP status through no fault of the lessee, EPA intends to exercise its enforcement discretion on a property-specific basis and not pursue the lessee so long as the lessee meets the statutory requirements for the BFPP liability protection discussed above.²⁸ If the owner is a PRP, the lessee cannot derive BFPP status from the owner.

Lessees and Potential Operator Liability under CERCLA

Many developers who lease contaminated property for renewable energy generation projects may not be leasing from a BFPP and may not have sufficient indicia of ownership to be eligible to seek BFPP status. Parties who lease or develop contaminated property should recognize the potential to incur liability as a current operator under CERCLA, even if they did not cause or contribute to the original contamination. For example, the installation of renewable energy infrastructure often may require activities such as grading or earth removal and the installation of footings, power lines, and other infrastructure. Determining whether these or other activities may exacerbate existing contamination will require a careful technical and legal analysis of the property and the proposed activities. To assist lessees with this analysis, EPA may be able to provide a property-specific document containing information on the property's cleanup status and EPA's current intentions concerning its exercise of its cleanup and enforcement authorities.

State Liability Protections for Lessees

As discussed above, states, through cleanup programs such as state Superfund, brownfields, VCPs, or UST programs oversee the cleanup of most contaminated properties. Such state programs often facilitate the reuse of these properties by providing liability protections for new

owners, which may or may not apply to lessees of property or which may be contingent upon whether the owner is liable because he or she caused or contributed to the contamination. EPA recommends that prospective lessees contact the state environmental protection agency in the state where the property is located to discuss available state liability protections for lessees.

I believe my project will not trigger cleanup liability. Can I obtain documentation to confirm that the government (state and/or EPA) will not hold me liable?

State VCPs frequently will provide property-specific liability protection (for example, covenants not-to-sue or no-action letters, sometimes accompanying certificates of completion) to entities seeking to purchase, rent, or otherwise become financially involved in reusing contaminated property. These property-specific tools typically work best at properties where significant environmental assessment work has already occurred and where information is available about the extent of the contamination. In addition and as discussed above, CERCLA's "enforcement bar" generally prohibits federal CERCLA enforcement against parties who are cleaning up certain lower risk contaminated properties in compliance with a state response program that specifically governs cleanups.

Given that most contaminated properties are addressed under state programs and that the CERCLA liability protections are self-implementing for the most part, EPA does not need to become involved with property-specific determinations regarding an entity's potential CERCLA liability. However, EPA will work with parties on a renewable energy project to determine whether a site-specific document from EPA may be needed for a transaction to go forward.

Moreover, EPA has issued guidance regarding how it intends to exercise its discretion in taking enforcement actions in certain common situations. These guidance documents are intended to clarify EPA's enforcement intentions and may provide greater certainty to parties who are not responsible for the contamination but are concerned about potential CERCLA or RCRA liability. As EPA gains more experience with renewable energy development, EPA may develop additional facts sheets that address common factual scenarios such as the installation of a solar generating facility on a landfill cap, or the construction of wind turbine facilities on mine-scarred land.

EPA also has developed a variety of property-specific informational documents for Superfund and RCRA properties designed to encourage cleanups and facilitate contaminated property transactions and revitalization by parties not responsible for the contamination. These property-specific documents include comfort/status letters, ready for reuse (RfR) determinations, and Superfund NPL partial deletions. EPA will work with parties on a renewable energy project to determine whether a property-specific document from EPA may be needed for a transaction to go forward. Each of these documents is intended to provide information on the property's cleanup status and may further provide information about EPA's current intentions concerning its exercise of its cleanup and enforcement authorities. For example, an RfR determination is an environmental status report that documents EPA's technical determination that all or a portion of a property is sufficiently cleaned up to support specified types of uses.

Comfort/status letters could provide renewable energy developers with information EPA has about a contaminated property and EPA's intentions with respect to the property as of the date of the letter. The "comfort" comes from a greater understanding of what EPA knows about the property and EPA's intentions with respect to any cleanup activities. The comfort/status letter also could discuss "reasonable steps" that a renewable energy developer who is purchasing or leasing property may need to take to achieve and/or maintain liability protection.²⁹ EPA believes Congress did not intend to create, as a general matter, the same types of cleanup obligations for a BFPP that exist for a liable party under CERCLA. "Nevertheless, it also seems clear that Congress also did not intend to allow a landowner to ignore the potential dangers associated with hazardous substances on its property."³⁰ Thus, for example, a "reasonable steps" comfort/status letter could identify steps to take when installing solar panels on a soil or engineered cap to help avoid exacerbating existing contamination and potentially triggering CERCLA liability. EPA recognizes that renewable energy projects may involve unique activities or require more invasive actions; thus, direct consultation is recommended with EPA's RE-Powering America's Land team members, other EPA revitalization staff, and relevant state environmental protection agency staff to identify property-specific recommendations or reasonable steps. A list and contact information for EPA Regional staff who can assist you is available on EPA's website at <http://www.epa.gov/renewableenergyland/contacts>.

Finally, in certain circumstances, EPA may enter into administrative agreements concerning the property to clarify potential CERCLA and/or RCRA liability. These may include BFPP doing work agreements, prospective purchaser agreements (PPAs), prospective lessee agreements (PLAs), windfall lien resolution agreements, contiguous property owner agreements, and contiguous property owner no action assurance letters.³¹ While EPA believes the need for these types of agreements has been largely addressed by the self-implementing liability protections provided by the Brownfield Amendments and by enforcement discretion guidance, the Agency recognizes that in certain circumstances, a property-specific document may be needed to facilitate a transaction. For example, under the Environmentally Responsible Redevelopment and Reuse (ER3) initiative, EPA has used enforcement incentives such as a PPAs and PLAs to promote sustainable cleanup and redevelopment of contaminated properties.³²

Generally, EPA's property-specific documents and agreements are available in situations where such documents may facilitate the cleanup and redevelopment of contaminated properties, where there is a realistic perception or probability of incurring Superfund or RCRA liability, and where there is no other mechanism available to adequately address the party's concerns. In accordance with EPA guidance, EPA generally considers issuing these documents for properties that are the subject of planned, ongoing, or previous federal cleanup or enforcement actions under CERCLA or RCRA. In addition, EPA anticipates that it will provide "reasonable steps" comfort/status letters for sites with significant federal involvement such that EPA has enough information to form a basis for suggesting reasonable steps (*e.g.*, the site is on the NPL or EPA has conducted or is conducting a removal or remedial action on the site).

Are there other mechanisms available to provide liability relief to purchasers and lessees who are not responsible for causing the contamination?

Yes. In addition to the self-implementing CERCLA liability protections, EPA guidance, and property-specific documents discussed in this fact sheet, there are various private arrangements that can be used to manage environmental liability risks associated with the reuse of contaminated properties. Indemnification and release agreements and environmental insurance policies are examples of non-governmental tools that may be used to allocate responsibility for liability concerns. Indemnification and release agreements are private contracts in which one party (for example, a property owner) agrees to assume another party's potential liability (for example, a lessee of that property). Indemnification and release agreements provide prospective buyers, lenders, insurers, and developers with a means of assigning responsibility for cleanup costs and encourage negotiations among private parties without government involvement. However, the existence of an indemnification and release agreement generally does not affect the way EPA or a particular state determines whether a party is a PRP and/or the decision whether to pursue an enforcement action against that party. Such an agreement, however, may affect the way a court determines whether a party qualifies for one of the CERCLA liability protections.³³ It is always advisable to seek legal advice before purchasing or leasing potentially contaminated property.

Who can I talk to about liability concerns or to find out more information about the RE-Powering America's Land Initiative?

EPA has a national team in place to implement the *RE-Powering America's Land Initiative*. There are a number of ways to find out more information or to get in contact with a team member. For general information, please go to <http://www.epa.gov/renewableenergyland> or contact EPA's Center for Program Analysis at cleanenergy@epa.gov. Staff from one of EPA's Ten Regional offices may also be able to provide information and assistance to parties with questions about siting renewable energy development on contaminated properties located in a Region's jurisdiction-- particularly on federal sites -- or with concerns about potential liability associated with such activities.

For a list and contact information for EPA Regional staff who can assist you, please go to <http://www.epa.gov/renewableenergyland/contacts>. EPA also encourages you to consult with your legal counsel and with the appropriate state, tribal or local environmental protection agency before taking any action to acquire, cleanup, or redevelop contaminated property.

Disclaimer: This fact sheet is provided solely as general information regarding liability in response to questions frequently raised by parties considering the purchase or lease of a potentially contaminated property. It does not provide legal advice, have any legally binding effect, or expressly or implicitly create, expand, or limit any legal rights, obligations, responsibilities, expectations, or benefits for any person. It is the property owner or lessee's sole responsibility to ensure compliance with applicable local, state and federal environmental requirements and to ensure that its use of a contaminated property does not interfere with or impede the property's cleanup or protectiveness, and participation in EPA's RE-Powering America's Land Initiative does not alter this responsibility.

REFERENCE DOCUMENTS AND WEBSITES

Documents and Information Cited to in this Fact Sheet (See endnotes)

EPA's RE-Powering America's Land Initiative
<http://www.epa.gov/renewableenergyland>

EPA's Renewable Energy Interactive Mapping Tool using Google Earth
http://www.epa.gov/oswercpa/mapping_tool.htm

EPA's Cleanups in My Community website
<http://iaspub.epa.gov/Cleanups/>

State & Tribal Response Programs Agreements
http://www.epa.gov/swerosps/bf/state_tribal/moa_mou.htm

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"), March 2003
<http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf>

All Appropriate Inquiries Rule website
<http://www.epa.gov/brownfields/aai>

UST Lender Liability Rule
http://www.epa.gov/oust/fedlaws/280_i.pdf

Enforcement Discretion Guidance Regarding the Applicability of the Bona Fide Prospective Purchaser Definition in CERCLA § 101(40) to Tenants ("Tenants Guidance"), January 2009
<http://www.epa.gov/compliance/resources/policies/cleanup/superfund/bfpp-tenant-mem.pdf>

Summary of EPA Enforcement Tools that Address Liability Concerns
<http://www.epa.gov/compliance/cleanup/revitalization/tools.html>

Environmentally Responsible Redevelopment and Reuse (ER3) Initiative
<http://www.epa.gov/compliance/cleanup/revitalization/er3/index.html>

Additional EPA Documents and Websites – Enforcement and Liability

Revitalizing Contaminated Sites: Addressing Liability Concerns ("Revitalization Handbook"), March 2011
<http://www.epa.gov/compliance/resources/publications/cleanup/brownfields/handbook/index.html>

Top 10 Questions to Ask When Buying a Superfund Site, May 2008
<http://www.epa.gov/compliance/resources/publications/cleanup/superfund/top-10-ques.pdf>

CERCLA Liability and Local Government Acquisitions and Other Activities, March 2011
<http://www.epa.gov/compliance/resources/publications/cleanup/brownfields/local-gov-liab-acq-fs-rev.pdf>

Brownfields and Land Revitalization Cleanup Enforcement website
<http://www.epa.gov/enforcement/cleanup/revitalization/index.html>

CERCLA, Brownfields and Lender Liability Fact Sheet, April 2007
http://www.epa.gov/swerosps/bf/aai/lenders_factsheet.pdf

Other Cleanup Enforcement Policies and Guidance
<http://www.epa.gov/compliance/resources/policies/cleanup/index.html>

REFERENCE DOCUMENTS AND WEBSITES (CONT.)

Additional EPA Documents and Websites – Long-Term Stewardship and Institutional Controls

Institutional Controls Guidance website
<http://www.epa.gov/superfund/policy/ic/guide/index.htm>

Long-Term Stewardship Task Force Report, September 2005
http://www.epa.gov/landrecycling/ltsf_report/index.htm

Additional EPA Documents and Websites – Superfund

Superfund Redevelopment website
<http://www.epa.gov/superfund/programs/recycle>

Considering Reasonably Anticipated Future Land Use and Reducing Barriers to Reuse at EPA-lead Superfund Remedial Sites
<http://www.epa.gov/superfund/programs/recycle/pdf/reusedirective.pdf>

Additional EPA Documents and Websites – RCRA

RCRA Brownfields Prevention website
<http://www.epa.gov/waste/hazard/correctiveaction/bfields.htm>

Additional EPA Documents and Websites – Petroleum and Underground Storage Tanks

Region, State, Tribal, and Local Underground Storage Tank Program Contacts
<http://www.epa.gov/oust/states/index.htm>

Petroleum Brownfields website
<http://www.epa.gov/oust/petroleumbrownfields/index.htm>

Additional EPA Documents and Websites – Federal Facilities

Policy Towards Landowners and Transferees of Federal Facilities, June 1997
<http://www.epa.gov/swerffrr/documents/613memo.htm>

Addendum to 1997 Policy Towards Landowners and Transferees of Federal Facilities, December 2006
www.epa.gov/fedfac/addendum_to_EPA_1997_Policy_Towards_Landowners_and_Transferees_of_FF.pdf

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) (“Early Transfer Authority Guidance”), June 1996
<http://www.epa.gov/fedfac/documents/hkfin.htm>

Interim Guidance for EPA’s Base Realignment and Closure Program, April 2006
http://www.epa.gov/swerffrr/pdf/interim_brac_guidance.pdf

Additional EPA Documents and Websites – State Programs

Review of All State Brownfields and VCP Programs, November 2009
http://www.epa.gov/brownfields/state_tribal/pubs.htm

Individual State Summaries of Incentives and Liability Relief for Renewable Energy on Contaminated Land
<http://www.epa.gov/renewableenergyland/incentives.htm>

1 For purposes of this Fact Sheet, the term “developer” is meant broadly, and includes financing parties as well as project developers.

2 Additional information about EPA’s RE-Powering America’s Land Initiative is available on the Agency’s website at <http://www.epa.gov/renewableenergyland>.

3 EPA’s Renewable Energy Interactive Mapping Tool using Google Earth, available on the Agency’s website at http://www.epa.gov/oswercpa/mapping_tool.htm, will assist in locating these sites identified by EPA.

4 CERCLA, 42 U.S.C. §§ 9601, *et seq.*; RCRA, 42 U.S.C. §§ 6901, *et seq.* EPA and authorized states have several statutory authorities under RCRA under which they may require site investigation and/or cleanup activities at or from a RCRA facility. EPA encourages renewable energy developers to seek legal advice regarding potential liability before purchasing or leasing contaminated property.

5 States and private parties can also use CERCLA and RCRA in certain circumstances to pursue potentially responsible parties for performance of cleanups and payment of cleanup costs. Common law actions for nuisance, trespass, or negligence may also be available to states and private parties in certain circumstances.

6 For more information about individual properties being addressed by federal cleanup or enforcement actions, visit EPA’s Cleanups in My Community website at <http://iaspub.epa.gov/Cleanups/>.

7 *Small Business Liability Relief and Brownfields Revitalization Act*, Pub. L. 107-118 (Jan. 11, 2002).

8 CERCLA § 128(b). “Eligible response sites” are defined at CERCLA § 101(41).

9 CERCLA § 128(b)(1)(B)(i)-(iv) describes the four exceptions to this enforcement bar.

10 More information on current VCP MOAs is available from EPA’s State and Tribal Response Program Agreements website at http://www.epa.gov/swerosps/bf/state_tribal/moa_mou.htm.

11 CERCLA §§ 101(40)(A)–(H) and 107(r)(1).

12 CERCLA § 107(q).

13 CERCLA §§ 107(b)(3) and 101(35)(A).

14 Some of the requirements for achieving BFPP status must be satisfied prior to acquiring a property. Other requirements for maintaining BFPP status are ongoing obligations that must be met after the purchase of the property for the duration of the BFPP’s ownership. For more information on these statutory requirements, see EPA’s “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”) (Bromm, March 6, 2003). This guidance is available at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf>.

15 EPA’s “All Appropriate Inquires” (AAI) website, <http://www.epa.gov/brownfields/aai>, provides a link to the final rule which establishes specific regulatory requirements for conducting AAI into previous ownership, uses, and environmental conditions of a property for the purposes of qualifying for certain landowner liability protections under CERCLA. See also, All Appropriate Inquiries Rule, 70 Fed. Reg. 66070 (effective Nov. 1, 2006); 40 C.F.R. Part 312.

16 “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, extraction and treatment of contaminated groundwater).” Common Elements at pp. 9-10.

17 CERCLA § 101(20)(E) addresses lenders holding indicia of ownership to protect security interests.

18 It is important to note that CERCLA § 101(35)(A)(ii) explicitly includes acquisitions by condemnation or eminent domain in addition to certain “involuntary” acquisitions.” Conversely, the CERCLA § 101(20)(D) exemption does not apply to eminent domain or condemnation.

19 CERCLA §§ 120(h)(3) and (4) provides that certain deeds shall warrant all necessary remedial action has been taken before the transfer and that the United States will conduct all additional remedial action found to be necessary after the transfer.

20 Section 330, *National Defense Authorization Act for Fiscal Year 1993*, Pub. L. 102-484, as amended, 10 U.S.C. § 2687.

21 Solid Waste Disposal Act § 9003(h)(9), 42 U.S.C. § 6991b.

22 40 C.F.R. § 280.200-300. Additional information on the UST Lender Liability Rule is available on EPA’s website at http://www.epa.gov/oust/fedlaws/280_i.pdf.

23 CERCLA § 101(40).

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- ²⁴ See “Enforcement Discretion Guidance Regarding the Applicability of the Bona Fide Prospective Purchaser Definition in CERCLA § 101(40) to Tenants” (“Tenants Guidance”) (Nakayama/Bodine, Jan. 14, 2009) available on EPA’s website at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/bfpp-tenant-mem.pdf>. Also see “Enforcement Discretion Guidance Regarding the Applicability of the Bona Fide Prospective Purchaser Definition in CERCLA Section 101(40) to Tenants: Frequently Asked Questions,” available on EPA’s website at <http://www.epa.gov/compliance/resources/publications/cleanup/superfund/tenant-bfpp-guide-ref.pdf>.
- ²⁵ See Tenants Guidance at pp. 3-4.
- ²⁶ CERCLA §§ 101(40)(A)–(H) and 107(r)(1).
- ²⁷ *Commander Oil Corp. v. Barlo Equip. Corp.*, 215 F.3d 321, 330-331 (2d Cir. 2000).
- ²⁸ Although there is no All Appropriate Inquiries (AAI) requirement for a tenant with derivative BFPP status, a tenant may need to obtain information on the prior uses of the property to have an informed basis on which to comply with these requirements.
- ²⁹ Developers of contaminated property should recognize that property conditions, reasonable steps to address such property conditions, and costs to implement such reasonable steps are unique to each property.
- ³⁰ Common Elements at p. 10.
- ³¹ CERCLA § 107(q)(3). For more information about contiguous property owner no action assurance letters, see “Interim Enforcement Discretion Guidance Regarding Contiguous Property Owners” (Jan. 13, 2004) available on EPA’s website at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/contig-prop.pdf>. Also, see “Model CERCLA Section 107(q)(3) Contiguous Property Owner Assurance Letter” (Nov. 9, 2009) available on EPA’s website at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/cpo-assure-mod-ltr-mem.pdf>.
- ³² More information about ER3 is available on the Agency’s website at <http://www.epa.gov/compliance/cleanup/revitalization/er3/index.html>.
- ³³ One recent judicial decision addressed the applicability of the BFPP “no affiliation” requirement in a case involving an indemnification agreement in which the purchaser agreed to indemnify the seller as to environmental liability at the site. One of the grounds for the court’s decision that the purchaser could not claim liability protection as a BFPP was that the indemnification agreement constituted an affiliation. *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, 2010 WL 4025885, *57 (D.S.C., Oct. 13, 2010).