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

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ASSISTANT ADMINISTRATOR
FOR ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Enforcement Discretion Guidance Regarding Statutory Criteria for Those Who May Qualify as CERCLA Bona Fide Prospective Purchasers, Contiguous Property Owners, or Innocent Landowners ("Common Elements")

FROM: Susan Parker Bodine

TO: Regional Counsels
Superfund National Program Managers

I. Introduction

The U.S. Environmental Protection Agency recognizes that environmental cleanup can help promote reuse or redevelopment of contaminated, potentially contaminated, and formerly contaminated properties (collectively referred herein as "impacted properties") and thereby revitalize communities that may have been adversely affected by the presence of these impacted properties. The EPA also understands that parties interested in acquiring an impacted property for reuse and redevelopment, as well as parties that currently own an impacted property or land contiguous to an impacted property, may be concerned about the potential liabilities stemming from the presence of contamination to which they have not contributed.

Congress also understood these concerns, and in an effort to address them enacted the Small Business Liability Relief and Brownfields Revitalization Act ("Brownfields Amendments"), Pub. L. No. 107-118, in January 2002, which amended the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, also known as Superfund)[1] to provide important liability limitations for landowners that qualify as: (1) bona fide prospective purchasers (BFPPs), (2) contiguous property owners (CPOs), or (3) innocent landowners (ILOs) (hereinafter, "landowner liability protections" or "landowner provisions"). Congress intended these provisions to be self-implementing, enabling private parties to save time and costs, in part, by reducing EPA involvement in most private party transactions. Despite the self-implementing nature of the qualified landowner liability protections, however, the EPA has continued to receive requests for more clarity on the specific statutory criteria for BFPPs, CPOs, and ILOs.

[1] 42 U.S.C. §§ 9601, *et seq.*

To achieve and maintain these statutory landowner liability protections, a landowner must meet certain threshold criteria and satisfy certain continuing obligations.[2] Many of the conditions are the same or similar under the three landowner provisions ("common elements").

This memorandum is intended to provide EPA personnel with general guidance on the common elements of the landowner liability protections to assist them in exercising their enforcement discretion, which at the same time may provide general information to landowners, developers, lenders, investors, or other third-party stakeholders who may wish to become involved with impacted properties. Specifically, this memorandum first discusses the threshold criteria of:

- Performing "all appropriate inquiries" into the previous ownership and uses of property before acquisition; and
- Demonstrating no "affiliation" with a liable party (for BFPPs and CPOs).[3]

The memorandum then discusses the common continuing obligations:[4]

- Demonstrating that no disposal of hazardous substances occurred at the facility after acquisition by the landowner (for BFPPs and ILOs);
- Complying with land use restrictions and not impeding the effectiveness or integrity of institutional controls (ICs);
- Taking "reasonable steps" with respect to hazardous substance releases affecting a landowner's property;
- Providing cooperation, assistance, and access to persons authorized to conduct response actions or natural resource restoration;
- Complying with information requests and administrative subpoenas (for BFPPs and CPOs); and
- Providing legally required notices (for BFPPs and CPOs).

A chart summarizing the common elements and other statutory criteria applicable to BFPPs, CPOs, and ILOs is attached to this memorandum (Attachment A). Also attached is a "Reasonable Steps Categories and Examples" document (Attachment B), which identifies acts and omissions that courts have found to be indicative of "due care" or the lack thereof in evaluating the ILO affirmative defense. The attachment further includes limited discussion on "reasonable steps" identified by courts in evaluating BFPP status. Attachment B also lists some site-specific examples of reasonable steps from previously-issued EPA comfort/status letters.[5]

This guidance supersedes the EPA's 2003 interim guidance titled *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* ("2003 Interim Common Elements

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[2] *See* CERCLA §§ 101(40)(B)(i)-(viii) and 107(r) for BFPPs, 107(q)(1)(A) for CPOs, and 101(35)(A)-(B) and 107(b)(3) for ILOs.

[3] While some common elements are only applicable to two of the three landowner liability protections (as indicated), there may be related obligations for the third category of landowner. *See* each of the common element's sections and Attachment A for a fuller explanation.

[4] Certain obligations specific to the individual landowner liability protections are not listed here. Please see the statute and Attachment A for further information.

[5] Attachment C ("Sample Federal Superfund Interest Reasonable Steps Letter") to the 2003 Interim Common Elements Guidance has been removed, as sample "reasonable steps" language is now included in the Model Federal Superfund Interest Comfort/Status Letter (*see* Section III.B.3.c., below).

Guidance"). The 2003 Interim Common Elements Guidance noted that revisions to the document may be made as the "EPA gains more experience implementing the Brownfields Amendments."[6] Since the release of the 2003 Interim Common Elements Guidance, the EPA has gained experience through regular discussions with brownfields stakeholders, a more thorough analysis of relevant and emerging case law, continuous site-specific work on landowner liability issues, and development and issuance of related guidance documents.

This memorandum discusses the exercise of the EPA's enforcement discretion. The guidance does not address obligations and liability landowners may have under state statutory or common law, state or other federal agency claims under CERCLA, or private party claims under CERCLA, against landowners.[7]

II. Background

The bona fide prospective purchaser provision, CERCLA § 107(r), protects a party from Superfund owner/operator liability if the party acquires property after January 11, 2002 (the date of enactment of the Brownfields Amendments), and meets each of the criteria in CERCLA §§ 101(40) and 107(r), many of which are discussed in this memorandum.[8] BFPPs may purchase property with knowledge of contamination after performing all appropriate inquiries, and still qualify for the landowner liability protection, provided they meet the other statutory criteria, including not impeding the performance of a response action or natural resource restoration.[9] BFPPs that continue to meet the criteria in CERCLA §§ 101(40) and 107(r) are not liable as owners/operators for CERCLA response costs, but the property they acquire may be subject to a windfall lien where the EPA's response action has increased the fair market value of the property. The United States, after spending taxpayer money for cleanup at a property, may have a windfall lien on the property for the lesser of the unrecovered response costs or the increase in fair market value at the property attributable to the Superfund cleanup.[10]

The 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 the person's property.[11] The CPO provision "protects parties that are essentially victims of pollution incidents caused by their neighbor's actions."[12] To qualify

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[6] 2003 Interim Common Elements Guidance at 2.

[7] *See* infra, Section V.

[8] The Brownfields Utilization, Investment, and Local Development (BUILD) Act of 2018 amended CERCLA § 101(40) to allow parties with leasehold interests to qualify for the BFPP liability protection in certain circumstances, provided that the leasehold interest is not designed to avoid CERCLA liability and the leasehold was acquired after January 11, 2002. *See* Pub. L. No. 115-141 (2018); CERCLA § 101(40)(A)(ii).

[9] CERCLA § 107(r)(1).

[10] The windfall lien provision is found in CERCLA § 107(r). The EPA anticipates that there may be situations where a site has a windfall lien and a BFPP wants to satisfy any existing or potential windfall lien before or close to the time of acquisition. The EPA and the Department of Justice (DOJ) jointly issued the *Interim Enforcement Discretion Policy Concerning "Windfall Liens" Under Section 107(r) of CERCLA* (July 16, 2003), which includes a model agreement to facilitate resolution of windfall liens. The policy also provides guidance on how the EPA intends to perfect specific windfall liens and when the EPA may or may not seek to foreclose on windfall liens.

[11] In addition to statutory CPO parties, owners of property above aquifers contaminated from an off-site source may be concerned about CERCLA liability even though they did not cause and could not have prevented the groundwater contamination. The 1995 *Final Policy Toward Owners of Property Containing Contaminated Aquifers* (May 24, 1995), addresses this concern, and identifies when the EPA may, in an exercise of its enforcement discretion, not take action to compel such property owners to perform cleanups or reimburse the agency for cleanup costs. The Brownfields Amendments provide that contiguous property owners are generally not required to conduct groundwater investigations or to install groundwater remediation systems. *See* CERCLA § 107(q)(1)(D).

[12] S. Rep. No. 107-2, at 10 (2001).

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.[13] Prospective CPOs also must perform all appropriate inquiries prior to acquiring property, but unlike prospective BFPPs, these parties are not protected from liability under Section 107(q) if they know, or have reason to know, prior to purchase, that the property is or could be contaminated.[14] CPOs must also prove, by a preponderance of the evidence, that they did not cause, contribute, or consent to the release or threatened release of hazardous substances at the contiguous property.[15]

The innocent landowner provisions provide an affirmative defense when a person meets the requirements of the CERCLA § 107(b)(3) third-party defense and the criteria set forth in CERCLA § 101(35).[16] Many of the criteria in Section 101(35) are common elements. In part to promote redevelopment and provide more certainty for certain third-party purchasers, Congress promulgated the ILO defense in the 1986 Superfund Amendments and Reauthorization Act (SARA), Pub. L.No. 99-499, which allows ILOs to take advantage of the third-party defense in certain circumstances. As with the similar requirements for prospective CPOs, to establish the ILO affirmative defense, parties must have acquired property without knowledge of hazardous substance releases and must have conducted all appropriate inquiries prior to purchase.[17] The facility must also have been acquired after all disposal or placement of the hazardous substances on, in, or at the facility. Further, the failure to disclose the existence of hazardous substance releases to subsequent property purchasers may result in a loss of the ILO affirmative defense.[18] Although CERCLA § 101(35)(A) distinguishes between three types of "innocent landowners," this guidance only addresses "innocent landowners" who acquire property under the circumstances described in Section 101(35)(A)(i).

III. Discussion

A party claiming to be a BFPP, CPO, or Section 101(35)(A)(i) ILO bears the burden of proving that it meets all the conditions of the applicable landowner liability protection, and courts ultimately determine whether landowners in specific cases have met the conditions of the landowner liability protections.[19] However, this document offers general guidance to agency personnel regarding considerations for exercising their discretion concerning the threshold criteria and continuing obligations for BFPPs, CPOs, and ILOs. As landowner liability protection obligations are highly fact-specific and site-specific requirements to obtain or maintain the protection will vary and may change based on site conditions, the EPA encourages parties who own, or seek to own, impacted properties to consult with their own counsel and environmental professionals prior to and during property ownership. Landowners, developers,

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[13] For more information on the CPO provision, *see* the *Interim Enforcement Discretion Guidance Regarding Contiguous Property Owners* (Jan 13, 2004) ("CPO Guidance").

[14] *See* CERCLA § 107(q)(1)(A)(viii)(II). CERCLA § 107(q)(1)(C) provides that a person who does not qualify as a contiguous property owner because they had, or had reason to have, knowledge that the property was or could be contaminated when they bought the property, may still qualify for a landowner liability protection as a BFPP, as long as they meet the criteria set forth in CERCLA § 101(40).

[15] CERCLA § 107(q)(1)(A)(i). For a discussion of this distinct requirement for CPOs, *see* CPO Guidance at 5.

[16] CERCLA § 107(b)(3) offers a defense from liability if a person can show, by a preponderance of the evidence, that the release or threat of release of a hazardous substance was caused solely by the act or omission of a third party. The act or omission must not occur "in connection with a contractual relationship," and the entity asserting the defense must show that (a) it exercised due care with respect to the hazardous substance concerned; and (b) it took precautions against the third party's foreseeable acts or omissions and the consequences that could foreseeably result from such acts or omissions.

[17] Although CERCLA § 101(35)(A)(i) innocent landowners must perform all appropriate inquiries, the requirement is not a part of the more general CERCLA § 107(b)(3) third-party defense.

[18] CERCLA § 101(35)(C).

[19] CERCLA §§ 101(40), 107(q)(1)(B), 101(35) (landowners are required to establish each condition "by a preponderance of the evidence.")

lenders, investors, and other third-party stakeholders may also consider coordinating with EPA regional staff (subject to regional resources) on landowner liability issues at sites that are or may become of federal interest.

A. Threshold Criteria

To qualify as a BFPP, CPO, or ILO under the statute, a person must perform "all appropriate inquiries" before acquiring the property. Bona fide prospective purchasers and CPOs 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 Inquiries

All appropriate inquiries (AAI) is the process of evaluating a property's environmental conditions and assessing potential liability for any contamination.

a. Statutory Requirements

To meet the statutory criteria of a BFPP, CPO, or ILO, a person must perform "all appropriate inquiries" into the previous ownership and uses of property *before acquiring* a property.[20] Purchasers of potentially contaminated property wishing to avail themselves of a landowner liability protection under CERCLA cannot perform all appropriate inquiries *after* acquiring contaminated property. As discussed previously, it may be possible for BFPPs to acquire property with knowledge of contamination after performing all appropriate inquiries, and still maintain their protection from liability, assuming all other criteria are met. In contrast, knowledge, or reason to know, of contamination prior to purchase defeats the CPO and ILO liability protections, even if AAI is performed.[21]

The Brownfields Amendments required the EPA to promulgate regulations establishing standards and practices for conducting AAI. The EPA published the All Appropriate Inquiries Final Rule (Final Rule), setting federal standards and practices for AAI in the Federal Register on November 1, 2005 (70 Fed. Reg. 66,070). The Final Rule went into effect on November 1, 2006, and is codified at 40 C.F.R. Part 312. It was amended on December 30, 2013, to recognize an updated industry standard practice (ASTM E1527-13) as compliant with the requirements of the Final Rule (78 Fed. Reg. 79,319). The Final Rule was also amended on September 15, 2017 to recognize another industry standard practice (ASTM E2247-16) as compliant with the requirements of the Final Rule (82 Fed. Reg. 43,310).

b. Use of ASTM International Standards

The AAI Final Rule, as amended, provides that ASTM International Standard E1527-13 ("Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process") and E2247-16 ("Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process for Forestland or Rural Property") are consistent with the requirements of the Final Rule and can be used to satisfy the statutory requirements for conducting AAI (40 C.F.R. § 312.11). AAI may be conducted in compliance with either of these ASTM standards to satisfy the statutory criteria for conducting AAI as required by CERCLA for a BFPP, CPO, or ILO.

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[20] CERCLA §§ 101(40)(B)(ii), 107(q)(1)(A)(viii), 101(35)(A)(i),(B)(i).
[21] CERCLA §§ 107(q)(1)(A)(viii)(II), 101(35)(A)(i).

c. Overview of AAI Requirements

The AAI Final Rule requires that prospective purchasers conduct all appropriate inquiries **within one year prior to** the date of acquisition of a property (40 C.F.R. § 312.20(a)). It is important that the conditions of a property are understood at or near the time a property is purchased. The all appropriate inquiries investigation must include the following activities[22] to determine whether there are conditions indicative of releases or threatened releases of hazardous substances at, on, in, or to the subject property:

- Conduct interviews with past and present owners, operators, and occupants (40 C.F.R. § 312.23);
- Review historical sources of information (40 C.F.R. § 312.24);
- Review federal, state, tribal, and local government records, including records documenting required land use restrictions and institutional controls at the property (40 C.F.R. § 312.26);
- Conduct a visual inspection of the subject property and adjoining properties (40 C.F.R. § 312.27);
- Review commonly known or reasonably ascertainable information (40 C.F.R. § 312.30);
- Conduct a search for environmental cleanup liens and institutional controls filed or recorded against the property (40 C.F.R. 312.25);
- Assess any specialized knowledge or experience of the prospective landowner (40 C.F.R. § 312.28);
- Assess the relationship of the purchase price to the fair market value of the property if the property were not contaminated (40 C.F.R. § 312.29); and
- Assess the degree of obviousness of the presence or likely presence of contamination at the property and the ability to detect any contamination (40 C.F.R. § 312.31).

Additionally, certain aspects of an AAI investigation listed above must be completed or updated **within 180 days of and prior to** the property acquisition date (40 C.F.R. § 312.20(b)). These activities include:

- Conducting interviews of past and present owners, operators, and occupants (40 C.F.R. § 312.23);
- Reviews of government records (40 C.F.R. § 312.26);
- Visual on-site inspection (40 C.F.R. § 312.27);
- Searches for environmental cleanup liens (40 C.F.R. § 312.25); and
- Declaration of an environmental professional (40 C.F.R. § 312.21).

The performance of these activities within 180 days prior to a prospective purchaser attaining ownership of a property should ensure that the prospective purchaser has access to information regarding the environmental conditions of the property at the time that title is transferred.

For more information on the all appropriate inquiries requirement, *see* the EPA's Office of Brownfields and Land Revitalization's Brownfields All Appropriate Inquiries website.

[22] The AAI Final Rule does not require that sampling and analysis be conducted to comply with AAI requirements. However, sampling and analysis may be valuable in determining the possible presence and extent of potential contamination at the property, and this information may be used to determine how other post-acquisition continuing obligation requirements may best be fulfilled. *See* 70 Fed. Reg. 66,101.

2. Affiliation

To meet the statutory criteria of the BFPP and CPO liability protections, a party must not be potentially liable or affiliated with any other person who is potentially liable for response costs.[23] The specific "no affiliation" language in both provisions is similar.[24] To be a BFPP, the person invoking the liability protection cannot be:

a) 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
b) the result of a reorganization of a business entity that was potentially liable.[25]

As neither the BFPP nor CPO provisions explicitly define the phrase "affiliated with," the phrase could potentially be viewed broadly, to encompass many, if not all, familial relationships, and many corporate or other relationships. A broad reading of the "no affiliation" language could have the potential consequence of reducing the number of entities that otherwise would qualify for a liability protection. However, the EPA believes that Congress intended the "no 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. With this consideration in mind, the EPA's Office of Site Remediation Enforcement issued the *Enforcement Discretion Guidance Regarding the Affiliation Language of CERCLA's Bona Fide Prospective Purchaser and Contiguous Property Owner Liability Protections*.[26] The Affiliation Guidance is intended to assist EPA personnel in exercising the agency's enforcement discretion regarding the "no affiliation" language, on a site-specific basis. The guidance focuses on parties who meet each of the requirements of the BFPP or CPO provisions except for the "no affiliation" requirement. Among other things, the Affiliation Guidance identifies certain relationships that the EPA would generally *not* intend to treat as disqualifying affiliations in the exercise of enforcement discretion for purposes of EPA enforcement actions. These include, in certain circumstances: (i) relationships that occur between an entity seeking a liability protection and a potentially responsible party for properties other than the one impacted by the contamination or the source property; (ii) relationships between the purchaser and a potentially responsible party that arose after the purchase and sale of the property; (iii) contractual or financial documents or relationships that are often executed or created at the time that title to the property is transferred;[27] and (iv) relationships established between a tenant and an owner during

[23] The innocent landowner provision does not contain similar "no affiliation" language. In order 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. The term "contractual relationship" for the purpose of the innocent landowner liability protection is defined in CERCLA § 101(35)(A).
[24] The CPO provision closely tracks the BFPP affiliation language, with minor differences. *See* CERCLA § 107(q)(1)(A)(ii).
[25] CERCLA § 101(40)(B)(viii).
[26] Issued Sept. 21, 2011 (hereinafter "Affiliation Guidance").
[27] The EPA has taken the position that in certain circumstances, in an exercise of enforcement discretion, it "generally does not intend to treat certain contractual or financial relationships (e.g., certain types of indemnification or insurance agreements) that are typically created as a part of the transfer of title, although perhaps not part of the deed itself, as disqualifying affiliations." Affiliation Guidance at 10. More specifically, in certain circumstances, the EPA generally does not intend to treat indemnification agreements between a buyer and seller for pre-existing contamination, and environmental insurance policies obtained by a buyer to cover a seller, as disqualifying affiliations. However, indemnification agreements and insurance policies created to avoid CERCLA liability may be treated as disqualifying affiliations.

the leasing process.[28] These relationships are generally not likely to have been created to avoid CERCLA liability, and the EPA believes that not treating them as prohibited affiliations, on a site-specific basis, likely reflects congressional intent.

For more specific guidance on the "no affiliation" requirement, *see* the Affiliation Guidance.

B. Continuing Obligations

Several of the conditions a landowner must meet to achieve and maintain a landowner liability protection are continuing obligations. This section discusses those continuing obligations that are common to two or more of the liability protections, which include: (1) demonstrating that no disposal of hazardous substances occurred at the facility after acquisition by the landowner; (2) complying with land use restrictions and not impeding the effectiveness or integrity of institutional controls; (3) taking reasonable steps with respect to hazardous substance releases; (4) providing full cooperation, assistance, and access to persons who are authorized to conduct response actions or natural resource restoration; (5) complying with information requests and administrative subpoenas; and (6) providing legally required notices.

1. Disposal

To meet the statutory criteria of the BFPP and ILO liability protections, a party must show that all "disposal" of hazardous substances occurred prior to property acquisition. Specifically, the BFPP provision requires that:

> All disposal of hazardous substances at the facility occurred before the person acquired the facility.[29]

The ILO provision states that:

> The term "contractual relationship", for the purpose of section [107(b)(3)] of this title, includes, but is not limited to, land contracts, deeds, easements, leases, or other instruments transferring title or possession, *unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility….*[30]

The EPA views these provisions as imposing continuing obligations since the statutory language indicates that a party will lose the relevant protection if any disposal occurs after acquisition.

[28] Affiliation Guidance at 7. The BUILD Act amended CERCLA § 101(40) to allow parties with leasehold interests to qualify for the BFPP liability protection in certain circumstances, provided that the leasehold interest is not designed to avoid CERCLA liability and the leasehold was acquired after January 11, 2002. Pub. L. No. 115-141 (2018).
[29] CERCLA § 101(40)(B)(i).
[30] CERCLA § 101(35)(A) (emphasis added).

a. Meaning of "Disposal"

CERCLA defines "disposal" by referring to the definition in the Solid Waste Disposal Act,[31] which in turn defines "disposal" as, "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water."[32] Section 107(a)(2) identifies prior owners or operators of any facility "at the time of disposal of any hazardous substances" as parties that "shall be liable."[33]

In interpreting this provision, courts have held that the initial introduction of hazardous substances into the environment meets the definition of "disposal."[34] Furthermore, courts in various jurisdictions have found that "disposals" have occurred when parties actively disperse contaminants during site development activities, such as excavation and grading.[35] In addition, certain courts have found that the movement of contaminants through the soil, without any active human involvement, e.g., in the context of leaking tanks and drums, may constitute "disposal" under Section 107(a)(2).[36] In short, under CERCLA, some courts have held that "disposal" is not limited to just the initial placement of hazardous substances on or into the land or water.

The EPA recognizes that the definition of "disposal" may, in certain circumstances, impact a party's ability to assert the BFPP or ILO liability protection. In considering how the EPA might exercise its enforcement discretion in light of the definition, below are some examples of ways in which disposals might occur during the cleanup and redevelopment of brownfields properties.

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[31] CERCLA § 101(29) (cross-referencing Section 1004 of the Solid Waste Disposal Act (SWDA), 42 U.S.C. § 6903). The SWDA is more commonly identified as the Resource Conservation and Recovery Act (RCRA).

[32] RCRA § 1004(3).

[33] CERCLA § 107(a)(2).

[34] *See*, *e.g.*, *Kaiser Alum. & Chem. Corp. v. Catellus Develop. Corp*., 976 F.2d 1338, 1342 (9th Cir. 1992) (disposal includes the initial introduction of hazardous substances); *Nurad, Inc. v. William E. Hooper & Sons Co*., 966 F.2d 837, 846 (4th Cir. 1992) (active dumping or placing of hazardous waste at a facility constitutes disposal).

[35] *See*, *e.g.*, *Tanglewood E. Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1573 (5th Cir. 1988) ("[T]here may be other disposals when hazardous materials are moved, dispersed, or released during landfill excavations and fillings."); *Kaiser Alum*., 976 F.2d at 1342 ("disposal" can occur when a development contractor excavated the site for residential development and spread contaminated soil to previously uncontaminated areas of the property); *Bob's Beverage, Inc. v. Acme, Inc.*, 264 F.3d 692, 697 (6th Cir. 2001) (disposal where active human conduct "cause[s] the spread of contamination into or on previously uncontaminated soil or water."); *Bonnieview Homeowners Ass'n, LLC v. Woodmont Builders, LLC*, 655 F. Supp. 2d 473, 490-92 (D.N.J. 2009) (disposal had occurred where developer removed contaminated soil from a property and spread the soil to create lawns).

[36] *See*, *e.g.*, *Nurad, Inc*., 966 F.2d at 846 (mineral spirits leaking from underground tanks constituted disposal; court explained that section 107(a)(2) "imposed liability . . . for ownership of the facility at the time that hazardous waste was spilling or leaking."); *United States v. CDMG Realty Co*., 96 F.3d 706, 714 n.3 (3d Cir. 1996) (disposal could include leaking through a hole in a drum). While courts have held that leaking from tanks and drums may constitute "disposal," certain courts have also held that a more general gradual passive spreading of contaminants through soil or groundwater does not constitute "disposal." *See*, *e.g.*, *CDMG Realty Co*., 96 F.3d at 714-15 (the gradual spreading of landfill contaminants is not "spilling" or "leaking" and therefore does not constitute "disposal"); *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 879, 882-84 (9th Cir. 2001) (en banc) (finding that the gradual spreading of a tar-like substance under the facts of that case did not amount to a disposal under CERCLA § 107(a)(2), but acknowledging that statute will be applied to many different factual scenarios, and that there may be other situations where passive migration, e.g., leaking or spilling, could constitute disposal); *ABB Industrial Systems, Inc. v. Prime Technology, Inc.*, 120 F.3d 351, 354 (2d Cir. 1997) (gradual spreading of hazardous chemicals underground does not result in liability).

For example:

(1) A developer could bring new hazardous substances to the site, depositing or discharging them, for example, and thus causing a new "initial disposal."

(2) A landowner could cause a disposal of existing contamination at the site in the course of its redevelopment activity. This "movement or dispersal of already-once disposed hazardous substances through earthmoving or construction activities" is sometimes referred to as "secondary disposal."[37] Secondary disposals may occur in at least two ways:

   A. First, they may occur while an owner/developer is taking steps to manage the existing on-site contamination, such as the "reasonable steps" required by the BFPP and ILO provisions.

   B. Second, they may occur during other redevelopment activities, e.g., grading the site, digging foundations, or other activities.

(3) A disposal may also occur when existing hazardous substances at the site spill, leak, or migrate, e.g., from storage tanks or drums, even if there is no direct human conduct.[38]

b. Enforcement Discretion for BFPP and ILO Disposals

To qualify for a landowner liability protection, parties must take "reasonable steps" to manage hazardous substance "releases."[39] This continuing obligation assumes that releases of existing contamination on the property may continue to occur during property ownership, but that the landowner will continuously take reasonable steps to halt or minimize exposure to the contamination. Further, CERCLA's definition of "release" includes *any* "disposing into the environment."[40] While courts, not the EPA, are the final arbiter of whether a party meets the landowner liability protection requirements,[41] EPA personnel, in exercising their enforcement discretion on a site-specific basis, should consider not treating certain post-acquisition disposals as automatically disqualifying a party from a BFPP or ILO landowner liability protection that would otherwise apply. The EPA's exercise of enforcement discretion in certain instances in a manner that harmonizes the requirement to take "reasonable steps" to manage "releases" with the requirement that BFPPs and ILOs not "dispose" of hazardous substances after property acquisition is reasonable given congressional intent to encourage the redevelopment of brownfields sites.[42] The EPA provides guidance for its personnel here by describing examples of situations that could warrant the exercise of this discretion, but the facts of each site are unique, and the EPA's prosecutorial discretion should be exercised only after a review of the relevant facts at each site.

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[37] *PCS Nitrogen, Inc.*, 714 F.3d at 177; *see, e.g.*, cases discussed at note 35.

[38] *See, e.g.*, some of the cases discussed at note 36.

[39] Under CERCLA, parties must take "reasonable steps" to: stop any continuing release; prevent any threatened future release; and prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance. For a comprehensive discussion on the "reasonable steps" requirement, *see* Section III.B.3. and Attachment B.

[40] CERCLA § 101(22).

[41] *See*, *e.g.*, *Kelley v. EPA,* 15 F.3d 1100, 1107-08 (D.C. Cir. 1994) (Congress has "designated the courts and not EPA as the adjudicator of the scope of CERCLA liability.").

[42] Legislative history shows that Congress identified the concern that CERCLA liability fears were preventing the cleanup and revitalization of brownfields properties. *See* S. Rep. 107-2, at 2-3 ("The fear of prolonged entanglements in Superfund's liability scheme has been reported by some to be an impediment to the cleanup of even lightly contaminated sites, today known as brownfields . . . . [T]he U.S. Conference of Mayors cited high cost and fear of CERCLA liability as the primary factors that prevent the successful redevelopment of brownfields sites.").

Concerning the first type of disposal (scenario 1, above), the EPA does not believe that an "initial disposal" after acquisition should give rise to any exercise of enforcement discretion.

Concerning "secondary disposals" that occur while a party is working to contain or remediate existing hazardous substances at the property (scenario 2.A, above), EPA personnel should consider not treating such disposals as disqualifying if the disposal occurred as a direct result of "reasonable steps" taken by the party invoking the protection, and the party continued to take "reasonable steps" to manage the resulting release, in accordance with CERCLA and Section III.B.3. and Attachment B of this guidance. For example, if a property owner took reasonable steps in conducting soil investigations at a property, a resulting dispersal of contaminants during such investigations should not ordinarily be treated by the EPA as disqualifying a landowner from liability protection, in its exercise of enforcement discretion, as long as the party continued to perform "reasonable steps" concerning the release.

Concerning "secondary disposals" that occur while a property owner performed site development and construction activities that are not related to "reasonable steps" activities, such as excavation and grading or digging a foundation at the property (scenario 2.B, above), EPA personnel should consider exercising their discretion not to pursue the owner as a PRP as a result of that post-acquisition disposal if the owner undertook the activities in a reasonable manner given the type, amount, and location of the contamination at the site, and the owner proactively and subsequently took reasonable steps to manage the release. For example, if a secondary disposal occurred in the course of the landowner performing reasonable excavation and grading for its development, and the landowner took reasonable steps to prevent and manage resulting releases to prevent the exacerbation of contamination, the act of moving soil should not, by itself, ordinarily preclude the EPA from exercising enforcement discretion to not treat that act as disqualifying for a liability protection.[43] On the other hand, if the EPA determines that the development activity was unreasonable to begin with given site conditions and, as a consequence, a disposal occurred, the EPA should generally not continue to treat that landowner as a BFPP or ILO even if the owner tried to take reasonable steps concerning the resultant release. This scenario might occur where, for example, a landowner breaks a protective cap, allowing rainwater to infiltrate the soil and groundwater and spread contaminants to other areas of the property.

Concerning disposals of existing contamination that occur without any earthmoving or other construction activity, such as new or continued leaking from underground storage tanks (scenario 3, above), if a party takes reasonable steps to address these releases and cooperates with appropriate regulatory authorities in the cleanup of the property, the EPA generally should consider exercising its enforcement discretion to not seek to hold the potential BFPP or ILO liable on the sole basis of any post-acquisition contaminant migration of that existing contamination.

The above examples are illustrative only. It is possible that EPA personnel could determine, in the exercise of their enforcement discretion, that the "reasonable steps" requirement could be satisfied through other reasonable actions, based on relevant site-specific facts and circumstances, or conversely that steps described in the above scenarios are insufficient at other sites based on the facts at those sites.

Exercising enforcement discretion in a manner that allows certain types of post-purchase activities to occur in harmony with the "reasonable steps" requirement, as in the examples above, may alleviate certain liability concerns relating to federal enforcement and provide purchasers with greater certainty in redeveloping brownfields sites. Therefore, these types of post-acquisition disturbances of existing

[43] In circumstances where a property owner manages releases in accordance with an EPA or state response program-approved plan, the EPA may be more likely to exercise enforcement discretion to not treat "secondary disposals" as disqualifying for a landowner liability protection. However, property owners need not always act under these plans to qualify as a BFPP or ILO.

contamination, related to the performance of "reasonable steps," should generally be viewed differently by the EPA for parties that otherwise are able to meet the criteria for establishing and maintaining the BFPP and ILO liability protections. The EPA should exercise its enforcement discretion on the disposal requirement in the context of the liability protections on a case-by-case basis, in light of all relevant facts and circumstances.[44] This document is meant only to provide EPA personnel guidance on the EPA's exercise of its enforcement discretion concerning the BFPP and ILO liability protections and is not applicable in other contexts, including disposal analysis in litigation involving CERCLA § 107.

2. Land Use Restrictions and Institutional Controls

The BFPP, CPO, and ILO 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 IC employed in connection with a response action.[45]

Initially, there are two important points worth noting about these two requirements. First, because land use restrictions are a specific subset of ICs, as explained below, failing to comply with a land use restriction may also impede the effectiveness or integrity of an IC. As explained below, however, these two requirements do set forth distinct obligations. Second, these are ongoing obligations and, therefore, the EPA believes the statute requires BFPPs, CPOs, and ILOs to cooperate with the EPA and/or the state or local governments in the implementation of land use restrictions and/or ICs that were not in place at the time the BFPP, CPO, or ILO purchased the property, but that are established or employed in connection with a cleanup remedy.

a. Compliance with Land Use Restrictions Established or Relied on in Connection with the Response Action

For purposes of this guidance, the term "land use restrictions" is interpreted to mean those ICs that (1) establish legally binding use or activity restrictions or limitations on land or other resources associated with land (e.g., government restrictions on the use of groundwater for drinking water purposes); and (2) bind current and future owners, as well as other users, of the property. Thus, "land use restrictions" may include governmental controls (e.g., zoning ordinances; groundwater use restrictions by tribal, state, or local governments; building codes) and proprietary controls (e.g., environmental covenants, restrictive covenants, conservation easements).[46] This interpretation generally is consistent with the ordinary meaning of the term, plain language of the statute,[47] prior EPA

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[44] Determining what actions constitute a "disposal" under CERCLA is inherently site-specific. While the EPA will exercise enforcement discretion in accordance with this section, courts are the final arbiter of whether certain actions are "disposals."
[45] CERCLA §§ 101(40)(B)(vi), 107(q)(1)(A)(v), 101(35)(A).
[46] For more details and information about these types of ICs, *see* Institutional Controls: A Guide to Planning, Implementing, Maintaining, and Enforcing Institutional Controls at Contaminated Sites ("PIME Guidance") (Dec. 2012).
[47] Because Congress did not define "land use restriction" and the legislative history offers no clarification, it is appropriate to look to the plain and ordinary meaning. The dictionary definition of "restriction" is "something that restricts, such as a regulation that restricts or restrains." Merriam-Webster Dictionary (2018). The preceding words "land use" are intended to describe the restriction, such that the restriction is on the use of land. Further, Congress limited the BFPP requirement that parties be in compliance with land use restrictions only to those land use restrictions "established or relied on in connection with the response action." CERCLA § 101(40)(B)(vi)(I). Thus, for purposes of this requirement, the relevant land use restrictions are those that were developed in connection with the response action or those that the response action relies on.

guidance,[48] related state statutes,[49] and relevant case law.[50] Institutional controls, including governmental controls and proprietary controls, are further discussed below.

Accordingly, the EPA should not consider exercising enforcement discretion where BFPPs, CPOs, and ILOs do not continue to comply with those legally binding restrictions (governmental controls and proprietary controls) in place at the time of purchase. Further, as discussed in more detail below, BFPPs, CPOs, and ILOs are expected to cooperate and provide assistance to the EPA in implementing any ICs selected as part of a response action.

Finally, compliance with land use restrictions is unrelated to a purchaser's AAI obligations. Generally, to meet the AAI requirements, purchasers must search, among other things, government records, ICs that are filed or recorded against the property, and historical documents and records, which may include chain of title documents and land use records.[51] In carrying out AAI, purchasers should engage a title company, real estate attorney, or other title professional to undertake a review of reasonably ascertainable recorded property records.[52]

b. Not Impeding the Effectiveness or Integrity of Any Institutional Control Employed in Connection with a Response Action

EPA's PIME Guidance describes ICs as "non-engineered instruments, such as administrative and legal controls, that help to minimize the potential for exposure to contamination and/or protect the integrity

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Often, when issuing a decision document, the EPA may include in that decision document, for example, laws, ordinances, or restrictive or environmental covenants that already restrict activity and use of the affected property. Because these controls are already in effect at the time the decision document is issued, it can be said that the response action relies on them to ensure the remedy is protective of human health and the environment.

[48] This interpretation of land use restriction is consistent with the EPA's earliest guidance on ICs. *Institutional Controls: A Site Managers Guide to Identifying, Evaluating, and Selecting Institutional Controls at Superfund and RCRA Corrective Action Cleanups*, (Sept. 2000). The Brownfields Amendments do not define "land use restrictions" or "institutional controls," and nothing in the amendments indicate that the EPA's use and discussion of these terms in this guidance was incorrect.

[49] This interpretation is consistent with the various state laws that define or discuss land use restrictions when dealing with brownfields programs or other state cleanup programs. *See*, *e.g.*, Cal. Health & Safety Code § 25117.13 (2018) (defining "land use restriction" to mean "any limitation regarding the uses of property which may be provided by, but is not limited to, a written instrument which imposes an easement, covenant, restriction, or servitude, or a combination thereof, as appropriate, upon the present and future uses of all, or part of, the land"); Miss. Code Ann. § 49-35-5 (2018) ("'Land-use restriction' means the limitation on use of or access to a brownfield agreement site to reduce or eliminate the potential for exposure to contaminants. These restrictions may include, but are not limited to, deed restrictions, use restrictions, or restrictive zoning."); N.C. Gen. Stat. § 130A-310.35 (discussing the enforceability and binding effect of land use restrictions filed through a state-based Notice of Brownfields Property pursuant to this section); Tenn. Code Ann. § 68-212-225 (2018) (same).

[50] This interpretation is consistent with relevant case law in existence before or at the time the Brownfields Amendments were passed that discusses the enforceability or legality of certain land use restrictions, or whether a particular land use restriction amounted to a compensable taking. *See*, *e.g.*, *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 532 U.S. 302 (2002) (discussing and using the term "land use restriction" together with zoning regulations and other planning regulations in the context of exercises of state authority); *Wermager v. Cormorant Township Bd*., 716 F.2d 1211 (8th Cir. 1983) (discussing land use restrictions in the context of a zoning ordinance); *Hensler v. City of Glendale*, 8 Cal. 4th 1 (1994) (explaining that not every land use restriction that designates areas on which no development is permitted results in a compensable taking, and that the impact of a law or regulation as applied to a property determines whether there has been a compensable taking); *Bd. of Supervisors v. Waste Mgmt. of Miss., Inc*., 759 So. 2d 397 (Miss. 2000) (addressing the legality of a county ordinance, described as a land use restriction); *Healey v. Town of New Durham Zoning Bd. of Adjustment*, 140 N.H. 232 (1995) (referring to a local zoning ordinance as land use restriction).

[51] *See* EPA Standards for Conducting AAI, 40 CFR §§ 312.24, 312.26; ASTM, Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process, E1527-13, at sections 6.2, 8.2, 8.3.4; ASTM, Standard Guide for Identifying and Complying with Continuing Obligations, E2790-11.

[52] ASTM, Standard Practice for Environmental Site Assessments, *supra* note 51, at 6.2.

of a response action. . . . [and] are designed to work by limiting land and/or resource use or by providing information that helps modify or guide human behavior at a site."[53] The EPA typically uses ICs whenever contamination remains on-site in a manner that precludes unlimited use and unrestricted exposure at the property. Institutional controls are often needed both before and after completion of the remedial action.

Generally, EPA guidance divides ICs into four categories:

(1) Governmental controls (e.g., zoning or well-drilling ordinances);
(2) Proprietary controls (e.g., environmental covenants[54] and easements that restrict use and that are entered into with the property owner; for example, establishment of restrictions for the benefit of the EPA or a state agency and include a grant of enforcement rights to such governmental agency);
(3) Enforcement documents (e.g., administrative orders, consent decrees, permits); and
(4) Informational devices (e.g., deed notices or notices of contamination, state registries of contaminated sites, health advisories).

Institutional controls typically are selected as part of the response selection process and documented in site-specific remedy decision documents (including records of decision (ROD), ROD amendments, explanations of significant difference, or action memoranda) ("CERCLA decision document"). They may also be further discussed in administrative settlement agreements and orders on consent, or consent decrees; certificates of completion; no further action letters, comfort letters, or closure letters; or, under some state response programs, a statute or regulation (e.g., no groundwater wells when relying on natural attenuation).

Depending on the specific IC, a property owner may need to take steps to implement the IC. As discussed in the EPA's PIME Guidance: "Under CERCLA, . . . non-source landowners of property that hazardous substances reached, or landowners who purchased property after it became contaminated with hazardous substances, may be liable for costs associated with the cleanup. Therefore, there may be instances where a response action calls for a restriction or notice to be placed on the property of a landowner who did not cause or contribute to the contamination. As a result, these landowners may have responsibilities for implementing and maintaining ICs on their properties."[55]

For BFPPs, CPOs, and ILOs, these purchasers or owners may not impede the effectiveness or integrity of any IC employed in connection with a response action.[56] Impeding the effectiveness or integrity of an IC does not necessarily involve a physical disturbance or disruption of the land. A landowner could jeopardize the reliability of an IC through actions short of violating restrictions on land or resource use. In fact, not all ICs restrict the use of land. For example, EPA and state programs often use notices to convey information regarding contamination on-site rather than restricting the use of the property. To do this, the EPA or a state may require a notice to be placed in the land records. If a landowner removes or voids the notice without being authorized by the EPA or the state to do so, the removal or voiding of the notice could impede the effectiveness of the IC.

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[53] PIME Guidance, *supra* note 46, at 2.
[54] Environmental covenants are a type of state-based legal control initially developed by the National Conference of Commissioners on Uniform State Laws through the Uniform Environmental Covenants Act (UECA). At the time this guidance was released, at least 23 states, the District of Columbia, and the U.S. Virgin Islands have adopted UECA. *See* Uniform Law Commission, Environmental Covenants Act for more information.
[55] PIME Guidance, *supra* note 46, at 16.
[56] CERCLA §§ 101(40)(B)(vi)(II), 107(q)(1)(A)(v)(II), 101(35)(A).

Another example of impeding the effectiveness of an IC would be if a landowner applies for a zoning change or variance from the current designated use of the property when the remedy relies on that designated use to act as an IC. In addition, as discussed below, the EPA might also consider a landowner's refusal to assist in the implementation of an IC employed in connection with the response action (such as not agreeing to an easement or covenant) a failure to satisfy the requirement to not impede the effectiveness or integrity of an IC.[57]

An owner may seek changes to land use restrictions and ICs 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 ICs 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 ICs. 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.

c. Monitoring Activities to Assist in Satisfying Land Use Restriction and Institutional Control Obligations

While monitoring the property and associated ICs or land use restrictions is not a distinct requirement under the statute, doing so is one way to ensure that a party continuously complies with the land use restrictions and does not impede the effectiveness or integrity of the ICs.

Bona fide prospective purchasers, CPOs, and ILOs owning property subject to ICs should conduct monitoring events at sufficient frequency to ensure ICs remain effective, unless a potentially responsible party (PRP) is already performing monitoring.[58] The EPA generally recommends annual reviews of ICs, but a shorter review period may be appropriate if site conditions are expected to change frequently (for example, if the site is in an area being redeveloped).[59] The EPA's PIME Guidance provides information about periodic monitoring.[60] Furthermore, there exist certain technologies and approaches that can facilitate more efficient and timely monitoring of ICs. Some of these technologies and approaches include land activity monitoring, one-call excavation monitoring, and land use and building permit monitoring. For more information, see the EPA's memorandum on "Advanced Monitoring Technologies and Approaches to Support Long-Term Stewardship."[61]

d. Implementation of Institutional Controls Employed in Connection with a Response Action

The EPA interprets the requirement to not impede the effectiveness or integrity of any IC employed in connection with a response action as related to the continuing obligation to provide full cooperation and assistance to persons authorized to conduct response actions.[62] Accordingly, through this interpretation, the EPA maintains that BFPPs, CPOs, and ILOs are required to cooperate and assist with the

[57] This may also constitute a violation of the ongoing obligation to provide full cooperation, assistance, and access. CERCLA §§ 101(40)(B)(v), 107(q)(1)(A)(iv), 101(35)(A).
[58] *See* PIME Guidance, *supra* note 46, at 29.
[59] *Id*.
[60] *Id*. at 29-30.
[61] U.S. EPA Office of Site Remediation Enforcement, *Advanced Monitoring Technologies and Approaches to Support Long-Term Stewardship* (Jul. 2018). Advanced monitoring technologies and approaches are not statutorily required and should be evaluated on a case-by-case basis.
[62] CERCLA §§ 101(40)(B)(v), 107(q)(1)(A)(iv), 101(35)(A).

implementation of ICs selected as part of a response action, but that have not yet been fully implemented prior to the purchase. This requirement is in addition to a BFPP's, CPO's, and ILO's obligations to comply with any land use restrictions established or relied on in connection with the response action and to not impede the effectiveness or integrity of any IC employed in connection with a response action.

For certain kinds of ICs, such as proprietary controls and governmental controls, other stakeholders besides the EPA play a key role in implementing these controls. Generally, proprietary controls are written agreements between the property owner and a second party, where the owner agrees to refrain from certain actions or to perform certain actions designed to protect a response action or human health and the environment.[63] Thus, to maintain their liability protection, BFPPs,[64] CPOs, and ILOs who own property to be encumbered by proprietary controls[65] must cooperate with and assist the EPA by signing and recording such controls where the controls have not yet been implemented. Regarding governmental controls, state, tribal, and local governments generally have a broad range of authority to implement a variety of ICs, stemming from their "police power."[66] Accordingly, for governmental controls, where the authority to implement these controls is vested in the state, tribal, or local governments, BFPPs, CPOs, and ILOs must cooperate with and assist the state, tribal, or local governments in the implementation of such controls where they have not yet been implemented.

The purpose of the requirement to cooperate and assist with the implementation of ICs is to help rectify those situations where a PRP-landowner fails to cooperate in implementing ICs (such as a proprietary control) selected as part of a remedy, or where the owner of property to be encumbered by an IC cannot be found. Often, by not cooperating, the PRP-landowner prevents the recording of a proprietary control. If the PRP-landowner later transfers the property and a future party, such as a potential BFPP, acquires the property, that party must cooperate with and assist the EPA in implementing that IC as part of attaining BFPP status. Similarly, if, for example, a potential BFPP or ILO acquires property and an IC selected as part of a remedy was not implemented because the previous owner could not be located, then the new owner must cooperate with and assist the EPA by signing and implementing that IC.

Further, the EPA views implementation and maintenance of an IC employed in connection with a response action as part of the continuing obligation that BFPPs, CPOs, and ILOs, take "reasonable steps" with respect to hazardous substance releases.[67] Institutional controls often are directly intended to address the impact of hazardous substance releases and contamination that remains on-site. As stated above, ICs help to minimize the potential for exposure to contamination and protect the integrity of a response action, particularly when a response action anticipates hazardous substances remaining in place. Institutional controls also help modify or guide human behavior at a site, such that they may help prevent human activity that could cause a future release of hazardous substances. Therefore, cooperating with and assisting the EPA in implementing ICs not yet in place may be appropriate "reasonable steps" to achieving and maintaining a landowner liability protection.[68]

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[63] PIME Guidance, *supra* note 46, at 18.

[64] CERCLA requires BFPPs to not impede the performance of a response action. CERCLA § 107(r)(1). Thus, if a response action requires the implementation of ICs to achieve certain use restrictions, then a BFPP needs to cooperate with and assist in the implementation of ICs in order to not impede the performance of that particular response action.

[65] BFPPs, CPOs, and ILOs are not expected to sign and record (i.e., implement) proprietary controls for property that they do not own, or for which they do not have title or a leasehold interest.

[66] PIME Guidance, *supra* note 46, at 23.

[67] CERCLA §§ 101(40)(B)(iv), 107(q)(1)(A)(iii), 101(35)(B)(i)(II). *See* "reasonable steps" discussion in Section III.B.3. below.

[68] *See* CERCLA §§ 101(40)(B)(iv) and (v), 107(q)(1)(A)(iii) and (iv), 101(35)(A); *see also* ASTM, "Standard Guide for Identifying and Complying with Continuing Obligations," *supra* note 51.

In fulfilling these continuing obligations (i.e., not impeding the effectiveness of ICs, cooperating with and assisting the EPA, and taking "reasonable steps"), potential BFPPs, CPOs, and ILOs should engage with the EPA to find out the status of ICs selected as part of a response action. At properties where ICs selected by a remedy decision document have not been fully implemented, Regions are encouraged to reach out to new purchasers of such properties or third parties who have expressed an interest in acquiring them to ensure that ICs selected as part of a remedy are implemented.[69]

3. Reasonable Steps

a. Overview

Congress intended that landowners who seek to establish and maintain the BFPP, CPO, and ILO liability protections act responsibly concerning hazardous substances that are present on their property. Thus, as a condition of qualifying for these protections, the statute requires these owners to take "reasonable steps" to, with respect to hazardous substance releases:

- Stop continuing releases,
- Prevent threatened future releases, and
- Prevent or limit human, environmental, or natural resource exposure to earlier hazardous substance releases.[70]

Although the "reasonable steps" legal standard is generally 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 threshold criteria is that a person claiming the status of a BFPP, CPO, or ILO must have "carried out all appropriate inquiries" into the previous ownership and uses of the property.[71] However, whereas a CPO or ILO cannot know, or have reason to know, that contamination exists on the property, a BFPP may purchase property with knowledge of the contamination and still be eligible for the liability protection. Thus, only a prospective BFPP could purchase a contaminated property that is, for example, on CERCLA's National Priorities List or is undergoing active cleanup under an EPA or State cleanup program, and still maintain the liability protection. The pre-purchase "all appropriate inquiries" by a BFPP will help inform the party as to the nature and extent of contamination on the property and what might be considered reasonable steps regarding the contamination. Knowledge of contamination and the opportunity to plan prior to purchase should be factors in evaluating appropriate reasonable steps, particularly for BFPPs. If, during property ownership, a CPO or ILO learns that contamination exists, reasonable steps will likely be required, considering all of the available site-specific information.

EPA regional staff should encourage parties to consult with environmental professionals and legal counsel when assessing "reasonable steps" obligations.[72] Though the landowner liability protections are

[69] Depending on the jurisdiction and any applicable state statutes, Regions may consider recording non-binding, non-enforceable deed notices or notices of contamination in the local records office where the property is located. In appropriate circumstances, where a proprietary control selected by a remedy decision document cannot be implemented, recording a notice of contamination may be used to provide information to future owners or purchasers, lenders, and other interested parties about the property and site conditions. Such informational devices may be helpful in providing notice to purchasers about potential ICs that may be needed.

[70] CERCLA §§ 101(40)(B)(iv), 107(q)(1)(A)(iii), 101(35)(B)(i)(II). Although the three provisions are nearly identical, the reasonable steps provision for the BFPP liability protection includes the added directive that the person exercise "appropriate care … by taking reasonable steps" with respect to hazardous substance releases.

[71] CERCLA §§ 101(40)(B)(ii), 107(q)(1)(A)(viii), 101(35)(B).

[72] ASTM E2790, "Standard Guide for Identifying and Complying with Continuing Obligations" ("ASTM Guide"), provides

self-implementing, courts are the final arbiter of whether a party took reasonable steps. EPA regional staff may be available to consult with parties should questions arise concerning the EPA's exercise of enforcement discretion related to "reasonable steps" obligations during property ownership. If a property owner or prospective purchaser is concerned that a specific act or omission may be deemed to be a critical deficiency in a "reasonable steps" analysis at a site that is or may become of federal interest, the party may wish to timely contact EPA regional staff. The EPA may be able to provide additional information on "reasonable steps" that the agency believes would be necessary for it to exercise its enforcement discretion not to consider the property owner or prospective purchaser to have lost a statutory liability protection, based on site-specific circumstances.

b. Interpreting "Reasonable Steps"

By making the landowner liability protections subject to the obligation to take "reasonable steps," the EPA believes Congress intended to protect certain landowners from CERCLA liability while at the same time recognizing that these landowners should act reasonably, in conjunction with other authorized parties, in protecting human health and the environment. In requiring reasonable steps from parties looking to qualify for a landowner liability protection, the 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).[73] Indeed, the contiguous property owner provision's legislative history states that absent "exceptional circumstances . . . , these persons are not expected to . . . undertake other response actions that would be more properly paid for by the responsible parties who caused the contamination."[74] Nevertheless, the statute does not suggest that Congress intended to allow a landowner to ignore the potential dangers associated with hazardous substances on its property.

CERCLA's third-party defense pre-dates the Brownfields Amendments and its associated requirements remain distinct obligations for innocent landowners. This defense 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."[75] The due care language differs from the Brownfields Amendments' "reasonable steps" language and the more specific language that requires BFPPs to exercise "appropriate care … by taking reasonable steps." As such, while case law from multiple jurisdictions provides examples of activities that constitute "due care" and may be a useful reference point for evaluating the "reasonable steps" requirement, this "due care" jurisprudence is not dispositive in an analysis of whether a prospective BFPP, CPO, or ILO has satisfied its "reasonable steps" obligation.

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information and guidance for establishing a process and, in turn, identifying and performing the continuing obligations needed in site specific circumstances, to help inform persons seeking CERCLA liability protections or similar state law protections. As to reasonable steps, the ASTM Guide suggests steps to take at the initial stage of property purchase, or knowledge of a release, such as prudent soil management during redevelopment as well as ongoing longer-term steps, such as institutional control monitoring and stewardship. The ASTM Guide also provides recommendations for planning and, in turn, documenting reasonable steps. The ASTM Guide is not EPA guidance but is referenced here as an additional resource that parties may find useful.

[73] There could be unusual circumstances where the "reasonable steps" required of a BFPP, CPO, or ILO would be akin to the obligations of a potentially responsible party (e.g., the only remaining response action is institutional controls or monitoring, 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 BFPP as the purchaser may buy the property with knowledge of the contamination.

[74] S. Rep. No. 107-2, at 11 (2001). CERCLA § 107(q)(1)(D) provides that contiguous property owners are generally not required to conduct groundwater investigations or to install groundwater remediation systems, except in accordance with the EPA's *Policy Toward Owners of Property Containing Contaminated Aquifers* (May 24, 1995).

[75] CERCLA § 107(b)(3)(a).

In evaluating due care under CERCLA § 107(b)(3), courts have generally concluded that a landowner should take some positive or affirmative step(s) when confronted with hazardous substances on its property. These steps include taking timely, reasonable action based on available information, protecting other parties from exposure, controlling the future spread of contamination, and preventing the exacerbation of contaminated site conditions. Further, courts have referenced the legislative history of the due care requirement, which suggests that due care is proven if a party "demonstrate[s] that he took all precautions with respect to the particular waste that a similarly situated reasonable and prudent person would have taken in light of all relevant facts and circumstances."[76]

Though jurisprudence on exercising appropriate care by taking "reasonable steps" is not as extensive as case law on due care, courts have provided some direction when examining whether parties have met their burden of proving the requirements for a landowner liability protection. The first federal appellate court to examine this language held that a brownfields developer had taken too much time to adequately clean out and fill in concrete sumps on its property.[77] The sumps, previously identified as "recognized environmental conditions," had been left exposed to the elements after demolition of above-ground structures, and this exposure may have exacerbated environmental conditions. In this case, the court held that the developer had not exercised appropriate care because the developer failed to take "reasonable steps to … prevent any threatened future release" and applied the "similarly situated reasonable and prudent person" standard.[78] Another court examined a landowner's claim that it was a BFPP and held that the party had exercised appropriate care by taking reasonable steps to prevent the further release of hazardous substances.[79] The court was persuaded by the fact that the landowner removed the contents of underground storage tanks one month after discovering samples were contaminated.[80] The court also noted that the landowner had been cooperating with authorities under a state voluntary cleanup program.[81]

While these cases demonstrate that the "reasonable steps" determination will involve a site-specific, fact-based analysis, this analysis should reflect Congress' stated interest in protecting certain brownfields landowners from CERCLA liability, while at the same time assuring that landowners act reasonably, given the site-specific circumstances. Further, the analysis should take into account the different elements of the landowner liability protections, as courts and/or the EPA may view other continuing obligations, such as providing cooperation, assistance, and access, and not impeding the effectiveness or integrity of institutional controls, as reasonable steps in their own right. Although each site will have its own unique aspects involving individual site analysis, Attachment B ("Reasonable Steps Categories and Examples") identifies and outlines the main categories of "reasonable steps" obligations described by courts and recommended in previously-issued EPA comfort/status letters. For reference purposes, it also includes "due care" jurisprudence. The reasonable steps categories and examples identified in Attachment B are illustrative, will not be applicable in all circumstances, and are intended as general guidance on the question of what actions may constitute reasonable steps. While certain identified obligations, such as notifying appropriate authorities of contamination and restricting site access, are examples of initial reasonable steps a landowner may take to address continuing or threatened releases or unacceptable exposure, other listed categories and

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[76] H.R. Rep. No. 1016, 96th Cong., 2d Sess., pt. I, at 34 (1980); *see, e.g.*, *PCS Nitrogen, Inc. v. Ashley II of Charleston, LLC*, 714 F.3d 161, 180-81 (4th Cir. 2013), *quoting New York v. Lashins Arcade Co*., 91 F.3d 353, 361 (2d Cir. 1996).
[77] *PCS Nitrogen, Inc*., 714 F.3d at 180-81, *affirming Ashley II of Charleston, LLC v. PCS Nitrogen, Inc*., 746 F. Supp. 2d 692 (D.S.C. 2010). *See also*, *Saline River Properties v. Johnson Controls*, 823 F. Supp. 2d 670, 686 (E.D. Mich. 2011) (party affirmatively broke up concrete floor slab on property, resulting in infiltration of rainwater and possible release of hazardous substances).
[78] *PCS Nitrogen, Inc*., 714 F.3d at 180.
[79] *3000 E. Imperial, LLC v. Robertshaw Controls*, 2010 U.S. Dist. LEXIS 138661, *32-35 (C.D. Cal. Dec. 29, 2010).
[80] *Id*. at *34.
[81] *Id*. at *32-33.

examples demonstrate that the "reasonable steps" obligation continues throughout site ownership. For example, a landowner may have ongoing responsibilities to maintain existing response action elements and monitor lessee conduct, in order to satisfy the "reasonable steps" requirement of a landowner liability protection.

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

The EPA may, in its discretion and based upon a variety of factors, including site complexity, issue comfort/status letters to inform interested parties of site-specific information known to the EPA about reuse of impacted properties.[82] Comfort/status letters may help serve to address concerns parties may have when acquiring and developing these properties by providing publicly-available information about a specific property and the potential applicability of statutory provisions, regulations, and EPA guidance. The "comfort" comes from hearing directly from the agency, close in time to the potential property transaction, about the Region's knowledge of the property based on information known or provided to the EPA at the time of the letter. This knowledge includes past and present contamination; cleanup status, if relevant; the potential for, or actual, agency involvement at the property; and any statutory protections or agency policies that may be germane to the interested party's situation. Comfort/status letters may also suggest property-specific reasonable steps that EPA staff believe a party should take at the property to help ensure protectiveness of human health and the environment.[83] Suggested language on reasonable steps is included in the Model Federal Superfund Interest Comfort/Status Letter, which was issued as part of the *Policy on the Issuance of Superfund Comfort/Status Letters*.[84] The model language provides a template for EPA Regions to outline specific reasonable steps with respect to identified environmental concerns at a property, based on the information evaluated by the Region prior to issuance of the comfort/status letter.[85] In addition to identifying the main categories of "reasonable steps" obligations, Attachment B of this memorandum provides examples of suggested reasonable steps outlined in previously-issued EPA comfort/status letters.

The Comfort/Status Letter Policy notes that the recommended reasonable steps in EPA comfort/status letters are based on current information and are not to be construed as dispositive of actions that may or may not be required of an interested party or as an endorsement of a particular land use.[86] Parties seeking to reuse and redevelop contaminated property should be aware that the EPA may suggest additional "reasonable steps," based on any additional information that may become available regarding the nature and extent of hazardous substance contamination. The EPA encourages parties to consult with their own counsel and environmental professionals prior to and during property ownership, to evaluate any environmental conditions that may necessitate the performance of reasonable steps.

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[82] The EPA may also list suggested reasonable steps in site-specific settlement agreements. Parties may consult with EPA regional staff (subject to regional resources) to understand agency views on potential options to help address site-specific liability concerns and whether "reasonable steps" recommendations may be appropriate to include in settlement documents.
[83] Courts are the final arbiter of whether a party has met the requirements for a landowner liability protection. Though the EPA can suggest that a party take specific reasonable steps, these suggestions should not be considered dispositive of actions that may or may not be required of an interested party. Though nearly all EPA comfort/status letters are issued to parties seeking to achieve or maintain status as a BFPP, letters with suggested reasonable steps may also, on occasion, be issued to parties seeking to achieve or maintain status as CPOs or ILOs.
[84] Hereinafter "Comfort/Status Letter Policy".
[85] In its discretion, a Region may also conclude in a given case that it is not necessary to opine about reasonable steps because, for example, it is clear that the landowner does not or will not meet other elements of the relevant landowner liability protection.
[86] EPA-recommended reasonable steps are not binding on a court's determination on the matter. Superfund comfort/status letters are intended for use when circumstances warrant and are issued at a Region's discretion. The Comfort/Status Letter Policy provides a list of questions a Region may consider to assess whether a Superfund comfort/status letter is warranted.

4. Cooperation, Assistance, and Access

The Brownfields Amendments require that BFPPs, CPOs, and ILOs provide full cooperation, assistance, and access to persons who are authorized to conduct response actions or natural resource restoration at the 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 facility.[87] The EPA interprets these requirements broadly and views them together with other landowner liability protection requirements.[88]

5. Compliance with Information Requests and Administrative Subpoenas

The Brownfields Amendments require BFPPs and CPOs to be in compliance with, or comply with, any request for information or administrative subpoena issued under CERCLA.[89] In particular, the EPA expects timely, accurate, and complete responses from all recipients of Section 104(e) information requests. As an exercise of its enforcement discretion, the 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 or missed the response deadline by a day), a BFPP or CPO, so long as the landowner also meets the other conditions of the applicable landowner liability protection.

6. Providing Legally Required Notices

The Brownfields Amendments subject BFPPs and CPOs 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."[90] The ongoing "legally required notices" obligation ensures that the 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, and under ICs and settlement agreements. 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). BFPPs and CPOs 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 CPOs), or *will provide* within a certain number of days of purchasing the property (in the case of BFPPs), all legally required notices. Such self-certifications may be required, for example, when demonstrating compliance with the BFPP or CPO liability protection in the context of an enforcement action. Self-certifications to the EPA may be in the form of a letter signed by the landowner as long as the letter is sufficient to satisfy the EPA that applicable notice requirements have been met. Like many of the other common elements discussed in

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[87] CERCLA §§ 101(40)(B)(v), 107(q)(1)(A)(iv), 101(35)(A).

[88] For instance, the EPA maintains that BFPPs, CPOs, and ILOs are required to cooperate and assist with the implementation of ICs selected as part of a response action, but that have not yet been fully implemented prior to the purchase. *See supra* Section III.B.2.d.

[89] CERCLA §§ 101(40)(B)(vii), 107(q)(1)(A)(vi). While compliance with information requests and administrative subpoenas is not specified as a statutory criterion for achieving and maintaining the § 101(35)(A)(i) innocent landowner liability protection, CERCLA requires compliance with administrative subpoenas from all persons, and timely, accurate, and complete responses from all recipients of EPA information requests.

[90] CERCLA §§ 101(40)(B)(iii), 107(q)(1)(A)(vii). While provision of legally required notices is not specified as a statutory criterion for achieving and maintaining the § 101(35)(A)(i) innocent landowner liability protection, such landowners may have notice obligations under federal, state and local laws.

this memorandum, providing legally required notices is an ongoing obligation of any landowner desiring to maintain its status as a BFPP or CPO.

IV. Conclusion

This guidance is intended to be used by agency personnel in exercising enforcement discretion, and may also provide general information to landowners, developers, lenders, investors, or other third-party stakeholders who may wish to become involved with impacted properties. As landowner liability protection obligations are highly fact-specific and individual requirements may change based on site conditions, the EPA encourages parties to consult with their own counsel and environmental professionals prior to and during property ownership. Landowners, developers, lenders, investors, and other third-party stakeholders may reach out to coordinate with EPA regional staff (subject to regional resources) on landowner liability issues at sites that are or may become of federal interest. Agency staff remain committed to fostering an overall level of expertise on the common elements of the landowner liability protections through regular discussions with brownfields stakeholders, staying updated on relevant case law, regular site-specific work on landowner liability issues, and issuance of related guidance documents, when necessary.

Questions and comments regarding this memorandum or site-specific inquiries should be directed to Craig Boehr, in the EPA's Office of Site Remediation Enforcement (202-564-5162, boehr.craig@epa.gov).

V. Disclaimer

This memorandum is intended solely for the guidance of employees of the EPA. It is not a rule and it does not alter liabilities or limit or expand obligations under any federal, state, tribal, or local law. It is not intended to and does not create any substantive or procedural rights for any person at law or in equity. The extent to which the EPA applies the Common Elements Guidance will depend on the facts of each case.

Attachments

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Attachment A

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

Common Elements and other Requirements	**Bona Fide Prospective Purchaser** Can acquire with knowledge of contamination	**Contiguous Property Owner** Cannot acquire with knowledge of contamination	**Innocent Landowner Section 101(35)(A)(i)** Cannot acquire with knowledge of contamination
Threshold Criteria			
Perform All Appropriate Inquiries	✔ 101(40)(B)(ii)	✔ 107(q)(1)(A)(viii)	✔ 101(35)(A)(i),(B)(i)
"No Affiliation" demonstration	✔ 101(40)(B)(viii)	✔ 107(q)(1)(A)(ii)	*See* supra note 23, at 7
Acquisition after January 11, 2002	✔ 101(40)(A)(i)(I)		
Continuing Obligations			
No disposal after acquisition	✔ 101(40)(B)(i)		✔ 101(35)(A)
Compliance with land use restrictions and not impeding institutional controls	✔ 101(40)(B)(vi)	✔ 107(q)(1)(A)(v)	✔ 101(35)(A)
Taking "reasonable steps" to manage releases	✔ Exercise appropriate care 101(40)(B)(iv)	✔ 107(q)(1)(A)(iii)	✔ 101(35)(B)(i)(II)
Providing full cooperation/assistance/access	✔ 101(40)(B)(v)	✔ 107(q)(1)(A)(iv)	✔ 101(35)(A)
Compliance with information requests and administrative subpoenas	✔ 101(40)(B)(vii)	✔ 107(q)(1)(A)(vi)	*See* supra note 89, at 21
Providing legally required notices	✔ 101(40)(B)(iii)	✔ 107(q)(1)(A)(vii)	*See* supra note 90, at 21
No impeding performance of response action or natural resource restoration	✔ 107(r)(1)		
Did not cause/contribute to contamination		✔ 107(q)(1)(A)(i)	
Third-Party Defense requirements (due care and precautions)			✔ 107(b)(3)

All section citations in this table are to the Comprehensive Environmental Response, Compensation, and Liability Act, 42. U.S.C. Chap. 103, §§ 9601-9675. Visit the GPO website for current version of the United States Code.

Attachment B

Reasonable Steps Categories and Examples

Because the bona fide prospective purchaser (BFPP), contiguous property owner (CPO), and innocent landowner (ILO) liability protections are self-implementing, the EPA encourages parties to consult with their own counsel and environmental professionals to evaluate "reasonable steps" obligations. The EPA may suggest site-specific reasonable steps in comfort/status letters or settlement agreements, but those suggestions may change and are not to be construed as dispositive of actions that may or may not be required of an interested party or as an endorsement of a particular land use. Further, a court, not the EPA, is the final arbiter of liability.[1] Though the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) does not comprehensively define "reasonable steps" for purposes of the landowner liability protections,[2] courts have provided guidance by both establishing the parameters of "due care" under the original third-party defense, and more recently, examining the requirement to "exercise[] appropriate care … by taking reasonable steps" as a condition for BFPPs. Further, the EPA has issued numerous comfort/status letters since enactment of the 2002 Brownfields Amendments that have included suggested reasonable steps related to site-specific hazardous substance contamination.

This attachment supplements Section III.B.3. of this guidance by identifying and outlining the main categories of "reasonable steps" obligations described by courts and recommended in previously-issued EPA comfort/status letters. For reference purposes, it also includes "due care" jurisprudence. The reasonable steps categories and examples identified in this Attachment are illustrative, will not be applicable in all circumstances, and are intended as general guidance on the question of what actions may constitute reasonable steps.

While not applicable in all circumstances, these categories and examples serve to provide meaningful guidance to EPA personnel, landowners, and interested third parties, on the "reasonable steps" obligation for BFPPs, CPOs, and ILOs under CERCLA §§ 101(40)(B)(iv), 107(q)(1)(A)(iii), and 101(35)(B)(i)(II), respectively, as well as the "due care" criterion that ILOs must show as an element of the third-party defense under CERCLA § 107(b)(3).

Overview

Congress intended that landowners who seek to establish and maintain the BFPP, CPO, and ILO liability protections act responsibly concerning hazardous substances that are present on their property. Specifically, Section 101(40)(B)(iv) requires the following for BFPPs:

> "The person exercises appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to:
>
> - Stop any continuing release,
> - Prevent any threatened future release, and

[1] There may be required actions 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 landowner obligations under state statutory or common law.

[2] CERCLA legislative history does provide some guidance on the "due care" requirement of the original third-party defense and identifies limited examples of "reasonable steps" (*see* below).

- Prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance."[3]

The meaning of the unique "reasonable steps" standard required by this provision has been examined by a few courts but remains unsettled jurisprudence. To help apply this standard, the "due care" case law discussed herein serves as a useful reference point, but because Congress chose to use different language when establishing "appropriate care," it is not dispositive in an analysis of whether a prospective BFPP, CPO, or ILO has satisfied its "reasonable steps" obligation.

Courts addressing the "due care" requirement under CERCLA have clearly indicated that site owners must take at least some affirmative steps to address hazardous substance contamination in order to succeed in invoking a third-party or innocent landowner defense. *See*, *e.g.*, *United States v. DiBiase Salem Realty Trust*, 1993 U.S. Dist. LEXIS 20031, at *22 (D. Mass. Nov. 19, 1993) (construing "due care" requirement of Section 107(b)(3) affirmative defense and holding that failure to do anything after concededly becoming aware of hazardous wastes does not satisfy the obligation to exercise due care; court stated that "[i]n no circumstances can 'no care' be considered 'due care.'"), *aff'd*, 45 F.3d 541, 545 (1st Cir. 1995); *Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co*., 14 F.3d 321, 325 (7th Cir. 1994) (innocent landowner defense failed because no attempt was made to remove hazardous substances or take any other positive steps to reduce the threat posed by those substances). On the other hand, some courts have concluded that the policy of CERCLA "does not mandate precluding a 'due care' defense by imposing a rule that is tantamount to absolute liability for ownership of a site containing hazardous waste" (*New York v. Lashins Arcade Co*., 91 F.3d 353, 362 (2d Cir. 1996) (party played no role in the events that led to the hazardous waste problem and came on scene after public authorities were investigating and remediating)); *see also*, *Akzo Nobel Coatings, Inc. v. Emblen*, 2005 U.S. Dist. LEXIS 39801 (S.D. Ohio May 9, 2005) (court found that owner "exercised all care that was required of her" and was under no obligation to take affirmative action because she cooperated with authorities and had no involvement with hazardous drums). Numerous courts have cited to legislative history on the "due care" requirement, which suggests that due care is proven if a party "demonstrate[s] that he took all precautions with respect to the particular waste that a similarly situated reasonable and prudent person would have taken in light of all relevant facts and circumstances." H.R. Rep. No. 1016, 96th Cong., 2d Sess., pt. I, at 34 (1980); *see also*, *PCS Nitrogen, Inc. v. Ashley II of Charleston, LLC*, 714 F.3d 161, 180-81 (4th Cir. 2013), *quoting Lashins Arcade Co*., 91 F.3d at 361 (borrowing "due care" jurisprudence to inform a determination of what "reasonable steps" must be taken to demonstrate "appropriate care" under the BFPP provision).

In addition to invoking the "similarly situated reasonable and prudent person" standard when assessing due care and reasonable steps, courts have stressed the importance of taking timely, meaningful, and affirmative steps to address releases, in the context of a "due care" analysis. *See*, *e.g.*, *Lashins Arcade Co*., 91 F.3d at 358 (regular water sampling and maintenance of filter, instructions to tenants to avoid discharging hazardous substances, and periodic inspections of premises to ensure compliance led to finding that due care had been exercised); *Redwing Carriers, Inc. v. Saraland Apts*., 94 F.3d 1489, 1508 (11th Cir. 1996) (timely development of maintenance plan and remediation program, cooperation with federal agency, and no exacerbation of site conditions supported due care finding). However, multiple steps may be required to satisfy the "due care" and "reasonable steps" obligations and courts may undertake a highly fact-specific analysis when scrutinizing whether a party is entitled to a landowner liability protection. *See American Nat'l Bank & Trust Co. v. Harcros Chemicals, Inc*., 997 F. Supp. 994

[3] Although the three provisions are nearly identical, the reasonable steps provision for the BFPP liability protection includes the added directive that the person exercise "appropriate care … by taking reasonable steps" with respect to hazardous substance releases.

(N.D. Ill. 1998) (despite a landowner hiring an environmental consultant to analyze and monitor soil and groundwater, the court found that landowner had not exercised due care because it did not attempt to ascertain the nature or degree of the threat posed by hazardous substances and did not remove the contamination once discovered). In general, courts have examined whether a landowner took timely, reasonable action based on available information, protected other parties from exposure, controlled the future spread of contamination, and prevented the exacerbation of contaminated site conditions.

Timely Notify Appropriate Authorities of Contamination

Bona fide prospective purchasers and CPOs may have an obligation to provide timely notice of the discovery or release of a hazardous substance under legally required notice provisions, such as CERCLA §§ 101(40)(B)(iii) and 107(q)(1)(A)(vii). Even if not expressly required by the notice provisions, providing notice of the contamination to appropriate governmental authorities may be a reasonable step in order to prevent a "threatened future release" and "prevent or limit … exposure." For example, in legislative history, 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 Foster v. United States*, 922 F. Supp. 642, 657 (D.D.C. 1996) (failure to notify proper regulatory authorities was a factor in the court rejecting party's third-party and innocent landowner defenses). Proper notification is particularly important where a response may be needed that goes beyond "due care" or "reasonable steps" obligations. Further, some courts have stressed that notification of authorities must be timely to satisfy the due care requirement, and this timeliness component has similarly been stressed in EPA-issued comfort/status letters that outline suggested "reasonable steps." *See*, *e.g.*, *Bob's Beverage Inc. v. Acme, Inc*., 169 F. Supp. 2d 695, 716 (N.D. Ohio 1999) (failure to timely notify the EPA and Ohio EPA of groundwater contamination was a factor in the conclusion that party did not exercise due care).

Examples from EPA-issued comfort/status letters:

- Immediately call the EPA regional Emergency Response Center hotline to report the discovery or release of any hazardous substances.
- Provide timely notice to the EPA about hazardous substance contamination on the property, including investigations that will be conducted, and provide the results of such investigations to the EPA.
- Provide timely notice to the EPA if additional contamination is discovered.

Comply and Cooperate with Authorities

Bona fide prospective purchasers, CPOs, and ILOs have an obligation to provide full cooperation, assistance, and access to authorized persons to conduct response actions or natural resource restoration under CERCLA §§ 101(40)(B)(v), 107(q)(1)(A)(iv), and 101(35)(A). This continuing obligation may itself be identified as a suggested "reasonable step" in EPA-issued comfort/status letters in order to stop a "continuing release," prevent a "threatened future release," and "prevent or limit … exposure" under CERCLA §§ 101(40)(B)(iv), 107(q)(1)(A)(iii), and 101(35)(B)(i)(II). Courts have similarly identified compliance and cooperation with authorities as a factor in a due care analysis. *Compare Interfaith Community Org. v. Honeywell Int'l, Inc*., 263 F. Supp. 2d 796, 864-65 (D.N.J. 2003) (current site owner fully cooperating with state authorities in attempts to compel third party to conduct investigation and remediation was a factor in finding that owner was entitled to ILO/third-party defense), *1325 "G" Street Associates, LP v. Rockwood Pigments NA, Inc*., 2004 U.S. Dist. LEXIS 19178, at *30 (D. Md. Sept. 7, 2004) (consistent compliance with EPA and State orders to conduct further assessments and investigations helped party establish due care element of third-party defense), and *Coppola v. Smith*,

2015 U.S. Dist. LEXIS 5127, at *36-37 (E.D. Cal. Jan. 15, 2015) (party cooperated with state and federal environmental authorities after discovery of hazardous substances and no evidence was presented that party was evasive, obstructive, or failed to follow authorities' directives); *with Franklin County Convention Facilities Auth. v. American Premier Underwriters, Inc.*, 240 F.3d 534, 548 (6th Cir. 2001) (failure to prevent further migration of contaminants for more than eight months after Ohio EPA notified party of potential issue was not due care), *United States v. Domenic Lombardi Realty, Inc.*, 290 F. Supp. 2d 198, 212 (D.R.I. 2003) (failure to obtain container to store contaminated soils despite EPA orders was factor in finding that party did not exercise due care), and *United States v. Timmons Corp.*, 2006 U.S. Dist. LEXIS 7642, at *40 (N.D.N.Y. Feb. 8, 2006) (party failed to exercise due care as it impeded the EPA's prompt investigation by leaving an information request unanswered for three years and failing to take any action with regard to possible exposure).

Courts may view cooperation under a state cleanup program as an important factor in recognizing that a party exercised appropriate care by taking reasonable steps at a property. *See 3000 E. Imperial, LLC v. Robertshaw Controls*, 2010 U.S. Dist. LEXIS 138661, at *32-35 (C.D. Cal. Dec. 29, 2010) (property owner's cooperation with a state on a voluntary cleanup of the property was a factor in finding that party exercised appropriate care by taking reasonable steps to prevent further hazardous substance releases).

Examples from EPA-issued comfort/status letters:

- Contact the necessary authorities (the EPA if Superfund site or appropriate state program if state-lead cleanup) prior to undertaking construction activities on the site property, such as during any excavation or soil-disturbing activities.
- Provide access to the property at all reasonable times and cooperate with the EPA for the purpose of conducting monitoring and response actions.
- Ensure that the design and construction of the roadway do not impede the EPA's access to the site to perform remedial activities.
- Provide access onto and across the property to parties carrying out site O&M and monitoring requirements under the CERCLA remedy.
- Provide the EPA with copies of any environmental data collected at the property.

Prevent Public Exposure by Restricting Site Access

Bona fide prospective purchasers, CPOs, and ILOs, are required to take reasonable steps by preventing or limiting "human, environmental, or natural resource exposure" to hazardous substances, under CERCLA §§ 101(40)(B)(iv)(III), 107(q)(1)(A)(iii)(III), and 101(35)(B)(i)(II)(cc). The legislative history for the CPO 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). Courts have identified the existence or lack of site access restrictions as an important consideration in determining whether a party has met its burden of proving that it is entitled to an innocent landowner defense. *Compare City of Emeryville v. Elementis Pigments*, 2001 U.S. Dist. LEXIS 4712, at *28-29 (N.D. Cal. Mar. 7, 2001) (fencing-off site and subjecting site to 24-hour security to prevent foreseeable acts or omissions by third parties was factor in determining that party exercised due care), and *Interfaith Community Org.*, 263 F. Supp. 2d at 864 (providing site security measure to protect the public from contamination was factor in finding that party exercised due care); *with 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), *New York v. DelMonte*, 2000 U.S. Dist. LEXIS 5149, at *15 (W.D.N.Y. Mar. 31, 2000) (failure to limit access despite knowledge of trespassers was not due care), and *City of Banning v. Dureau*, 2013 U.S. Dist. LEXIS 163930, at *23-24 (C.D. Cal. Nov. 18, 2013) (failure to

adequately secure property to prevent transient break-ins was factor in determining that party did not exercise due care).

Examples from EPA-issued comfort/status letters:

- Maintain the integrity of any fencing or physical access controls at the site property.
- Install security fencing for the duration of the remedial action and post signs on the fencing stating that trespassing is forbidden and that soils contaminated with hazardous substances are present inside the fence line.
- Take other actions to prevent public exposure to un-remediated soils above the action levels.

Contain Releases by Maintaining Existing Elements of a Response Action

Bona fide prospective purchasers, CPOs, and ILOs, have the obligation to take reasonable steps to "prevent any threatened future release" under CERCLA §§ 101(40)(B)(iv)(II), 107(q)(1)(A)(iii)(II), and 101(35)(B)(i)(II)(bb). 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 existing response action elements 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*, *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, 746 F. Supp. 2d 692, 752 (D.S.C. 2010) (failure to adequately maintain limestone cover was factor in holding that party did not exercise appropriate care), *aff'd*, *PCS Nitrogen, Inc.*, 714 F.3d at 180-81; *Saline River Properties v. Johnson Controls*, 823 F. Supp. 2d 670, 686 (E.D. Mich. 2011) (party affirmatively broke up concrete floor slab on property, resulting in infiltration of rainwater and possible release of hazardous substances); *Franklin County Convention Facilities Auth.*, 240 F.3d at 548 (failure to promptly erect barrier that allowed migration was not due care). In many instances, the current property owner will have responsibility for maintenance of the containment system and should repair any breach to that system. If someone other than the current landowner has responsibility for maintenance of the containment system (e.g., a prior owner or other liable party signed a consent decree with the EPA and/or a state), the current owner should, at a minimum, give notice of the breach and needed repair to the party responsible for the system and to the government. Moreover, additional actions to prevent contaminant migration would likely be appropriate. If the party responsible for maintaining existing response action elements is unavailable or otherwise unable to repair a breach, the current landowner should consider taking reasonable steps to promptly repair the breach and prevent additional exposures.

Examples from EPA-issued comfort/status letters:

- Ensure that development activities do not interfere with the design, implementation, or maintenance of a response action.
- Protect and maintain all elements of the existing groundwater recovery and treatment system during and after redevelopment activities.
- Protect and maintain all aspects of the existing containment area and temporary cap and cooperate fully with the anticipated design and installation of a permanent cap on the containment area.
- Refrain from using the property in any manner that would interfere with or adversely affect the implementation, integrity, or protectiveness of any past or future response actions performed at the site.

Timely Mitigate Newly Discovered Releases and Address Environmental Conditions

If a BFPP, CPO, or ILO discovers a previously unknown release of a hazardous substance from an on-site source, the landowner would likely be responsible for taking timely reasonable steps to "stop the continuing release." Compare *3000 E. Imperial, LLC*, 2010 U.S. Dist. LEXIS 138661, at *34-35 (party took reasonable steps by timely sampling contents of underground storage tanks after purchasing property and removing contents one month after discovering samples were contaminated); *Lincoln Properties, Ltd. v. Higgins*, 823 F. Supp. 1528, 1543-44 (E.D. Cal. 1992) (sealing sewer lines and wells and subsequently destroying wells to protect against releases helped establish party exercised due care element of Section 107(b)(3) third-party defense); with *Idylwoods Assoc.*, 956 F. Supp. at 419-20 (property owner's decision to do nothing resulting in spread of contamination to neighboring creek was not due care); *United States v. 175 Inwood Assocs. LLP*, 330 F. Supp. 2d 213, 230 (E.D.N.Y. 2004) (failure to complete cleanup activities for nearly five years after tenants released hazardous substances was not due care).

When environmental conditions are identified through the "all appropriate inquiries" process or by environmental professionals before or during property ownership, the landowner may need to address these conditions by taking reasonable steps.[4] *See*, *e.g.*, *PCS Nitrogen, Inc.*, 714 F.3d at 181 (failure by party to clean out and fill in concrete pads and sumps on property until a year after environmental expert had identified sumps as recognized environmental condition demonstrated that reasonable steps were not taken); *MPM Silicones, LLC v. Union Carbide Corp.*, 2016 U.S. Dist. LEXIS 98535, at *100-01 (N.D.N.Y. Jul. 7, 2016) (receiving reports regarding contamination and recommendations for further sampling and investigation but failing to take prompt steps to delineate hazardous substances would be part of a due care analysis). Notice to appropriate governmental officials and containment or other measures to mitigate the release or address the environmental condition would likely be considered appropriate reasonable steps, and the EPA would generally not recommend that the landowner implement significant additional response measures as "reasonable steps." However, if the release is the result of an initial disposal or a lack of appropriate care, the landowner may lose the liability protection and be required to undertake response measures as a CERCLA liable party.

Examples from EPA-issued comfort/status letters:

- Segregate, identify, and contain and/or dispose of hazardous substances stored on site in drums, vats, or other containers in accordance with all federal, state, and local laws and regulations so as to prevent releases.
- Address potential vapor intrusion concerns where concentrations have the potential to impact human health, consistent with EPA guidance.
- If management of contaminated soils is needed to facilitate development activities, manage such soils appropriately to avoid human and natural resource exposure.

[4] The All Appropriate Inquiries Final Rule does not require that sampling and analysis be conducted to comply with AAI requirements. However, despite this fact and though sampling and analysis is not always required to satisfy the "reasonable steps" requirement, the EPA may include sampling, analysis, testing, and/or assessment of contamination as suggested site-specific "reasonable steps" in comfort/status letters or agreements. Further, a court has identified timely sampling as being a part of a "reasonable steps" analysis. *See 3000 E. Imperial, LLC*, 2010 U.S. Dist. LEXIS 138661, *34-35.

Appropriately Assess/Inspect the Extent of Contamination Once Aware/Upon Discovery

Generally, a landowner should take certain basic actions to assess the extent of on-site contamination, once discovered.[5] 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. Doing nothing in the face of a known or suspected environmental hazard would likely be insufficient to satisfy the "reasonable steps" obligation and courts have concluded as such in a due care analysis. *See*, *e.g.*, *DiBiase Salem Realty Trust*, 1993 U.S. Dist. LEXIS 20031, at *22 (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); *Bonnieview Homeowners Ass'n, LLC v. Woodmont Builders, LLC*, 655 F. Supp. 2d 473, 500 (D.N.J. 2009) (appropriate inspection would be a basis for finding due care). Where the government is actively investigating the property, the need for assessment by the landowner may be lessened, but the landowner should be careful not to rely on the governmental investigation as a shield from potential liability and should communicate with the appropriate authorities, their own counsel, and/or environmental professionals to assess additional "reasonable steps" obligations. *See DiBiase Salem Realty Trust*, 1993 U.S. Dist. LEXIS 20031, at *22-23 (state agency 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). Once a landowner discovers on-site contamination, additional reasonable steps may include characterizing the threat posed by the contaminants and reporting this characterization to the appropriate authorities. *See American Nat'l Bank & Trust Co*., 997 F. Supp. at 1002 (party monitored soil and groundwater but failed to ascertain the nature or degree of the threat posed by hazardous substances).

Examples from EPA-issued comfort/status letters:

- Any contaminated soils encountered, such as during digging foundation footings or installing underground lines or piping, must be characterized to determine appropriate handling and disposal methods in accordance with all applicable state and federal laws and regulations.
- Assess the extent of any hazardous substance contamination on the property.
- Characterize any soil contamination on the property.

Prevent the Exacerbation of Contaminated Site Conditions

Parties seeking to satisfy the "reasonable steps" obligation of one of the landowner liability protections should ensure that they do not exacerbate any contaminated conditions during their ownership of the site at issue. Exacerbation may occur when, for example, contaminated soils are moved to previously uncontaminated areas without proper precautions, contaminated surface water is allowed to migrate, groundwater wells are installed that alter contaminated groundwater flow, or drainage systems are installed that pump contaminated materials to other areas of a property. Courts and the EPA have identified both general and specific reasonable steps that may be taken to protect against activities that would exacerbate contamination and increase exposure risks. These steps include protecting exposed contaminated media from the elements and preventing on-site grading or excavation without proper precautions or approval from necessary authorities. *See*, *e.g.*, *Ashley II of Charleston, LLC*, 746 F. Supp. 2d at 752 (failure to clean out and fill in concrete sumps, leaving them exposed to the elements and potentially exacerbating contaminated site conditions was factor in holding that party did not exercise appropriate care), *aff'd*, *PCS Nitrogen, Inc*., 714 F.3d at 180-81; *Saline River Properties*, 823 F. Supp. 2d at 686 (party affirmatively broke up concrete floor slab on property during excavation activities,

[5] Absent exceptional circumstances, the 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. *See* Policy Toward Owners of Property Containing Contaminated Aquifers (May 24, 1995).

resulting in infiltration of rainwater and possible release of hazardous substances); *Voggenthaler v. Maryland Square LLC*, 724 F.3d 1050, 1062-63 (9th Cir. 2013) (party demolished building and exposed contaminated soil to the elements but did not identify any steps taken to remove the soil or prevent the spread of contaminants).

Examples from EPA-issued comfort/status letters:

- Refrain from digging or disturbing soil without first consulting with the EPA remedial project manager.
- Refrain from excavating below the groundwater level and do not install groundwater wells or structures below the groundwater level which may expose groundwater or alter the groundwater flow.
- Do not perform any activities or construct any structures that will or may exacerbate contaminated conditions at the site property.
- Implement stormwater management and erosion controls as necessary to ensure that construction does not result in the discharge of additional stormwater to the site.

Monitor Lessee Conduct and Address Improper Practices

Landowners should ensure that lessees, managers, and other users of the subject property are aware of any "reasonable steps" obligations.[6] Further, landowners should closely monitor lessee conduct and address any improper practices, as courts have held that not doing so could result in the landowner losing a claimed liability protection. *See*, *e.g.*, *New York v. Shore Realty Corp*., 759 F.2d 1032, 1048-49 (2d Cir. 1985) (party that did nothing to address tenants' dumping activities and ignored leaking hazardous substances on the property did not exercise due care); *United States v. Atchison, Topeka & Santa Fe Ry*., 2003 U.S. Dist. LEXIS 23130, at *155-56 (E.D. Cal. July 16, 2003) (property owner failed to take any meaningful action to correct tenant's hazardous on-site business activities and therefore did not act with due care). *Compare United States v. Saporito*, 684 F. Supp. 2d 1043, 1061 (N.D. Ill. 2010) (merely including lease provisions requiring lessee to comply with the law without monitoring lessee conduct is not enough for due care); *with Lashins Arcade Co*., 91 F.3d at 358 (party instructed tenants to avoid discharging hazardous substances and conducted periodic inspections of tenants' premises to ensure compliance).

Examples from EPA-issued comfort/status letters:

- Notify all contractors, subcontractors, lessees, and any other parties operating at the property of this comfort/status letter and ensure that these parties satisfy the requirements set forth in this letter.
- Make sure that contact with groundwater during redevelopment, by workers and tenants, only occurs under property-specific health and safety plans until the remedy is complete.

Other Reasonable Steps Identified in EPA Comfort/Status Letters

In addition to the reasonable steps categories and examples outlined above, the EPA may suggest other "reasonable steps" in letters and agreements on a site-specific basis. As part of these suggested reasonable steps, the EPA, for clarity, may include the performance of other continuing obligations (for

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[6] Tenants and those with a leasehold interest in a property can meet the BFPP definition in certain circumstances. *See* CERCLA § 101(40).

instance, compliance with land use restrictions, providing full access to authorities) as independent reasonable steps, even though these obligations are distinct requirements under the statute. Though the following examples from previously-issued EPA comfort/status letters should not be considered exhaustive, they serve to provide instructive guidance on reasonable steps, but do not preclude the EPA from identifying other reasonable steps, where appropriate. Landowners, who are most acquainted with their properties, should also think proactively about whether or not other reasonable steps might be advisable given particular site conditions. Further, the EPA's identification of certain reasonable steps that a landowner should take does not preclude a later finding that additional steps were required to maintain the EPA's application of enforcement discretion.

Examples from EPA-issued comfort/status letters:

- Comply with any land use restrictions established in connection with the remedial action and do not impede the effectiveness or integrity of any institutional or engineering control established by the EPA in connection with the remedial action.
- Upon request by the EPA, implement and record institutional controls in the official county property records.
- Do not install any above-ground or subsurface structures that may create or impact potential exposure pathways without first obtaining EPA approval.
- Test on-site groundwater wells prior to use as a drinking water source.
- Prohibit public or private well installation on the property for irrigation or consumption purposes.
- Provide evidence that any employee or contractor entering the property has taken Hazardous Waste Operations training and has attended a safety and security briefing by the EPA's remedial contractor.
- Ensure that all environmental response actions are performed in accordance with all applicable local, state, and federal laws and regulations.
- Ensure appropriate measures are implemented during any construction to minimize the potential for excess worker exposure to soils at the property impacted by contamination.
- Install vapor barriers or other suitable vapor intrusion mitigation measures in future buildings on the property as deemed necessary by the EPA pursuant to anticipated decision documents.

For further information on general "reasonable steps" obligations in relation to the exercise of the EPA's enforcement discretion, please contact Craig Boehr, in the EPA's Office of Site Remediation Enforcement (202-564-5162, boehr.craig@epa.gov). Parties are encouraged to consult with EPA regional staff (subject to regional resources) should questions arise concerning specific "reasonable steps" obligations prior to or during property ownership at sites that are or may become of federal interest.