

# **Innovative Liability Tools: Removing Barriers to Redevelopment Brownfields 2003**



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# Overview

- ❑ Windfall Lien
- ❑ Bona Fide Prospective Purchasers
- ❑ Common Elements – institutional controls, reasonable steps
- ❑ All Appropriate Inquiry

# Windfall Lien Guidance

- Guidance issued July 16, 2003
- A CERCLA §107(r) lien for the **increase in the fair market value** of that property attributable to EPA's cleanup efforts
- Unlike a CERCLA §107(l) lien, it is **not** a lien for all of EPA's unrecovered costs. The windfall lien is limited to the **lesser of** EPA's unrecovered response costs **or** the increase in fair market value attributable to EPA's cleanup

# Windfall Lien Guidance

- A windfall lien can only arise on properties where the United States spends money cleaning up the property. Thus, at the vast majority of Brownfield sites, there is no windfall lien
- Applies to properties that are or may be acquired by a “bona fide prospective purchaser” as defined at CERCLA §101(40)

# Whether to perfect a Windfall Lien

- Substantial unreimbursed cleanup costs unlikely to be recovered from liable parties
- Whether a BFPP will reap a significant windfall directly as a result of EPA's expenditure of Superfund money at a site
- A real estate transaction[s] structured so as to either create a BFPP windfall at taxpayer expense, or allow a liable owner to avoid CERCLA liability

# When EPA Generally Will **Not** Perfect A Lien

- A BFPP acquires the property at fair market value after cleanup
- EPA has previously resolved the potential windfall through a settlement with the liable owner
- EPA's only site expenditures are Brownfields grants or loans
- EPA's only site response costs are preliminary site assessment or site investigation costs

# When EPA Generally Will Not Perfect A Lien

- A homeowner sells a residential property to another homeowner
- The BFPP is going to use the property for the creation of a public park or other similar public purpose
- There is a substantial likelihood of full cost recovery from CERCLA liable parties
- An existing EPA landowner enforcement discretion policy (e.g., the Contaminated Aquifers Policy) applies to the BFPP

# How Will EPA Value the Lien?

- EPA will generally seek only the increase in fair market value (FMV) attributable to a response action that occurs **after** a BFPP acquires the property at a FMV
- Generally, EPA will calculate the increase in FMV attributable to EPA's cleanup by considering the FMV of the property as if cleanup were complete versus the FMV of the property when acquired, presumably the BFPP's purchase price

# Windfall Lien Concerns

- Today's enforcement discretion policy addresses many windfall lien concerns and limits the need for EPA involvement in private real estate transactions
- However, consistent with EPA's existing "Comfort/Status Letter" policy, in situations where it may be appropriate for EPA to provide more site-specific information to interested parties, EPA Regions may provide a comfort/status letter where EPA generally not pursue a windfall lien. To date EPA has done at least a half dozen comfort/status letters addressing parties' windfall lien concerns

# Windfall Lien Concerns

- Where EPA is likely to pursue a windfall lien and a BFPP wants to resolve any existing or potential windfall lien, EPA has developed a model **windfall lien resolution document**. The model is attached to the policy
- To date we have done 3 windfall lien resolution agreements

# Bona Fide Prospective Purchasers

- ❑ EPA believes the law is largely self-implementing but there are a few limited circumstances where a Prospective Purchaser Agreement might be appropriate if it serves the public interest.
- ❑ EPA is committed to removing liability barriers to redevelopment of property where it is appropriate to do so

# “Common Elements” Guidance

- Contiguous Property Owners (CPOs), Bona Fide Prospective Purchasers (BFPPs), & Innocent Landowners (ILOs) must meet certain threshold criteria and continuing obligations in order to qualify for the “landowner liability protections.”
- This is an interim guidance, and may be revised as EPA gains experience in implementing the Brownfields Amendments.

# “Common Elements” Guidance

- ❑ Guidance was signed March 6, 2003.
- ❑ The party claiming the protection bears the burden of proof that it meets the conditions of the applicable liability protection

# “Common Elements” Guidance – Threshold Criteria

- BFPPs, CPOs and ILOs must meet the threshold criteria of performing “all appropriate inquiry” **on or before** acquiring the property. Contiguous property owners and bona fide prospective purchasers must also demonstrate they are not potentially liable or affiliated with any other person that is potentially liable for response costs at the property.

# “Common Elements” Guidance – Innocent Landowners

- ❑ Innocent Landowners must also show that the release or threatened release is by someone not in an employment, agency, or contractual relationship with the innocent landowner.

# “Common Elements” Guidance

## Ongoing Obligations

- ❑ If the institutional controls or land use restrictions were not in place at the time the person purchased the property, the person must still comply with the restrictions and implement the controls
- ❑ Furthermore, a person may not impede the effectiveness or integrity of any institutional control employed in connection with a response action. Impeding does not require a physical disturbance or disruption of the land.

# “Common Elements” Guidance “Reasonable Steps”

- EPA expects landowners to act responsibly if they find hazardous substances on their property. EPA is balancing Congress’ objectives of protecting certain landowners from CERCLA liability with ensuring protection of human health and the environment. EPA believes the pre-existing “due care” case law provides a good reference point for evaluating reasonable steps. EPA is not looking for a full blown CERCLA response as a reasonable step.

# “Common Elements” Guidance “Reasonable Steps”

- The “reasonable steps” language is the same for all three types of landowners. But because of the facts surrounding a BFPP purchase, a BFPP may have greater reasonable steps obligations than the others. The pre-purchase “appropriate inquiry”\* by a BFPP will most likely have informed the BFPP as to the nature and extent of contamination on the property and what might be reasonable steps regarding the contamination.

\*Remember all BFPPs, CPOs and ILOs must do  
“all appropriate inquiry”

# “Common Elements” Guidance “Reasonable Steps”

- ❑ The required reasonable steps only relate to responding to contamination for which the exempted landowner is not responsible. Activities on the property **subsequent** to purchase that result in new contamination can give rise to full CERCLA liability.

# “Common Elements” Guidance “Reasonable Steps”

- If a landowner discovers a previously unknown release of a hazardous substance from a source on her property and, provided the landowner is not otherwise liable for the release from the source, she should take some affirmative steps to “stop the continuing release.”

# “Common Elements” Guidance “Reasonable Steps”

- If a new purchaser agrees to assume the obligations of a prior owner PRP, as defined in an EPA order or consent decree, compliance with those obligations will generally satisfy the reasonable steps in most cases, if the order or consent decree comprehensively addressed the obligations of the prior owner through completion of the remedy.

# “Reasonable Steps” Comfort/Status Letters

- EPA may provide a comfort/letter addressing reasonable steps at a specific site on request
- Intended to be consistent with our 1997 comfort/status letter policy
- Limited to sites where EPA has sufficient involvement to form a basis for suggesting reasonable steps (e.g. NPL, removal)

# “All Appropriate Inquiry” Standard To Be Applied

- ❑ For property purchased before 5/31/97 there is a statutory narrative standard – commonly known information about the property, value of the property if clean, ability of the defendant to detect contamination, and other similar criteria.

# “All Appropriate Inquiry” Standard To Be Applied

- For property purchased after that date, use the 1997 or 2000 ASTM Phase I Environmental Assessment standards. The new legislation provides that EPA is required to promulgate all appropriate inquiry standards by January 11, 2004.
- EPA has established and is using a committee under the Federal Advisory Committee Act (FACA) to engage in negotiated rulemaking for proposed regulatory language setting standards and practices for conducting all appropriate inquiry.

# Guidance on the Municipal Solid Waste Exemption

- Act provided exemption from liability for response costs at NPL sites for three categories of generators of MSW
  - Owners, operators or lessees of residential property
  - Certain small businesses
  - Certain non-profit organizations
- Interim guidance issued August 20, 2003

# Guidance on the Municipal Solid Waste Exemption

- Discusses the statutory exemption, identifies some factors to be considered by EPA and DOJ in the exercise of their enforcement discretion under the exemption, and addresses the relationship of the exemption to existing EPA policies regarding MSW parties

# Where Do We Go From Here?

- Working on a guidance on Contiguous Property Owners
- Closely coordinating within the Agency on implementation
- Guidance are interim. Comment and ideas for clarification are welcome

# Our new web address

- [epa.gov/enforcement/brownfields](http://epa.gov/enforcement/brownfields)
- This will take you to our new Cleanup Enforcement Brownfields page where you can find policy and guidance documents, and the Brownfields Handbook