**Model**

**RE-Powering America’s Land Initiative**

**Comfort/Status Letter**

**September 2021**

[**Insert Addressee**]

RE: [**Insert name or short description of property/site**]

Dear [**Insert name of interested party**]:

Thank you for [contacting or having your attorney/contractor/agent contact] the U.S. Environmental Protection Agency (EPA or the Agency) on [**insert** **date**] about your plans concerning the property referenced above (“Property”). In your inquiry, you described your interest in [**insert general description of the development (e.g., leasing or buying the Property for a proposed renewable energy project)**] and requested that we provide you with a Superfund comfort/status letter.

The purposes of this comfort/status letter are to provide you with information that may be relevant to the potential Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) liability concerns you have identified at the Property and summarize the relevant information available to EPA about the [**insert name of Superfund site**] (“Site”) as of the date of this letter. We hope this information will enable you to make informed decisions as you move forward with your plans regarding the Property.

[**Optional: EPA regional office practice information**]

Under CERCLA (commonly referred to as Superfund),[[1]](#footnote-2) the Agency’s mission is to protect human health and the environment from risks posed by exposure to contaminated or potentially contaminated land, water, and other media. A Superfund cleanup can help return these properties to productive reuse. The EPA regards environmentally responsible, renewable energy projects as a particularly productive reuse of such lands. We are issuing this letter in support of EPA’s RE-Powering America’s Land Initiative[[2]](#footnote-3) and current Agency guidance.[[3]](#footnote-4)

**[Optional: Federal facility-specific language to use when the property is a federal facility rather than a private site**: The U.S. [**insert agency/department**] [owns or owned] the facility, including the Property planned for redevelopment. Consistent with CERCLA § 120(h) and *Executive Order (E.O.) No. 12580* *- Superfund Implementation*,[[4]](#footnote-5) at federally owned and operated facilities, the federal department or agency is generally responsible for any necessary cleanup activity undertaken through a federal facility agreement (FFA).[[5]](#footnote-6) The FFA also provides that the [federal department/agency] and EPA jointly make remedial decisions, or, if the [federal department/agency] and EPA disagree, EPA will select the remedy.

With respect to federal transfers of property to non-federal parties, purchasers receive certain deed covenants from the United States pursuant to CERCLA § 120(h)(3) and (4).[[6]](#footnote-7) Section 120(h)(3)(C) of CERCLA sets forth the conditions under which either the EPA Administrator with the concurrence of the governor of the state where the facility is located [for federally-owned property on the National Priorities List (NPL) or for federally-owned property not on the National Priorities List (NPL)] may defer the CERCLA § 120(h)(3)(A)(ii)(I) requirement to provide a covenant that all necessary remedial action has been taken prior to the date of transfer. In such cases, a transferee of property conveyed under CERCLA § 120(h)(3)(C) also receives assurances at the time of transfer that all necessary remedial action will be taken in the future.[[7]](#footnote-8) Once the United States has taken “all response action necessary to protect human health and the environment,” it must issue a warranty that satisfies that covenant requirement.[[8]](#footnote-9) Nothing in this letter is meant to diminish or affect a federal agency’s continuing environmental responsibilities under Section 120(h) of CERCLA.

EPA recommends that you contact, if you have not done so already, the [**insert federal department/agency that owns the facility**] regarding the status of its CERCLA actions on the property and on the form of the CERCLA § 120(h) covenant that may be provided at transfer. If the facility is on the NPL, EPA [and the State] will help ensure that transfer by the federal agency is conducted consistent with the property transfer requirements of the FFA and CERCLA. In addition, the Agency issued its revised *Policy Towards Landowners and Transferees of Federal Facilities to Encourage Cleanup and Reuse of Federal Facilities on the National Priorities List (NPL)* (“2019 Transferee Policy”) (May 17, 2019),[[9]](#footnote-10) which further describes the Agency’s policy with respect to transfers of U.S. property, to encourage reuse and redevelopment at U.S. properties.]

**Property Status**

Interested parties can find information on sites that are, or potentially are, contaminated and may warrant action under Superfund, including site-specific documents and fact sheets, in the Superfund Enterprise Management System (SEMS).[[10]](#footnote-11) **[Please add the site-specific URL to the Superfund site profile, if available]**.

The Property [**insert one of the following:**

[**a.**] is defined as

[**b.**] is situated within

[**c.**]may be part of

[**d.**]is located near the[**insert SEMS/NPL site name**].]

This Site [is or was] located in SEMS, [**insert one of the following:**

[**a.**] but is not on the National Priorities List (NPL).

[**b.**] and has been proposed to the National Priorities List (NPL).

[**c.**] and is on the National Priorities List (NPL).

[**d.**] and is subject to [**describe ongoing response action**] under the Superfund Alternative Approach.[[11]](#footnote-12)

[**e.**] but was [deleted or partially deleted] from the National Priorities List (NPL).]

For the reasons stated below, we are addressing the Siteunder Superfund [remedial/removal] authority.

**History and Status of the Site**

SEMS provides information on (1) whether an NPL site is proposed, final or deleted, (2)  sites subject to a federal removal action, and (3) sites with a [Superfund Alternative Approach](https://www.epa.gov/enforcement/superfund-alternative-approach) agreement.[[12]](#footnote-13)

[**Note: Include a discussion, if known, of the current site conditions, cleanup status, selected remedies, Agency actions, reasonable steps, land use restrictions and determinations, deed restrictions, ready for reuse determinations, etc.]**

**Reuse of the Property**

Based on the information [you provided or that was provided on your behalf], EPA understands that you [**or** **insert name of interested party if requestor is a third party**] intend to [**insert brief description of the development**] at the Property. We also understand the development will involve [**insert brief description of proposed on-site activities**]. [**Optional, in whole or in part, and to be revised, as needed, if incompatibilities are currently known:** Please note that, to ensure the remedy remains protective of human health and the environment, any development must be compatible with the EPA [or federal agency] cleanup actions and institutional controls designed to protect the remedy and prevent unacceptable exposure to residual contamination.] [**Note:** **For example, the EPA regional office could include language that an interested party should not conduct any activities or construct any structures that would interfere with the EPA’s [or federal agency’s] investigation or cleanup or be inconsistent with the underlying land use assumptions used to design and implement the cleanup.**] As of the date of this letter, we [have not identified any obvious incompatibility or have identified an incompatibility] between your proposed use of the Property as you have described it to us and EPA’s selected cleanup option. [**If incompatibilities are identified, explain EPA’s concerns and potential options, if possible. Also, insert any land restrictions, if known by the EPA Region**.] As your plans develop further, please continue to discuss the development with us [and/or the affected federal agency].

**CERCLA’s Bona Fide Prospective Purchaser Liability Protection**

EPA is providing you with information regarding the bona fide prospective purchaser (BFPP) provision of CERCLA. Congress amended CERCLA in 2002 to exempt certain parties who buy contaminated or potentially contaminated properties from CERCLA liability if they qualify as BFPPs. The BFPP provision provides that a person who meets the criteria of CERCLA §§ 101(40) and 107(r)(1), and who purchases the property after January 11, 2002, will not be liable as an owner or operator under CERCLA.

[**For lessees, add:** The statutory definition of a BFPP also includes a party who acquires a leasehold interest in a property after January 11, 2002, where the leasehold is not designed to avoid liability and the interested party meets certain conditions and criteria.]

A key advantage of the BFPP provision is that it is self-implementing; therefore, the Agency is not involved in determining whether a party qualifies for BFPP status. A party, on its own, can achieve and maintain status as a BFPP, which provides statutory protection from CERCLA liability, without entering into an agreement with EPA, so long as that party meets the threshold criteria and continuing obligations identified in the statute.[[13]](#footnote-14)

Based upon your representation of your situation, the BFPP provision may apply. Note that a court, rather than EPA,ultimately determines whether a landowner has met the criteria for BFPP status. Thus, EPA recommends that you consult with your legal counsel to assess whether you satisfy each of the statutory requirements necessary to achieve and maintain BFPP status.

[**Optional: Reasonable Steps**

Among other criteria outlined in CERCLA, a BFPP must take “reasonable steps” to stop continuing releases, prevent threatened future releases, and prevent or limit human, environmental, or natural resources exposure to any previously released hazardous substances as required by CERCLA § 101(40)(B)(iv). This requirement is explored further in the Common Elements Guidance.[[14]](#footnote-15)

[**If there is enough information available to the EPA Region to determine reasonable steps, insert the following:** By making the BFPP Exemption subject to the obligation to take “reasonable steps,” EPA believes Congress intended to protect certain landowners from CERCLA liability while at the same time recognizing that these landowners should act reasonable, in conjunction with other authorized parties, in protecting human health and the environment. As noted above, the Agency has [**insert most recent/relevant action taken by the Agency**] at the Siteand has identified several environmental concerns. Based on the information we have evaluated; we believe that the following may be reasonable steps related to the hazardous substance contamination found at the Site:

[**Insert the list of reasonable steps or paragraphs outlining reasonable steps with respect to each environmental concern.**]]

Any reasonable steps suggested by EPA are based on the nature and extent of contamination currently known to the Agency and are provided as a guide to help you as you seek to reuse the Property. Because a final determination about which steps are reasonable would be made by a court rather than EPA, and because additional reasonable steps may later be necessary based on site conditions, this list of reasonable steps is not exhaustive. You should continue to identify reasonable steps based on your observation and judgment and take appropriate action to implement any reasonable step whether or not EPA regional staff have identified any such steps.[[15]](#footnote-16)

[**If the EPA Region has insufficient information to identify reasonable steps, insert the following (language may be modified, as appropriate):** As noted above, **[insert explanation as to why the EPA Region is lacking information (e.g., the remedial investigation has not yet been completed for the site.)**] Although reasonable steps may be appropriate, we do not have enough information about the nature and extent of contamination at the Site to provide [you or **insert name of the interested party if requestor is a third party**] with what EPA would consider to be appropriate reasonable steps at this time.]]

**[Note: Pursuant to requirement C7 of the** [**OSRE Roles Chart**](https://cfint.rtpnc.epa.gov/ioic/osre_roles/)**, before the EPA Region inserts language discussing such a statutory exemption or guidance not included in this model letter, the Region should consult with OSRE as this would be considered a significant deviation from this model.]**

[**Liens**

[**Optional: Superfund Lien Pursuant to CERCLA § 107(*l*)]**

[**Insert one of the following:**

[**a.**]No Superfund lien has arisen against the[Site or Property]pursuant to CERCLA § 107(*l*). **Or**

[**b.**]A Superfund lien has arisen on the[Site or Property]pursuant to CERCLA § 107(*l*).]

[**Then choose one of the following:**

[**i.**]EPA has not filed a notice of lien pursuant to CERCLA § 107(*l*)(3) on this [Site or Property] and is not in a position today to determine whether we intend to file such notice of lien with respect to the [Site or Property].

[**ii.**] EPA has not filed a notice of lien pursuant to CERCLA § 107(*l*)(3) on this [Site or Property]. Pursuant to CERCLA § 107(*l*), the Agency will generally not file a notice of lien on property currently owned by a non-liable party.

[**iii.**] EPA has not filed a notice of lien pursuant to CERCLA § 107(*l*)(3) on this [Site or Property] because to date, we have recovered all the costs incurred at the Site from the potentially responsible parties (PRPs).

[**iv.**]EPA has filed a notice of its Superfund lien on this [Site or Property] pursuant to CERCLA § 107(*l*). According to the settlement agreement between the Agency and [**insert name of the interested party**], when the property is sold, we will release this lien upon compliance by the [**insert name of the interested party**] with the terms of the settlement agreement.

[**v.**]EPA has filed a notice of its Superfund lien on this [Site or Property] pursuant to CERCLA § 107(*l*) and [is or is not] willing to consider a resolution leading to release of the lien.

[**vi.**]EPA generally will not file a notice of a CERCLA § 107(*l*) lien on the property after such lien becomes unenforceable through operation of the statute of limitations provided in CERCLA § 113 (*See* CERCLA § 107(*l*)(2)).**]**

[**Optional**: **Windfall Lien Pursuant to CERCLA § 107(r)**

Although Congress provided liability protection under CERCLA for BFPPs to encourage the purchase and reuse of contaminated properties, the property they acquire may be subject to a windfall lien pursuant to CERCLA § 107(r) if there are unrecovered response costs incurred by the United States and the response action increases the fair market value of the property. Unlike a CERCLA § 107(*l*) lien (aka “Superfund lien”), a windfall lien is not a lien for all the Agency’s unrecovered response costs. The windfall lien is limited to the lesser of the Agency’s unrecovered response costs or the increase in fair market value attributable to EPA’s cleanup.[[16]](#footnote-17)

[**Optional, if applicable. Choose one of the following:**

[**a.**] Based upon the information now available to EPA, the Agency is not in a position today to determine whether the windfall lien policy may apply to this [Site or Property].

[**b.**]EPA has not filed notice of a windfall lien under CERCLA § 107(r) on this [Site or Property]. In accordance with EPA policy, the Agency, generally, will not file notice of a windfall lien [**insert reason set forth in the windfall lien policy, for example, “where a bona fide prospective purchaser acquires the property at fair market value after cleanup”**].

[**c.**]Based upon the information available to EPA and consistent with the Windfall Lien Policy, we believe that your situation may fall under the [**insert reason set forth in the Windfall Lien Policy**] section of the policy.

[**d.**] Based upon the information available to EPA, we believe that a windfall lien [has arisen or may arise] on the [Site or Property][**Optional:** in the amount of $ \_\_\_]. If you wish to settle the windfall lien, we are willing to consider a resolution leading to release of the lien.]]

**State Actions**

We can only provide you with information about federal **[insert relevant statue, e.g., Superfund]** actions at the [Site or Property], federal law and regulations, and EPA guidance. For information about potential state actions and liability issues, please contact [**insert** **name of state’s environmental program or name of specific state contact and contact information**]. [**Note: If there is a state contact who handles technical issues, also insert their contact information.**]

**Conclusion**

EPA remains dedicated to supporting the Agency’s RE-Powering America’s Land Initiative in facilitating the cleanup and beneficial reuse of contaminated properties and hopes the information contained in this letter is useful to you. You may find it helpful to consult with your own environmental professional, legal counsel, and your state, tribal, or local environmental protection agency before taking any action to acquire, clean up, or redevelop the [Site or Property]. These consultations may help you obtain a greater level of comfort about the compatibility of the proposed use and ensure compliance with any applicable federal, state, local, and/or tribal laws or requirements. If you have any additional questions or wish to discuss this information further, please feel free to contact [**insert EPA contact information**].

Sincerely,

[**Insert regional contact name**]

[**Insert regional contact title**]

[**Optional:** **Enclosure(s) (#)**]

cc: [**Insert EPA OSRE comfort/status letter contact**]

[**Insert FFEO comfort/status letter contact, if applicable**]

[**Insert EPA HQ RE-Powering contact]**

1. 42 U.S.C. §§ 9601, *et seq.* [↑](#footnote-ref-2)
2. Information on the Agency’s RE-Powering America’s Land Initiative is available at https://www.epa.gov/re-powering. [↑](#footnote-ref-3)
3. *See* 2019 Policy on the Issuance of Superfund Comfort/Status Letters (Aug. 21, 2019), available on the Agency’s website at https://www.epa.gov/enforcement/comfortstatus-letters-guidance. [↑](#footnote-ref-4)
4. Available on the National Archives website <https://www.archives.gov/federal-register/codification/executive-order/12580.html>. [↑](#footnote-ref-5)
5. Sections 2(d) and 2(e)(1) of E.O. No. 12580. [↑](#footnote-ref-6)
6. These covenants make clear that, post-transfer, federal agencies shall conduct “any additional remedial action found to be necessary after the date of such transfer.” *See* 42 U.S.C § 9620(h)(3). Similarly, under CERCLA § 120(h)(4), federal agencies provide a covenant warranting that “any response action or corrective action found to be necessary after the date of such sale or transfer shall be conducted by the United States.” Note that the Section 120(h) covenant only applies to CERCLA hazardous substances, as defined in Section 101(14). However, CERCLA § 104(a) also provides broad response authority to federal agencies to address pollutants and contaminants where there is an imminent and substantial danger to public health or welfare. [↑](#footnote-ref-7)
7. *See* 42 U.S.C. § 9620(h)(3)(C)(ii). [↑](#footnote-ref-8)
8. *See* 42 U.S.C. § 9620(h)(3)(C)(iii). [↑](#footnote-ref-9)
9. Available on the FedCenter.gov website at <https://www.fedcenter.gov/admin/itemattachment.cfm?attachmentid=1200>. [↑](#footnote-ref-10)
10. SEMS is available at: <https://cumulis.epa.gov/supercpad/cursites/srchsites.cfm>. [↑](#footnote-ref-11)
11. See *Transmittal of Updated Superfund Response and Settlement Approach for Sites Using the Superfund Alternative Approach (SAA Guidance)* (Sept. 28, 2012), <https://www.epa.gov/enforcement/transmittal-memo-updated-superfund-response-and-settlement-approach-sites-using>. Information on the Superfund Alternative Approach is available on the Agency’s website at <https://www.epa.gov/enforcement/superfund-alternative-approach>. [↑](#footnote-ref-12)
12. See *Transmittal of Updated Superfund Response and Settlement Approach for Sites Using the Superfund Alternative Approach (SAA Guidance)* (Sept. 28, 2012), <https://www.epa.gov/enforcement/transmittal-memo-updated-superfund-response-and-settlement-approach-sites-using>. Information on the Superfund Alternative Approach is available on the Agency’s website at <https://www.epa.gov/enforcement/superfund-alternative-approach>. [↑](#footnote-ref-13)
13. See EPA’s *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 Guidance") (July 29, 2019) available on the Agency’s website at <https://www.epa.gov/enforcement/common-elements-guidance>. [↑](#footnote-ref-14)
14. *Id.* [↑](#footnote-ref-15)
15. CERCLA § 101(40)(B)(iv) provides that “The person exercises appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to (i) stop any continuing release; (ii) prevent any threatened future releases; and (iii) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance.” [↑](#footnote-ref-16)
16. For more information, please refer to the Agency’s *Interim Enforcement Discretion Policy Concerning “Windfall Liens” Under Section 107(r) of CERCLA July 16, 2003 (“*Windfall Lien Policy”) available at <https://www.epa.gov/enforcement/interim-guidance-enforcement-discretion-concerning-windfall-liens-cercla-section-107r>]. [↑](#footnote-ref-17)