
**EPA'S BROWNFIELDS TOOLBOX:
AN EVALUATION OF EPA'S REGULATIONS
FOR DEVELOPERS OF CONTAMINATED
PROPERTY**

Brian J. Pinkowski

**Technical Service Report No. 14
The Rocky Mountain Land Use Institute**



**College of Law
University of Denver**

EPA'S BROWNFIELDS TOOLBOX: AN EVALUATION OF EPA'S REGULATIONS FOR DEVELOPERS OF CONTAMINATED PROPERTY

**Brian J. Pinkowski
Wright & Adger, LLP**

Technical Service Report No. 14

ABOUT THE INSTITUTE

The Rocky Mountain Land Use Institute at the University of Denver College of Law engages in a variety of educational and research activities related to public interest aspects of land use and development. In addition to providing educational opportunities for students at the College of Law through internships and research projects, the Institute sponsors workshops and symposia for land use practitioners and citizen groups on specific land use topics. The Institute, working closely with both the public and private sectors, also undertakes and supports research and service projects on selected issues and topics related to land use and development in the Rocky Mountain region. The Institute operates in affiliation with both regional and national advisory boards, the members of which are among the leading practitioners and academics in the field. The Rocky Mountain Land Use Institute is supported by revenues generated by the Institute's own activities, sale of publications, grants and gifts.

© Copyright 1998 - The Rocky Mountain Land Use Institute
College of Law, University of Denver
7150 Montview Boulevard, Suite 122
Denver, Colorado 80220
Phone (303) 871-6319; Fax (303) 871-6051

All rights reserved. No part of this report may be reproduced in any form or by any means, electronic or mechanical, including photocopying, or by any information storage and retrieval system, without permission from the publisher.

OVERVIEW AND PURPOSE

Introduction

Developers, lenders, attorneys, municipalities and landowners are confused about how to develop contaminated property while minimizing potential environmental liabilities. In an effort to diminish the confusion, the American Bar Association has held seminars and published books on the subject.¹ Additionally, there have been at least 150 law review articles which mention the subject,² and significant effort by the U.S. Environmental Protection Agency (EPA) to deal with the issue under its new Brownfields program.³ These efforts have not been successful. As a result, approximately 450,000 properties are presently left underused or abandoned, liabilities to the owners.

The objective of this essay is to provide a functional guide to EPA's Brownfields toolbox in a way that will allow the reader to develop successful strategies for the sale and redevelopment of problem properties. Accordingly, the first topic of discussion will be identifying the common risks/liabilities associated with such property.

Next, this essay will discuss EPA's efforts to provide certainty for property owners, lenders and developers, and include a discussion of how well these tools work for the parties of a real estate transaction.

Last, this essay will conclude with a discussion of the key factors to be considered by a developer when evaluating a deal involving contaminated property.

THE RISKS OF BEING ASSOCIATED WITH CONTAMINATED PROPERTY

Common Environmental Issues

There is much available in the existing literature on general environmental issues associated with property. Accordingly, merely a brief introduction will be given to these subjects in this essay.⁴ Most of the attention in this section will be devoted to the consequences of the CERCLA statute, Superfund.⁵ Superfund may be the single largest impact on economic development of contaminated property.⁶

1. Asbestos

Asbestos use in commercial building products began in the early 1900s.⁷ Airborne asbestos particles can cause scarring of lung tissue and cancer in the

lung and stomach.⁸ Asbestos removal and disposal are regulated primarily by state air quality requirements, while federal requirements address asbestos material found in schools and public buildings.⁹ Recently revised standards place new and significant responsibilities on building and facility owners, managers and lessees.¹⁰ These include due diligence surveys, communications and disclosure about presumed asbestos-containing materials, and employee training and work practices.¹¹ Asbestos issues have been successfully dealt with by owners, purchasers, and developers for many years now.

2. Lead Paint

Lead-based paint can pose a severe health risk and represent a significant financial liability. This heavy metal can pose a health risk even in the minute quantities found in chipped or peeled paint or caulking.¹² Lead-based paints for residential use have been banned for some time. More recent regulation seeks to control and manage its continued presence.¹³ The ubiquity of lead paint and lead in the environment, combined with the potential health risks and costs of remediation create a significant incentive for purchasers to perform extensive pre-purchase audits of any commercial/industrial property. This is particularly true where the lead may have become located in the soils surrounding the property and building structures.¹⁴

3. Lighting Wastes and PCBs

Transactions involving Brownfields properties often involve pre-existing structures. Pre-existing structures will necessarily raise a question about the status of the florescent lighting. Properties built before 1979 may contain old style light fixtures containing polychlorinated biphenyls (PCBs), a hazardous material.¹⁵ Light ballasts manufactured through 1979 are considered to contain PCBs.¹⁶ The handling and disposal of these materials as part of demolition or remodeling can pose a potential problem for owners and developers.

4. Radon

This colorless, odorless radioactive gas, which results from the natural decay of uranium below ground, has been identified as a potential problem in many areas of the country.¹⁷ Radon gas has been linked to lung cancer.¹⁸ Owners and lessors of commercial or residential property could be subjected to potential tort liability if radon gas buildup within a structure is a problem. However, radon is not a significant problem for most owners and developers of

commercial property at present.

While there are no current laws or regulations requiring control of radon gas buildup, EPA has drafted model standards for controlling radon in new residential structures.¹⁹ Test kits are also available to examine radon levels in buildings, with radon mitigation measures costing anywhere from a few hundred dollars, to a few thousand dollars.²⁰

5. Air Emissions

Historical hazardous air emissions may have resulted in contaminant deposition which can create environmental liabilities.²¹ These emissions may have contaminated the property where the emissions originate, including the industrial structure itself. Thus, even if the industrial structure was torn down long ago, effects from its operations may still linger on the former industrial site and surrounding areas.²² Historical air emissions problems may also create problems for owners under Superfund, discussed *infra*.²³

6. RCRA

The Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 (RCRA),²⁴ also may have significant implications for current and prospective property owners. If the property has been used at any time for disposal of hazardous wastes, or storage or treatment, contaminants could be on the property that "may present an imminent and substantial endangerment" to public health or the environment.²⁵ If so, "EPA may bring suit against any person who has contributed or who is contributing to such handling, storage, treatment, transportation or disposal to restrain such person from such handling, storage, treatment, transportation, or disposal, to order such person to take such other action as may be necessary, or both."²⁶ In such case, significant transaction costs can result from the additional state and federal involvement.

Past and present owners or operators of the property can be held liable if waste disposal or treatment activities occur during their ownership which result in a violation of RCRA.²⁷

7. TSCA

The Toxic Substances Control Act (TSCA)²⁸ focuses on the production, registration and export of chemical substances. TSCA also regulates the manufacture, processing, commercial distribution, use and disposal of these substances. TSCA recently began addressing lead-based paint found in

residential buildings and other structures.²⁹ A variety of formerly common materials can trigger TSCA and present a surprising array of transaction costs for the unwary owner or buyer.³⁰ Thus, the existence of a present or former manufacturer at or near the subject property could trigger the need for extensive audits.³¹

8. CERCLA

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund) was enacted in 1980 to eliminate unsafe hazardous waste sites. CERCLA may be the single largest concern of property owners and purchasers. CERCLA authorizes the EPA to clean up hazardous waste sites and creates a "Superfund" to pay for the EPA's response actions.³² This fund is financed through a combination of appropriations, industry taxes, and judgments received through legal actions. CERCLA places responsibility for cleanup on those associated with the disposal of hazardous substances.³³

CERCLA also provides the EPA with significant enforcement authority to hold parties accountable for the costs of cleanup.³⁴ EPA's enforcement authority is based upon strict, joint and several, and retroactive liability for the cleanup of hazardous waste sites.³⁵

The strict, joint and several, and retroactive liability has been seen by Congress as providing the impetus for waste site cleanup.³⁶ Strict liability holds parties accountable for waste disposal practices regardless of intent, negligence, or causal connection.³⁷ Joint and several liability ensures that all liable parties at a site are responsible for cleanup and that each party could be held responsible for the entire cleanup.³⁸ Retroactive liability holds parties liable for waste disposal practices that took place before CERCLA was enacted, and which may have been legal at the time of disposal.³⁹

In practice, transaction costs have represented a large percentage of the total cleanup costs at many Superfund sites.⁴⁰ These costs are primarily litigation and other settlement expenses and are principally generated by cost allocation disputes.⁴¹ The potential liability associated with the Superfund Program, as well as the significant transaction costs, have provided incentives to many potential property developers to look toward low-risk, greenfields property.⁴²

EPA'S RESPONSE

In an effort to counter the increasing development of greenfields over

previously used property, EPA is attempting to recharacterize the underlying issues. "The EPA firmly believes that environmental cleanup is a building block to economic development, not a stumbling block - that revitalizing contaminated property must go hand in hand with bringing life and economic vitality back to the community."⁴³

The EPA defines Brownfields as "abandoned, idled, or under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination."⁴⁴ Equipped with information regarding the potential liabilities and costs of cleanup, a party can begin to make an informed decision regarding the purchase and/or development of property.

On January 25, 1995, EPA Administrator Carol Browner announced the Brownfields Action Agenda in an effort to address several of the issues interfering with the redevelopment of contaminated property.⁴⁵ The Action Agenda outlines EPA's activities and future plans to help states and localities implement and realize the benefits of the Brownfields Initiative. EPA hopes that implementation of the Brownfields Action Agenda will help reverse the spiral of unaddressed contamination, declining property values, and increased unemployment often found in inner city industrial areas, while maintaining deterrents to future contamination and increase attention on assessing and cleaning up "worst sites first."⁴⁶

The efforts outlined in the Brownfields Action Agenda can be grouped into four broad and overlapping categories:

Partnerships and Outreach

EPA has committed to building partnerships with states, cities, and community representatives and among Federal agencies to develop strategies for promoting public participation and community involvement in Brownfields decision making.⁴⁷ However, the public participation aspect of EPA's agenda may be one reason that property owners and developers should consider avoiding working with EPA.

Additionally, each EPA Region has established a Brownfields coordinator position to oversee Brownfields pilots and initiate other Brownfields activities.⁴⁸

EPA also has assigned five staff members to cities through intergovernmental personnel assignments to assist in addressing the Brownfields redevelopment challenges presented at the state and local levels.⁴⁹

EPA, with the National Environmental Justice Advisory Council, co-sponsored a series of public dialogs in 1995 related to urban revitalization and Brownfields.⁵⁰ EPA has also identified Brownfields pilots in several cities that provide opportunities to concentrate on the impact of particular industrial

sectors on Brownfields.⁵¹

Job Development and Training

EPA has been attempting to foster job development and training through partnerships with Brownfields pilot communities and community colleges.⁵² EPA is working with the Hazardous Materials Training and Research Institute to expand environmental training and curriculum development.⁵³ In November 1995, EPA hosted a workshop in Baltimore, Maryland to assist community colleges from 17 Brownfields pilot communities in developing environmental job training programs.⁵⁴ In July 1996, EPA held a second workshop in St. Louis, Missouri with additional community colleges from more recently selected Brownfields pilot communities.⁵⁵ Through a cooperative agreement with Rio Hondo Community College, EPA has established an environmental education and training center to provide comprehensive technical-level training.⁵⁶ EPA and the National Institute of Environmental Health Sciences are working to coordinate minority worker training grant recipients with Brownfields pilot city activities.⁵⁷

EPA Brownfields staff, local contacts, and community colleges have established partnerships to develop long-term plans for fostering workforce development through environmental education, ensuring the recruitment of students from socio-economically disadvantaged communities, providing worker training, and allowing local residents an opportunity to qualify for jobs developed as a result of Brownfields efforts.⁵⁸ It is clear from these efforts that EPA recognizes that the overall health (environmental, economic and social) of the communities across the nation can be supported with a successful Brownfields program.

Brownfields Pilots

EPA had set a goal of selecting 50 states, cities, towns, counties, and tribes for Brownfields pilots by the end of 1996.⁵⁹ The pilots, each funded at up to \$200,000 over two years, were intended to test redevelopment models, direct special efforts toward removing regulatory barriers without sacrificing protectiveness, and facilitate coordinated public and private efforts at the federal, state, and local levels.⁶⁰

By the end of September 1996, EPA had selected 76 Brownfields pilots projects across the U.S.⁶¹ The cooperative agreements for all pilots are subject to negotiation.⁶² Of the 76 pilots, 39 are national pilots selected and funded through Headquarters, while 37 are regional pilots selected and funded through the ten regional offices.⁶³

Clarification of Liability and Cleanup Issues

EPA has been working with states and localities to develop and issue guidances that will clarify the liability of prospective purchasers, lenders, property owners, and others regarding their association with and activities at a site.⁶⁴ EPA hopes that these statements will alleviate concerns these parties may have and will facilitate their involvement in cleanup and redevelopment.⁶⁵ EPA's most significant efforts are discussed below.

1. Refining CERCLIS

EPA has refined the process for registering and maintaining site information in the Comprehensive Environmental Response, Compensation and Liability Information System (CERCLIS).⁶⁶ CERCLIS is EPA's automated inventory of potential or confirmed hazardous waste sites addressed under the Federal Superfund Program through archiving.⁶⁷ CERCLIS supports EPA Headquarters and Regions for the management and oversight of the Superfund program.⁶⁸ It has two purposes: maintain an automated inventory of abandoned, inactive, or uncontrolled hazardous waste sites, and act as a vehicle for Regions to report status of major stages of site cleanup.⁶⁹ The system provides a decentralized national database where each Region controls and enters its respective data.⁷⁰

CERCLIS contains one entry for each hazardous waste disposal or spill site that has either been listed by the EPA on the National Priorities List (NPL) for cleanup under Superfund or investigated for consideration for the NPL.⁷¹ More than 40,500 sites across the United States were covered by the database at the last update.⁷² The CERCLIS database is updated on a quarterly basis by the EPA.

Of the 40,500 sites that have come to the attention of the EPA, fewer than 5% have made it onto the final NPL.⁷³ Nonetheless, the perception exists that being included in EPA's CERCLIS database is sufficient to label a property hazardous. This perception, combined with the perception that lenders may be at risk on such properties, has led to the refusal of financing for projects associated with these properties.⁷⁴ The perceived threat of Superfund liability for sites remaining on the list continues even if EPA has evaluated a property and determined that it does not warrant NPL status.⁷⁵

In response to growing concerns about this unintended stigma, EPA introduced the CERCLIS archiving effort in early 1995 as part of the Agency's Brownfields Initiative on economic redevelopment.⁷⁶ Specifically, CERCLIS archiving is an ongoing effort that addresses this stigma by removing those sites with no further interest under the Federal Superfund Program from the CERCLIS inventory.⁷⁷

There are several conditions which must be met before EPA archives a site in the CERCLIS database.⁷⁸ EPA will archive a site if

- a) no contamination was found at the site;
- b) the site, while contaminated, neither met the criteria for inclusion on the NPL nor required any EPA response action; or
- c) contamination was removed quickly without the need to place the site on the NPL; and
- d) EPA has completed its cost recovery action for the site.⁷⁹

EPA initially archived 24,000 sites from the CERCLIS inventory in February 1995.⁸⁰ EPA and the states had screened these 24,000 sites under Superfund's Site Assessment Program and found them to be of "no further Federal Superfund interest."⁸¹

In June 1996, EPA provided guidance identifying types of sites eligible for archiving, and initiated efforts to research those sites remaining in the CERCLIS inventory and make archive decisions as appropriate.⁸²

2. Clarifying NPL Sites

Listing property on the NPL may also affect the value of that property and the surrounding area, whether or not all of the property or adjacent property is contaminated.⁸³ In order to facilitate the transfer, development or redevelopment of property determined to be uncontaminated, EPA is developing a program which provides its Regions with the flexibility to clarify the areas of sites determined to be contaminated or uncontaminated.⁸⁴ The Regions have already initiated partial deletions of several NPL sites.⁸⁵

3. Removing Liability Barriers

Perhaps the most significant of EPA's efforts to remove obstacles to property development are its tools to remove Superfund liability barriers. The EPA hopes to give prospective purchasers, lenders, and property owners better defined risks of liability to work with in real estate transactions.⁸⁶ The Agency is also developing guidance to define federal, state, and tribal roles at sites with redevelopment potential, as well as of specific parties such as lenders and prospective purchasers associated with contaminated properties.⁸⁷

Specifically, EPA issued three guidance documents in 1995 and one document in 1996 that provide some assurance to prospective purchasers, lenders, and property owners that they do not need to be concerned with

Superfund liability.⁸⁸ The guidance documents, as described *infra*, clarify EPA's intentions toward certain types of parties and activities at a site.

POLICY TOWARD OWNERS OF PROPERTY CONTAINING CONTAMINATED AQUIFERS⁸⁹

This policy describes EPA's intended exercise of enforcement discretion. Specifically, EPA intends to forego enforcement actions under CERCLA against owners of property above aquifers contaminated by hazardous substances resulting from sources outside the property.⁹⁰ Additionally, if the owner is being sued or threatened with suit by a third party, EPA will consider providing contribution protection through a settlement with the owner.⁹¹ At first blush, the aquifer policy is merely a reflection of good judgment. Why would EPA consider suing a property owner who has no causal relation to the contamination? The Superfund law provides the answer to this question. There are no exceptions or defenses in the CERCLA statute for owners of property which is contaminated as a result of sources on neighboring properties.

Nationwide, there are numerous sites that are the subject of response actions under CERCLA due to contaminated groundwater.⁹² Approximately 85% of the sites on the National Priorities List have some degree of groundwater contamination.⁹³ Natural subsurface processes, such as infiltration and groundwater flow, often carry contaminants far from their sources.⁹⁴ Thus, the plume of contaminated groundwater may be relatively long and/or extend over a large area.⁹⁵ For this reason, it is sometimes difficult to determine the source or sources of such contamination.

Further, owners of property containing contaminated aquifers may experience difficulty selling these properties or obtaining financing for development because of the potential for CERCLA liability. The Agency is concerned that such unintended effects are having an adverse impact on property owners and on the ability of communities to develop or redevelop property.⁹⁶

EPA's Aquifer Policy is aimed at addressing the concerns raised by owners of property to which contamination has migrated in an aquifer, as well as lenders and prospective purchasers of such property.⁹⁷

Under this section, when the Agency determines that a settlement is "practicable and in the public interest," it "shall as promptly as possible reach a final settlement" if the settlement "involves only a minor portion of the response costs at the facility concerned" and the Agency determines that the potentially responsible party: "(i) is an owner of the real property on or in

which the facility is located; (ii) did not conduct or permit the generation, transportation, storage, treatment or disposal of any hazardous substance at the facility; and (iii) did not contribute to the release or threat of release through any act or omission."⁹⁸

The "rules" about aquifer liability are fairly clear. EPA will not take enforcement action against the owner of a property which contains a contaminated aquifer if:

i.) *The landowner did not cause, contribute to, or exacerbate the release or threat of release of any hazardous substances, through an act or omission.* The failure to take affirmative steps to mitigate or address groundwater contamination, such as conducting groundwater investigations or installing groundwater remediation systems, will not, in the absence of exceptional circumstances, constitute an "omission" by the landowner within the meaning of this condition.⁹⁹ This policy may not apply where the property contains a groundwater well, the existence or operation of which may affect the migration of contamination in the affected aquifer.¹⁰⁰ Obviously, these situations will require fact-specific analysis.

ii.) *The person that caused the release is not an agent or employee of the landowner, and was not in a direct or indirect contractual relationship with the landowner.* In cases where the landowner acquired the property, directly or indirectly, from a person that caused the original release, application of this Policy will require an analysis of whether, at the time the property was acquired, the landowner knew or had reason to know of the disposal of hazardous substances that gave rise to the contamination in the aquifer.

iii.) *There is no alternative basis for the landowner's liability for the contaminated aquifer, such as liability as a generator or transporter under Section 107(a)(3) or (4) of CERCLA, or liability as an owner by reason of the existence of a source of contamination on the landowner's property other than the contamination that migrated in an aquifer from a source outside the property.*

Regardless of EPA's intentions not to pursue owners with the misfortune of having contaminated groundwater running beneath their property, the owner may still face potential litigation from the owners of surrounding properties. Accordingly, the owner may want additional assurances from EPA in the form of a "contribution protection" as protection from third parties.

Toward that end, EPA may exercise its discretion under Section 122(g)(1)(B) to consider de minimis settlements with a landowner in order to give the owner the benefit of EPA's contribution protection.¹⁰¹ Such settlements may be particularly appropriate where such a landowner has been sued or threatened with contribution suits.¹⁰²

In exchange for a covenant not to sue from the Agency and statutory contribution protection under Sections 113(f)(2) and 122(g)(5) of CERCLA, EPA may seek consideration from the landowner, such as the landowner's full cooperation (including but not limited to allowing EPA future access to the property for any potential future investigations) in evaluating the need for and implementing institutional controls or any other response actions at the site.¹⁰³

POLICY ON THE ISSUANCE OF COMFORT/STATUS LETTERS¹⁰⁴

This policy is intended to respond to requests from parties for some level of comfort that if they purchase, develop, or operate on Brownfields property, EPA will **not** pursue them for the costs to clean up any contamination resulting from the previous use.¹⁰⁵ The policy contains four sample comfort/status letters which address the most common inquiries for information that EPA receives regarding contaminated or potentially contaminated properties.¹⁰⁶ The sample letters provide an interested party with all releasable information that EPA has acquired regarding a particular piece of property, what that information means, and the likelihood of or current plans for Federal Superfund action.¹⁰⁷ The "comfort" comes from knowing what EPA knows about the property and what EPA's intentions are in terms of a Superfund response.¹⁰⁸

Environmental liabilities can be staggering.¹⁰⁹ However, EPA believes that the majority of the liability concerns raised by parties can be addressed through the dissemination of information known by EPA about a specific property and an explanation of what the information means to EPA.¹¹⁰ Information may also be disseminated through means other than comfort letters including public or individual meetings, or reference to public information repositories and EPA databases. Individual meetings provide the most useful information for the parties. However, the individuals who most often require "comforting" (i.e., the

lenders) often do not attend these meetings. Thus, a follow up letter from the Agency to the purchaser/developer is often necessary "for the file."

EPA seems to understand some of the needs of the parties and hopes to provide "comfort" by helping an interested party better understand the potential for actual EPA involvement at a Brownfields property. EPA's comfort letter policy describes the most common situations about which parties inquire and the type of information or comfort EPA may provide to parties to assist them in assessing the probability of incurring liability under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "Superfund").¹¹¹

Comfort letters are not available for all transactions.¹¹² Rather, EPA wants to limit the use of comfort letters to where it may facilitate the cleanup and redevelopment of Brownfields, where there is the realistic perception or probability of incurring Superfund liability, **and** where there is no other mechanism available to adequately address the party's concerns.¹¹³ The policy contains four sample comfort letters which address the most common inquiries for information that EPA receives regarding contaminated or potentially contaminated properties.¹¹⁴

This policy is not intended to supersede EPA's "Policy Against No Action Assurances."¹¹⁵ If a property owner were to demand assurances of no action from the Agency, approval of the Assistant Administrator of the Office of Enforcement and Compliance Assurance is required.¹¹⁶

Part of EPA's concern is that the Agency seldom has time and resources to satisfy themselves as to the environmental conditions at most properties where there may be a Brownfields issue. Thus, the Agency is often being asked to make assurances in the face of little or no data. In the event that the future reveals an environmental problem which was originally unanticipated, the Agency wants to avoid having property owners claiming "But you said . . ." in the face of work which may be necessary in the future.

EPA has attempted to structure the letters with opening and closing paragraphs applicable to all scenarios falling under that category of letter. Regions may then choose and combine the applicable substantive paragraphs to tailor the sample letter to address a party's particular request.¹¹⁷ Directions also are found within the description of the letters and within the body of each letter. A brief summary of the sample letters is provided below.

1. A "No Previous Federal Superfund Interest" Letter¹¹⁸

This letter may be provided to parties when there is no historical evidence of federal Superfund program involvement with the property in question (i.e.,

site is not found in the CERCLIS database).¹¹⁹

This letter introduces and explains the purpose of CERCLIS and may be sent when the property described by the interested party is **not** located in active or archived CERCLIS records.¹²⁰ The purpose of the letter is to inform the recipient that, to the best of EPA's knowledge, the property described in the request has never been addressed under EPA's Superfund program, nor are there current plans to do so.¹²¹ However, because there is the realistic fear among private parties that bringing a site to the Agency's attention, even briefly, may cause trouble in the future, Regions are encouraged to avoid interpreting a request for a No Previous Superfund Interest Letter as notification that the site should be entered into CERCLIS.¹²²

2. A "No Current Federal Superfund Interest" Letter¹²³

This letter may be provided when the property has either been archived and is no longer part of the CERCLIS inventory of sites, has been deleted from the National Priorities List ("NPL"), or is situated near, but not within, the defined boundaries of a CERCLIS site.¹²⁴

The purpose of the letter is to let the recipient know that EPA's Superfund program does not anticipate taking any/additional response action (which could include enforcement action if the Potentially Responsible Party ["PRP"] search and/or cost recovery has been completed), and the basis for its decision. The letter also refers the party to additional sources of information such as EPA's administrative record and the appropriate state agency.¹²⁵

3. A "Federal Interest" Letter¹²⁶

This letter may be provided by EPA at sites where the Agency either plans to respond in some manner or already is responding at the site.¹²⁷ This letter is intended to inform the recipient that EPA has some involvement at the property and of the status of EPA's involvement.¹²⁸ A portion of the letter provides language regarding the application of an EPA Superfund policy, CERCLA statutory provision or regulation to a party's particular set of circumstances.¹²⁹

Often the most important assistance EPA can provide an interested party may be information about current Superfund activities. EPA may issue a Federal Interest Letter to explain what actions have been taken by EPA toward the remediation of a particular site (e.g., site sampling, removal action).¹³⁰ The letter also may indicate whether EPA anticipates further action at a site and the type of action anticipated.¹³¹ Additionally, the letter provides the recipient with

the status of the property—whether the property is or may be part of CERCLIS/NPL site. It also describes EPA's planned or ongoing activities.¹³²

Use of the Federal Interest Letter is intended to be limited to situations where the requesting party provides information showing that 1) a project found to be in the public interest (e.g., an economic redevelopment project) is hindered or the value of a property is affected by the potential for Superfund liability, and 2) there is no other mechanism available to adequately address the party's concerns other than a letter from EPA with a statement regarding the applicability of a specific Superfund policy, statutory provision or regulation.¹³³ EPA Regional Offices are given precautions regarding the issuance of these letters.¹³⁴

4. "State Action" Letter¹³⁵

The agency may provide this letter when the state has the lead for day-to-day activities and oversight of a response action.

The State Action Letter is intended to provide comfort at sites where EPA may have either no current Superfund involvement or a secondary role under the state's lead of site activities.¹³⁶

The State Action Letter advises parties that EPA does not intend to take federal action under CERCLA when the state has the primary role of overseeing cleanups pursuant to either state or federal requirements.¹³⁷ Naturally, this letter does not prevent the Agency from taking action if it receives new information about site conditions requiring federal action or the responding party and the state are unwilling or unable to ensure compliance with the negotiated agreement between the state and responding party or the state and EPA.

Two different types of inquiries may trigger a "State Action Letter." The first type of inquiry may be from a state requesting that EPA send a State Action Letter regarding a particular site. The second type of inquiry may be from an outside party.

The policy provides that the State Action Letter is appropriate to send to parties in the following situations:

- (a) the site is designated "state-lead" in CERCLIS;
- (b) the site is designated "deferred to state" in CERCLIS;
- (c) the site was designated "deferred to state" and is subsequently designated "archived" in CERCLIS; or,
- (d) the site is listed in CERCLIS and is being addressed under a state voluntary cleanup program ("VCP") pursuant to an approved Memorandum of

USE OF COMFORT LETTERS

Each of the EPA's sample comfort letters is intended to address a particular set of circumstances and provide information contained within EPA's databases. The sample letters are based on the most commonly asked questions. To differentiate between the purposes of the letters and understand the relationship between them, the table below provides guidance on which letter to use to answer a request for information. This table is replicated from EPA's Policy on the Issuance of Comfort/Status Letters and represents EPA's recommendations, not necessarily the author's.

Question to be Answered	Recommended Letter if the Answer is Yes	Recommended Letter if the Answer is No
Is the site or property listed in CERCLIS?	Federal Interest Letter	No Previous Superfund Interest Letter or No Current Superfund Interest Letter
Has the site been archived from CERCLIS?	No Current Superfund Interest	Federal Interest Letter
Is the site or property contained (or undetermined) within the defined boundaries of a CERCLIS site?	Federal Interest Letter	No Previous Superfund Interest Letter or No Current Superfund Interest Letter
Has the site or property been addressed by EPA and deleted from the defined site boundary?	No Current Superfund Interest Letter	Federal Interest Letter
Is the site or property being addressed by a state voluntary cleanup program?	If a MOA is in place, No Previous Superfund Interest Letter for Non-CERCLIS sites, or State Action Letter for CERCLIS sites; in either case, in consultation with the state. ¹³⁹	If no MOA is in place, No Previous Superfund Interest Letter for non-CERCLIS sites; No Current Superfund Interest Letter for CERCLIS sites
or currently performing a at the site?	Federal Interest Letter	No Previous Superfund Interest Letter for non-CERCLIS sites; No Current Superfund Interest Letter for CERCLIS sites
Is the party asking whether or asserting that the conditions at the site or activities of the party are addressed by a statutory provision or EPA policy? (Refer to federal interest criteria on page 6)	If the party meets the policy criteria (see page 6), Federal Interest Letter, Section III, paragraph (a) with a copy of the policy or statutory/regulatory language attached	If the party does not meet the policy criteria (see page 6), Federal Interest Letter, Section III, paragraph (b), with a copy of the policy or statutory/regulatory language attached
Is the site in CERCLIS but designated state-lead or deferred site?	State Action Letter, in consultation with the state	No Previous Superfund Interest Letter for Non-CERCLIS sites, Federal Interest Letter for CERCLIS sites

CERCLA ENFORCEMENT AGAINST LENDERS AND GOVERNMENT ENTITIES THAT ACQUIRE PROPERTY INVOLUNTARILY

The problem for lenders arises under the language of CERCLA Section 101(20)(A) which leaves lenders and other interested parties uncertain as to which types of actions they may take to protect their security interests without risking EPA enforcement under CERCLA.¹⁴⁰ Courts have not always agreed on when a lender's actions are "primarily to protect a security interest," and what degree of "participation in the management" of the property will forfeit the lender's eligibility for the exemption.¹⁴¹ This uncertainty was heightened by *dicta* in the *Fleet Factors* opinion, where the circuit court suggested that a lender participating in the management of a vessel or facility to a degree indicating a capacity to influence the corporation's treatment of hazardous waste could be considered liable under CERCLA.¹⁴²

In an effort to resolve these uncertainties and as part of the Omnibus Consolidated Appropriations Bill for Fiscal Year 1997 signed by President Clinton on September 30, Congress enacted the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996 (the "Act").¹⁴³ The Act includes lender and fiduciary liability amendments to CERCLA, amendments to the secured creditor exemption set forth in Subtitle I of RCRA, and validation of the portion of the CERCLA Lender Liability Rule that addresses involuntary acquisitions by government entities.¹⁴⁴ The amendments to Superfund made by the Act apply to all claims not finally adjudicated as of September 30, 1996, which include all cases that are in the process of being settled.¹⁴⁵

The Act is generally based on the CERCLA Lender Liability Rule, but does not explicitly describe the steps a lender can take to avoid liability after foreclosure.¹⁴⁶ The Act also restates the exemption in EPA's original lender liability rule: "owner or operator" does not include a person who, without participating in the management of a facility, holds indicia of ownership primarily to protect that person's security interest in the facility.¹⁴⁷

Importantly, the Act states that a lender "participates in management" if it:

Exercises decision-making control over environmental compliance related to the facility, such that the lender has undertaken responsibility for hazardous substance handling or disposal practices; or

*Exercises control at a level comparable to that of a manager of the facility, such that the lender has assumed or manifested responsibility with respect to (1) day-to-day decision making with respect to environmental compliance, or (2) all, or substantially all, of the operational (as opposed to financial or administrative) functions of the facility other than environmental compliance.*¹⁴⁸

The Agency has attempted to clarify the meaning of the Act with the guidance document.¹⁴⁹ Its efforts to clarify activities shows a sensitivity to the lending community's need for clarity. Some of the Agency's clarifying efforts are repeated below.¹⁵⁰

The term "participate in management" does not include certain activities such as:

- inspecting the facility;
- requiring a response action or other lawful means to address a release or threatened release;¹⁵¹
- conducting a response action under Section 107(d)(1) or under the direction of an on-scene coordinator;¹⁵²
- providing financial or other advice in an effort to prevent or cure default;¹⁵³ and
- restructuring or renegotiating the terms of the security interest; provided the actions do not rise to the level of participating in management as defined in the subsection.¹⁵⁴

After foreclosure, a lender who did not participate in management prior to foreclosure is not an "owner or operator" if it:¹⁵⁵

- sells, re-leases (in the case of a lease finance transaction), or liquidates the facility;¹⁵⁶
- maintains business activities or winds up operations;¹⁵⁷
- takes any other measure to preserve, protect, or prepare the facility for sale or disposition;¹⁵⁸
- provided the lender seeks to divest itself of the facility at the earliest practicable, commercially reasonable time, on commercially reasonable terms.¹⁵⁹

GUIDANCE ON AGREEMENTS WITH PROSPECTIVE PURCHASERS OF CONTAMINATED PROPERTY¹⁶⁰

Prospective purchaser agreements (PPAs) are essentially contracts with the Agency that provide the purchaser some protection from the potentially staggering Superfund liabilities in exchange for the performance of cleanup work or other benefit for the public. PPAs are perhaps the single best way for a purchaser to clarify liability concerns and should be considered by all prospective purchasers. This guidance, issued in 1995, allows for a broader application of PPAs by expanding the universe of eligible sites and allows the use of such agreements when the agreement results in a substantial indirect benefit to the community in terms of cleanup, creation of jobs, and development of property. A model prospective purchaser agreement is included with the guidance.

Despite the availability of the guidance, the EPA has not been quick in allowing these agreements.¹⁶¹ In recent years, the Agency has come to recognize that entering into an agreement containing a covenant not to sue with a prospective purchaser of contaminated property, given appropriate safeguards, may result in an environmental benefit through a payment for cleanup or a commitment to perform a response action.¹⁶² EPA's experience has shown that prospective purchaser agreements have also benefited the community where the site is located by encouraging the reuse or redevelopment of property where the fear of Superfund liability may have been a barrier.¹⁶³ The Agency believes that it is necessary to provide greater flexibility in offering covenants not to sue.¹⁶⁴

The 1995 guidance document supersedes EPA's policy on agreements with prospective purchasers of contaminated property as set forth in the June 6, 1989 policy document entitled "Guidance on Landowner Liability under Section 107(a) of CERCLA, De Minimis Settlements under Section 122(g)(1)(B) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property". This revised guidance reflects both Agency experience in implementing the 1989 guidance and recognition that a change in enforcement practice may produce a larger benefit to the public.¹⁶⁵

The Agency believes that it may be appropriate to enter into agreements resulting in somewhat reduced benefits to the Agency through cleanup or response costs or in benefits that also may be available from other parties.¹⁶⁶ These agreements are anticipated by EPA to provide substantial benefits to the community through the creation or retention of jobs, productive use of abandoned property, or revitalization of blighted areas.¹⁶⁷ While this new guidance restates much of the 1989 guidance, it revises two of the original criteria used to determine whether a prospective purchaser agreement is

appropriate. The revised criteria allow the Agency greater flexibility to consider agreements with covenants not to sue to encourage reuse or development of contaminated property that would have substantial benefits to the community.¹⁶⁸

The EPA wants certain criteria to be followed before the Agency considers entering into agreements with prospective purchasers.¹⁶⁹ These criteria are intended to reflect EPA's commitment to removing the barriers imposed by potential CERCLA liability while ensuring protection of human health and the environment.¹⁷⁰ The Agency leaves itself free to reject any offer if entering into an agreement with a prospective purchaser is not sufficiently in the public interest to justify the investment necessary to reach an agreement.¹⁷¹ The guidance suggests but does not openly require that the Regional offices consider the following criteria when evaluating prospective purchaser agreements.¹⁷²

CRITERIA FOR PRIORITIZING AND PERFORMING BROWNFIELDS ASSESSMENTS

The EPA may rank a proposed activity using a scale of 1 to 4, where "1" is unsatisfactory and "4" is outstanding.

Site control and ownership transfer is not an impediment.

Site is currently publicly owned or may be publicly owned either directly by municipality or through a quasi-public entity such as a community development corporation.

Site is privately owned and a clear means of recouping EPA expenditures is available (e.g., through an agreement with the owner or developer or through a lien).

There is a strong municipal commitment.

There is a strong municipal commitment as demonstrated by a willingness to legally take the property if necessary, establishment of financial incentives, or commitment of municipal resources for other components of the project.

There is a clear municipal/community vision and support for property revitalization.

The site is clearly an integral part of a local development plan and there is no known public opposition.

There are adequate resources and high developer interest.

The municipality or potential site developer has demonstrated an ability to leverage additional funds for cleanup and other future work at the site; and/or the site has strong development potential as demonstrated by past or present interest by a developer(s).

EPA assessment assistance is crucial to the redevelopment of the site.

The lack of site assessment is the major obstacle to redevelopment and other resources are not available for assessing the site.

State/Congressional support

The State/Congressional members have no objection to Federal involvement or the redevelopment project.

Existing information supports directing resources to the site.

Based on existing information, the site is likely to have low to moderate levels of contamination.

Commitments are in place for the cleanup and redevelopment of the site.

Redevelopment will result in an increase in jobs for the surrounding residents.

Project area has a clear need for revitalization.

The project has existing significant deterioration or significant environmental justice issues, which provide a clear need for revitalization.

There is State support.

There is a clear coordination between the Region and the state program.

There is consistency with other EPA initiatives.

Site has an important linkage to other EPA/State initiatives.

A direct health/environmental threat will be mitigated or site revitalization will serve to spur further beneficial activity in nearby locations.

EPA's Evaluation Criteria for Entering PPAs

1. An EPA action at the facility has been taken, is ongoing, or is anticipated to be undertaken by the Agency.¹⁷³

This criterion is meant to ensure that EPA does not become unnecessarily involved in purely private real estate transactions nor expend its limited resources in negotiations which are unlikely to produce a sufficient benefit to the public.¹⁷⁴ EPA has come to recognize the potential gains in terms of cleanup and public benefit that may be realized with broader application of prospective purchaser agreements. Therefore, this criterion now includes sites where general federal involvement has occurred or is expected to occur.¹⁷⁵

Accordingly, when requested, the Agency may consider entering into prospective purchaser agreements at sites listed or proposed for listing on the National Priorities List (NPL), or sites where EPA has undertaken, is undertaking, or plans to conduct a response action.¹⁷⁶ If the Agency receives a request for a prospective purchaser agreement at a site where EPA has not yet become involved, Regions will likely first evaluate the realistic possibility that a prospective purchaser may incur Superfund liability when determining the appropriateness of entering into a prospective purchaser agreement.¹⁷⁷ This evaluation by EPA must clearly show that the covenant not to sue is essential to remove Superfund liability barriers and allow the private party cleanup and productive use, reuse, or redevelopment of the site.¹⁷⁸

2. Whether information regarding releases or potential releases of hazardous substances at the site indicates that there is a substantial likelihood of federal response or enforcement action at the site that would justify EPA's involvement in entering into the prospective purchaser agreement. EPA will consider information that is available through EPA's data systems, such as CERCLIS, a state agency, or through submissions from the prospective purchaser, such as the results of an environmental audit or site assessment.¹⁸⁰

3. Whether other available avenues (e.g., private indemnification agreements) may exist to sufficiently alleviate the threat of Superfund liability at the site without the need for EPA involvement. EPA may decline to consider an agreement at a site that is currently undergoing cleanup through a state program, since future EPA activity at such a site is extremely unlikely.¹⁸¹

EPA may not consider prospective purchaser agreements at sites screened out using the above criteria. For example, sites designated by EPA as No Further Response Action Planned (NFRAP) and removed from CERCLIS may not be deemed appropriate for a prospective purchaser agreement.¹⁸² EPA does not slam the door on the possibility of prospective purchaser agreements; it may, in

extremely unusual circumstances, consider a prospective purchaser agreement if it is in the public interest and the agreement is essential to achieve a very significant public benefit.¹⁸³

4. The Agency should receive a substantial benefit either in the form of a direct benefit for cleanup, or as an indirect public benefit in combination with a reduced direct benefit to EPA.

The key to the Agency's evaluation process under this policy is the measurement of environmental benefit, in the form of direct funding, or cleanup, or a combination of reduced direct funding or cleanup and an indirect public benefit.¹⁸⁴ The Agency believes that its past practice of limiting prospective purchaser agreements to those situations where substantial benefit was measured only in terms of cost reimbursement or work performed may have decreased the effectiveness of this tool.¹⁸⁵ Accordingly, a prospective purchaser may wish to employ an economist to help articulate this benefit clearly.

5. The continued operation of the facility or new site development, with the exercise of due care, will not aggravate or contribute to the existing contamination nor interfere with EPA's response action.¹⁸⁶

Information which the Agency will consider to evaluate the effect of new site development or continued operation of the facility could include site assessment data and the Engineering Evaluation Cost Analysis (EE/CA) of cleanup alternatives or remedial investigation/feasibility study (RI/FS) analyses of alternatives,¹⁸⁷ if available, and all other information relevant to the condition of the facility. If the purchaser intends to continue the operations of an existing facility, he should submit information sufficient to convince the Agency to determine whether the continued operations are likely to aggravate or contribute to the existing contamination or interfere with the remedy. If the purchaser plans to undertake new operations or development of the property, comprehensive information regarding these plans should be provided to EPA. If the planned activities of the purchaser are likely to aggravate or contribute to the existing contamination or generate new contamination, EPA may not enter into an agreement, or may include restrictions in the agreement which prohibit those operations or portions of those operations likely to aggravate or contribute to the existing contamination or interfere with the remedy.¹⁸⁸

The Agency will determine on a case-by-case basis whether the available information is sufficient for purposes of this evaluation.¹⁸⁹ One key factor to be considered is whether the site evaluation has been completed and the extent of information which has been generated in that process. EPA may not enter into an agreement if the available information is insufficient for purposes of evaluating the impact of the proposed activities.¹⁹⁰

6. The continued operation or new development of the property will not pose health risks to the community and those persons likely to be present at the site.¹⁹¹

EPA believes it is important to consider the environmental implications of site operations on the surrounding community and to those likely to be present or have access to the site.¹⁹²

7. The prospective purchaser is financially viable.¹⁹³

The purchaser should demonstrate that it is financially viable and capable of fulfilling any obligation under the agreement. In appropriate circumstances, EPA may structure payment or work to be performed to avoid or minimize an undue financial burden on the purchaser.¹⁹⁴

8. Consideration.¹⁹⁵

EPA will require that the U.S. receives adequate consideration when entering into a prospective purchaser agreement.¹⁹⁶ In determining what constitutes adequate consideration, it will consider a number of factors. Regions will examine the amount of past and future response costs expected to be incurred at the site, whether there are other potentially responsible parties who can perform the work or reimburse EPA's costs, and whether there is likely to be a shortfall in recovery of costs at the site.¹⁹⁷ EPA will also consider the purchase price to be paid by the prospective purchaser, the market value of the property, the value of any liens on the property under § 107(1) of CERCLA, whether the purchaser is paying a reduced price due to the condition of the property, and if so, the likely increase in the value of the property attributable to the cleanup (e.g., compare purchase price or market price with the estimated value of the property following completion of the response action).

Additionally, EPA will also consider the size and nature of the prospective purchaser and the proposed use of the site.¹⁹⁸ The analysis of any benefits received by the Agency also should contemplate any projected "windfall" profit to the purchaser when the government has unreimbursed response costs, and whether it is appropriate to include in the agreement some provision to recoup such costs.¹⁹⁹ This analysis will generally be coupled with an examination of any indirect benefit that the Agency may receive in determining whether a prospective purchaser agreement provides a substantial benefit.²⁰⁰

9. Public Participation.²⁰¹

In light of EPA's new policy of accepting indirect public benefit as partial consideration, and the fact that the prospective purchaser agreements will provide contribution protection to the purchaser, EPA may require that the surrounding community and other members of the public should be afforded

opportunity to comment on the settlement, wherever feasible.²⁰² Although there is no legal requirement for public participation for prospective purchaser agreements under CERCLA, EPA will generally publish notices in the Federal Register to ensure adequate notification of the agreement to all interested parties.²⁰³ Notice of a proposed settlement, in the Federal Register alone, however, will rarely be sufficient to appropriately involve a community in the process concerning an agreement with a prospective purchaser.²⁰⁴ Accordingly, Regions will want to provide additional opportunities for public information dissemination and facilitate public input.²⁰⁵ Private parties are often concerned about "unwanted interference" by the general public in their transaction. This is understandable and may be sufficient reason at some properties to avoid the prospective purchaser agreement process altogether.

However, seeking cooperation with state and local government may also facilitate public awareness and involvement and may satisfy EPA's public involvement concerns quite easily. Additionally, Regions will make a case-by-case determination of the need and level of additional measures to ensure meaningful community involvement with respect to the agreement.²⁰⁶ Because of business considerations, some prospective purchaser agreements may be subject to relatively short deadlines and EPA Headquarters is encouraging the Regions to allow sufficient time for appropriate approvals and public comment prior to the deadline.²⁰⁷

A mandatory consultation with the Director of the Regional Support Division, Office of Site Remediation Enforcement, is required for any agreement entered into with a prospective purchaser of contaminated property.²⁰⁸ Additionally, prospective purchaser agreements can only be entered into with the express concurrence of the Assistant Attorney General.²⁰⁹ Thus, the regional offices will involve EPA Headquarters and the Department of Justice throughout the process, and keep them involved throughout the negotiations.²¹⁰ This coordination takes a great deal of time and must be expected by the purchaser.

While prospective purchaser agreements are perhaps the best insurance a purchaser can obtain, they are not for everyone. The transaction costs are often prohibitive for smaller transactions. Similarly, transactions that may require a quick response from EPA may also be frustrated. However, it may be workable for several adjoining small properties to work out prospective purchaser agreements at the same time as part of the same transaction.

Factors which can kill a prospective purchaser agreement transaction are a dissatisfied surrounding community and failure to achieve political support for the deal. However, if a purchaser has a politically sanctioned deal that is satisfactory to the surrounding community, the purchaser will likely find that the Agency is willing to go to great lengths to help the deal go forward.

CONCLUSION

EPA's Brownfields program presents exciting opportunities for large scale economic redevelopment efforts where tens of millions of dollars are involved. Projects of this size are necessary to create the economies of scale to absorb legal fees and other significant transaction costs. Unfortunately, not quite 1% of the 450,000 properties that EPA considers Brownfields offer the financial scale necessary to absorb the transaction costs. This paper discusses the legal issues associated with a more typical project: a \$300,000 to \$500,000 commercial/industrial facility with low but uncertain levels of contamination.

Brownfields are often considered by investors as a potential bonanza for redevelopment of contaminated property. However, the owners of such property are often not as impressed. EPA's action agenda is of primary utility to redevelopment efforts worth substantial sums of money. While there is no published rule of thumb, a good guess would be that the project would have to be \$1 million or more to absorb the transaction costs. Most owners of contaminated property are unable to attract redevelopment efforts of this scale. In fact, most contaminated property is likely valued at under \$300,000. Since most Brownfields projects are transaction intensive, it will be extremely difficult for most owners to come up with redevelopment schemes that will support the anticipated transaction costs.

Like many of EPA Administrator Carol Browner's programs, the Brownfields Action Agenda is largely political. The functional aspects of the Agenda relate to clarification of liability issues under CERCLA, specifically, EPA's efforts to remove liability barriers. The policy regarding contaminated aquifers is an excellent example of an administrative agency taking steps to assist owners. On the other hand, the Agency's comfort letter policy is an excellent example of bureaucratic commitment to avoiding commitment. The most potentially useful effort of the Agency in the Brownfields arena is its attempt to resolve the liabilities of prospective purchasers of contaminated property. Unfortunately, the parties who are in primary need of relief from the Agency are the current owners, not the purchasers. Accordingly, the owners of contaminated property are still missing significant incentives for cleanup and redevelopment of their property.

Owners of contaminated property are forever liable to the United States under the Superfund law. Since most of these properties have uncertain amounts and types of contamination, the property owners may find it more expedient to remain ignorant of the nature and extent of contamination on their property than to spend significant sums of money on investigation without a clear benefit. Purchasers, however, can pursue these properties, acquire them

at a discount and leave the prior owner with liabilities, while resolving their own liabilities with the Agency. Thus, there is something of a gap between the interests of prospective purchasers and the needs of owners.

Furthermore, the transaction costs to the purchasers and uncertainties involved with environmental investigation and cleanup will often require the purchasers to require a significant payback on their investment. Naturally, only the largest and most lucrative projects are proceeding under the Brownfields program. For these reasons, the vast majority of the estimated 450,000 potential Brownfields projects are likely to remain dormant. The obvious next step in EPA's evolution of its Brownfields program will be for the Agency to continue to voice encouragement to the private sector, without taking significant steps of its own. No doubt, the Agency will be watching closely while the private sector works out for itself a mechanism for allocating the remaining uncertainties within the underlying real estate transactions. The private sector, however, is proceeding cautiously and largely allowing these troublesome Brownfields projects to lay dormant in favor of the still easier greenfields properties. Additionally, many of these Brownfields properties are well outside traditional urban areas. Thus, there is little demand that would force a market need to resolve the impediments to redeveloping these properties.

Notwithstanding this significant problem, much good will still come from EPA's efforts. One of the driving factors behind the program initiation was the need to rehabilitate abandoned or underused urban property. In this regard, the Agency is quite successful. Appropriately, the most promising properties for Brownfields redevelopment are those commercial or industrial facilities that are within existing metropolitan areas. It is often these attractive properties, with significant political interests, which take the lion's share of the benefits under the Brownfields program. However, in most respects Brownfields properties are subject to the same driving forces as ordinary real estate deals. Thus, it is not surprising that the prime urban properties would attract the most attention from developers and regulators. It is likewise expected that remote properties with little ordinary real estate value will not benefit from these regulatory schemes for the foreseeable future.

¹ See e.g., *Brownfields Transactions: Making the Deals Work*, An American Bar Association Satellite Seminar, Thursday, March 27, 1997. Also see, *Environmental Aspects of Real Estate Transactions*, James B. Witkin, Ed., American Bar Association, Section of Natural Resources, Energy, and Environmental Law.

²A simple Lexis search on May 21, 1997, revealed over 150 articles which held some discussion of either "Brownfields" or redevelopment of contaminated property.

³EPA has been a co-sponsor for the ABA's Brownfields seminars, and has made much of the guidance discussed in this essay publicly available over the Internet. See generally, the EPA's website: <http://www.epa.gov>.

⁴All of the environmental issues discussed below with the exception of Superfund, have been fairly successfully managed in real estate transactions for several years.

⁵See the discussion on CERCLA, *infra*.

⁶See generally 42 U.S.C.A. § 9607(a), and 42 U.S.C.A. §§ 9601 to 9675, Comprehensive Environmental Response, Compensation and Liability Act Of 1980, as amended (also known as "Superfund"). CERCLA §§ 101 to 405. Amended in 1986 by the Superfund Amendments and Reauthorization Act of 1986, Pub.L. No.99-499, 1986 U.S.Code Cong. & Admin. News (100 Stat.) 1613.

⁷See generally, D. Stewart, An Environmental Compliance Checklist, *The Colorado Lawyer*, January 1996, Vol. 25, No. 1, p. 62.

⁸*Toxicological Profile for Asbestos (Update)*, U.S. Dept. Of Health and Human Services, Public Health Services, Agency for Toxic Substances and Disease Registry, August 1995.

⁹See generally, *Managing Asbestos in Place*, EPA, 20T-2003, July 1990.

¹⁰See generally, 29 CFR 29 § 1926.1101 (a)(1)-(7), From June 30, 1993, regulating asbestos exposure in all work included but not limited to:

Demolition or salvage
Encapsulation or removal
Construction or remodel
Installation
Spills or emergency cleanup.

Also see, 1910.1001(a) which applies to all occupational exposures to asbestos in all industries covered by OSHA.

¹¹*Id.*

¹²See generally, *The Nature and Extent of Lead Poisoning in Children in the United States*, A Report to Congress, Agency for Toxic Substances and Disease Registry, U.S. Department of Health and Human Services, July 1988. (ATSDR Report).

¹³*Id.*, p. 1-2, p. 8. See also, *The Residential Lead-based Paint Hazard Reduction Act*, enacted in 1992 as Title X of the Housing and Community Development Act, provided a comprehensive approach to dealing with lead-based paint. The Act, which created Title IV of TSCA, directed the EPA to develop a national program to ensure that people involved in specific lead-based paint activities are properly trained and certified. (15 U.S.C. § 201 - 2671, P.L. 94-469, Oct. 11, 1976, 90 Stat. 2003).

¹⁴Lead in soils posed a significant liability threat to owners and others under Superfund, discussed *infra*.

¹⁵*Toxicological Profile for Polychlorinated Bi-Phenylys*, U.S. Dept. Of Health and Human Services, Public Health Services, Agency for Toxic Substances and Disease Registry, August 1995.

¹⁶See generally, "Lighting Waste Disposal," EPA's Green Lights Program, January 1994.

¹⁷*Toxicological Profile for Radon*, U.S. Dept. Of Health and Human Services, Public Health Services, Agency for Toxic Substances and Disease Registry, December 1990 (TP-90-23).

¹⁸*Id.*, p. 3.

¹⁹The only measures enacted to date are Title III to TSCA, 15 U.S.C. 2661, P.L. 94-469 (Oct. 11, 1976), which addresses publications of a citizen's guide to radon and development of model standards for controlling radon levels in new buildings by the EPA, technical assistance and funding for state radon control programs, and a study of radon in schools and federal buildings. See also, *Models Standards and Techniques for Control of Radon in New Residential Buildings*, 59 FR 13502 (March 21, 1994).

²⁰D. Stewart, An Environmental Compliance Checklist, *The Colorado Lawyer*, January 1996, Vol. 25,

No.1, p. 62.

²¹See *Escamilla v. ASARCO*, No. 91-CV-5716 (Colo. Dist. Ct., Apr. 23, 1993) (citizens of Globeville, Colorado sued their industrial neighbor, ASARCO, for almost 100 years of heavy metals deposits on their residential properties; the total verdict exceeded \$28 million).

²²*Id.*

²³*Id.*

²⁴Solid Waste Disposal Act, 42 U.S.C. 6901, *et seq.*, SWDA §1000, *et seq.*

²⁵42 U.S.C. 6972(a)(1)(B), SWDA § 7003.

²⁶42 U.S.C. 6972(a), SWDA § 7003(a).

²⁷*Id.*, See also 42 U.S.C. 6928.

²⁸See generally, 15 U.S.C. 2601 *et seq.* P.L. 94-469 (Oct. 11, 1976; 90 Stat. 2003).

²⁹See Section on lead-based paint, *supra*.

³⁰e.g. dioxins, PCBs and asbestos.

³¹Author's note: Extensive audit and investigation work, even \$2 million per acre for a 10 acre site, may be inadequate to reveal the historical misuses of the property.

³²See generally, 42 U.S.C. 9607(a) and 42 U.S.C. 9601 to 9675, Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (also known as "Superfund"), CERCLA §§ 101 to 405 (amended in 1986 by the Superfund Amendments and Reauthorization Act of 1986), Pub.L. No.99-499, 1986 U.S.Code Cong. & Admin. News (100 Stat.) 1613. See also 26 U.S.C. 9507.

³³*U.S. v. Aceto Agr. Chemicals Corp.*, 872 F.2d 1373, 1377 (8th Cir. 1989).

³⁴42 U.S.C. 9607 and 9604.

³⁵Although there is substantial case law supporting this characterization of CERCLA liability, Congressional support for this characterization can be found in: *Administration of the Federal Superfund Program*, Report of the Subcommittee on Investigations and Oversight of the Committee on Public Works and Transportation, U.S. House of Representatives, Committee Print 103d Congress, 1st Session (103-35), November 1993, p. 3. (Hereinafter *Report*)

³⁶ As a whole, representatives from industry testified that the Superfund liability system should be changed, while municipalities, insurers, contractors, and lenders testified that portions of the liability system should be altered or clarified. While many witnesses representing polluters complained about the Superfund liability system, the Subcommittee believes the strict, joint and several liability system has the following benefits:

it ensures that the parties generally responsible for creating and disposing of the hazardous waste are liable for cleaning it up;

it unburdens taxpayers and EPA resources by shifting the costs of cleanup to private parties; and

it provides incentives to private parties to minimize waste generation and to develop proper disposal practices for hazardous waste.

"The result of this tough strict, joint and several cleanup liability standard is that American industry fears Superfund liability. The very threat that they may be liable for cleanup causes many businesses to entirely change the way they operate."

Report, p. 3.

³⁷Black's Law Dictionary, 5th ed. See also, Report, p. 3.

³⁸*ibid.*

³⁹*ibid.*

⁴⁰Report, p. 119.

⁴¹*ibid.*

⁴²Report, p. 3.

⁴³Brownfields Action Agenda (August 21, 1995), p. 1.

⁴⁴*id.*

⁴⁵*id.*, EPA's Brownfields Economic Redevelopment Initiative:

will empower States, localities, and other agents of economic redevelopment to work together in a timely manner to prevent, assess, safely clean up, and sustainably reuse Brownfields. . . . Benefits of the Brownfields Initiative will be realized in affected communities through a cleaner environment, new jobs, an enhanced tax base, and a sense of optimism about the future.

⁴⁶*id.*

⁴⁷Superfund Administrative Reforms Annual Report, Fiscal Year 1996, USEPA, Dec. 1996, p. 39. (hereinafter, *Annual Report*).

⁴⁸Annual Report, p. 40.

⁴⁹*id.*

⁵⁰*id.*, p. 41.

⁵¹*id.*

⁵²*id.*

⁵³*id.*

⁵⁴*id.*

⁵⁵*id.*

⁵⁶*id.*

⁵⁷*id.*

⁵⁸*id.*

⁵⁹Brownfields Action Agenda, p.1.

⁶⁰*id.*

⁶¹Annual Report, p. 40.

⁶²*Id.*

⁶³*Id.*

⁶⁴Action Agenda, p. 5.

⁶⁵*Id.*

⁶⁶Annual Report, p. 41.

⁶⁷*Id.*, p. 41. See also, <http://epawww.ciesin.org/national/epaorg/cerclis.html>, last checked July 1997.

⁶⁸*Id.*

⁶⁹*Id.*

⁷⁰CERCLIS sensitive information is available on EPA's mainframe for EPA staff only. Magnetic tape versions of all non-enforcement-sensitive information in the database are available quarterly from the National Technical Information Service(NTIS) at (800) 553-NTIS or (703) 487-4650.

On-line access to CERCLIS data is also available through Great Lakes ENVIROFACTS, a database containing Great Lakes-relevant extracts from several EPA databases, including CERCLIS, which serves as a prototype for EPA's ENVIROFACTS database.

⁷¹*Id.*

⁷²*Id.*

⁷³*Id.*, See also, NPL discussion below.

⁷⁴*Id.*

⁷⁵*Id.*

⁷⁶*Id.*

⁷⁷*Id.*

⁷⁸*Id.*

⁷⁹*Id.*

⁸⁰Annual Report, p. 41.

⁸¹*Id.* See also, "comfort letters" below.

⁸²Annual Report, p. 42.

⁸³*Id.*

⁸⁴*Id.*

⁸⁵*Id.*

⁸⁶Annual Report, p. 44.

⁸⁷*Id.*

⁸⁸Or perhaps, not as concerned as before.

⁸⁹*Final Policy Toward Owners of Property Containing Contaminated Aquifers*, Memorandum from Bruce Diamond, Director, Office of Site Remediation and Enforcement, May 24, 1995. See also <http://es.inel.gov/oeca/osre/950524-1.html>; <http://www.epa.gov/swerosps/bf/gdc.html>, last checked July 1997.

⁹⁰*Id.*

⁹¹*Id.* See also, Annual Report, p. 44.

⁹²*Id.*, p. 3.

⁹³Aquifer policy, p. 3.

⁹⁴*Id.*

⁹⁵*Id.*

⁹⁶*Id.*

⁹⁷*Id.*

⁹⁸See Guidance on Landowner Liability and §122(g)(1)(B) De Minimis Settlements, *supra* note 2. This guidance analyzes the language in §§107(b)(3) and 122(g)(1)(B) of CERCLA.

⁹⁹*Id.*

¹⁰⁰*Id.*

¹⁰¹See, e.g., Policy Towards Owners of Residential Property at Superfund Sites, OSWER Directive #9834.6, (July 3, 1991) (hereinafter "Residential Property Owners Policy") (stating Agency policy not to take enforcement actions against an owner of residential property unless homeowner's activities led to a release); National Priorities List for Uncontrolled Hazardous Waste Sites, 60 Fed. Reg. 20330, 20333 (April 25, 1995). In this notice, the Residential Property Owners Policy was applied to "...residential property owners whose property is located above a groundwater plume that is proposed to or on the NPL, where the residential property owner did not contribute to the contamination of the site."

See also, Interim Policy on CERCLA Settlements Involving Municipalities or Municipal Waste, OSWER Directive # 9834.13, (December 6, 1989).

¹⁰²42 U.S.C. 9622(g)(5), states that "A party who has resolved its liability to the United States under this Subsection (de minimis settlements) shall not be liable for claims for contribution regarding matters addressed in this settlement. Such settlement does not discharge any of the other potentially responsible parties unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement."

¹⁰³A more complete discussion of the appropriate consideration that may be sought under Section 122(g)(1)(B) settlements is contained in Section IV.B.3.a. of Guidance on Landowner Liability and Section 122(g)(1)(B) De Minimis Settlements. The Agency has developed guidance which explains the authorities and procedures by which EPA obtains access or information. See Entry and Continued Access under CERCLA, OSWER Directive #9829.2, June 5, 1987; Guidance on Use and Enforcement of CERCLA Information Requests and Administrative Subpoenas, OSWER Directive 9834.4-A, August 25, 1988.

¹⁰⁴Policy on the Issuance of Comfort/Status Letters, Memorandum from Steve A. Herman, Asst. Administrator, Office of Enforcement and Compliance Assurance, Nov. 12, 1996. See also <http://www.epa.gov/swerosps/bf/html.doc/commemo.htm>, last checked July 2, 1997.

¹⁰⁵*Id.*

¹⁰⁶*Id.*

¹⁰⁷*Id.*

¹⁰⁸Comfort letters are useful, but also a little amusing. Generally, they say that an owner/purchaser does not have anything to worry about - if there's nothing to worry about.

¹⁰⁹History shows that going through the EPA's Superfund process is likely to take ten to fifteen years and twelve million dollars. Figures based on the average cost and duration of Superfund site activity as reported in the *Administration of the Federal Superfund Program*, Report of the Subcommittee on Investigations and Oversight of the Committee on Public Works and Transportation, U.S. House of Representatives, November 1993, p. 3 - 7. (Hereinafter, *Hearings*).

¹¹⁰*Id.*

¹¹¹*Id.*

¹¹²*Id.*

¹¹³*Id.*

¹¹⁴*Id.*

¹¹⁵*Id.*, p. 3. The Agency's "Policy Against No Action Assurances" issued November 16, 1984, reaffirms EPA's policy against giving definitive assurances outside the context of a formal enforcement proceeding that EPA will not proceed with a particular enforcement response. Consistent with that policy, EPA may only provide site-specific, no action assurances with the approval of the Assistant Administrator of the Office of Enforcement and Compliance Assurance.

¹¹⁶*Id.*

¹¹⁷The comfort letter policy is being implemented with some variability across EPA's ten Regions. It is too early to tell for certain; however, it appears that the policy is interpreted with decreasing stringency from the Northeast to the Southwest. In part, the "strict" Regions seem to believe that these comfort/status letters are not necessary or appropriate for typical real estate transactions.

¹¹⁸*Comfort letter policy, p.2.*

¹¹⁹*Id.*

¹²⁰*Id.*

¹²¹*Id.*

¹²²*Id.*

¹²³*Id.*, p. 3.

¹²⁴*Id.* See also, "Deletion from the NPL" 40 CFR 300.425(e) or "Partial Deletion of Sites Listed on the National Priorities List" published in the *Federal Register* on November 1, 1995, 60 FR 55466.

¹²⁵*Id.*, Section II of the letter focuses on sites deleted from the NPL and properties located in the vicinity of a CERCLIS site. Paragraphs (a) and (b) of Section II addresses inquiries regarding full or partial deletions of NPL sites and is appropriate if 1) the portion of the Superfund site is marked for deletion in CERCLIS **and** the state concurs with EPA's decision to delete the portion of the site or 2) after consultation with the state and a thirty day public comment period, the entire site is marked for deletion in CERCLIS. (Refer to the sample letter for specific directions.) A site or portion of a site is deleted from the NPL when "no further response is appropriate" (see 40 CFR 300.425(e)). No further response is

appropriate when responsible parties or EPA has completed all response actions, or when a remedial investigation shows "no significant threat." Either EPA or a petition from any person may initiate the deletion process.

Paragraph (c) of Section II addresses a property that is in the vicinity of a CERCLIS site but currently is not affected by the release of hazardous substances (e.g., a site may be known as the Jones Industrial Park but the release affects only a portion of the industrial park property). Paragraph (c) is appropriate when EPA has sufficient information regarding the level and extent of contamination at a site to determine that the property is not part of the release. When a site is listed in CERCLIS, EPA generally delineates the release of hazardous substances as a geographical area and defines the site by reference to that area. Thus, the actual release is not limited to that property but either may extend beyond the property due to contaminant migration or may not occupy the full extent of the property.

¹²⁶*Id.*, p. 4.

¹²⁷*Id.*

¹²⁸*Id.*

¹²⁹*Id.*

¹³⁰*Id.*

¹³¹*Id.*

¹³²*Id.*

¹³³*Id.*

¹³⁴This section of the policy is interesting, *inter alia*, because this information is usually readily available from many sources (such as conversations with agency staff, and EPA attorneys, and other sources such as publicly available site files and Freedom of Information Act Requests). Thus, in some respects this piece of policy instruction reflects EPA Headquarter's disconnect from the front line interaction between EPA staff and the "real world."

¹³⁵*Id.*, p. 5.

¹³⁶*Id.*

¹³⁷*Id.*

¹³⁸*Id.*

¹³⁹An MOA, or Memorandum of Agreement, codifies an agreement between agencies or others where a standard contract might otherwise be used between private parties.

¹⁴⁰42 USC 9601(20) formerly contained only the language quoted below, which left open the possibility that lenders may be found to be "owners" in the liability sense merely due to activities taken to protect their security interest. If these activities are interpreted as an exercise of control over the property, the lenders may find themselves with unexpected liability. Thus, the question for lenders is how active they can be in protecting their interest without participating in management and becoming an owner or operator. The language at the heart of this issue is

"The term "owner or operator" means . . . (iii) in the case of any facility, title, or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to . . . any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility." 42 USC 9601(20). Amended.

¹⁴¹*United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1557 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 752 (1991). (Hereinafter, *Fleet*).

¹⁴²*Fleet*, 901 F.2d at 1557.

¹⁴³See Pub. L. 104-208, the Asset Conservation, Lender Liability and Deposit Insurance Protection Act, §§ 2501 to 2505.

¹⁴⁴*Id.*

¹⁴⁵*Id.*

¹⁴⁶Congress was apparently pleased with EPA's efforts to resolve the difficulties of lenders and developers and wanted to make sure everyone, especially the courts, knew it. Section 2504 of the Act specifically states: (a) *IN GENERAL.*—Effective on the date of enactment of this Act, the portion of the final rule issued by the Administrator of the Environmental Protection Agency on April 29, 1992 (57 Fed. Reg. 18,344), prescribing section 300.1105 of title 40, Code of Federal Regulations, shall be deemed to have been validly issued under authority of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.) and to have been effective according to the terms of the final rule. No additional judicial proceedings shall be necessary or may be held with respect to such portion of the final rule. Any reference in that portion of the final rule to section 300.1100 of title 40, Code of Federal Regulations, shall be deemed to be a reference to the amendments made by this subtitle.

¹⁴⁷See, 42 U.S.C. 9601(20)(E)(i).

¹⁴⁸*Id.*

¹⁴⁹Recently Enacted Lender and Fiduciary Liability Amendments, Memorandum, Barry Breen, Director, Office of Site Remediation and Enforcement, Office of Enforcement and Compliance Assurance, October 3, 1996. (Hereinafter, Breen Memo.)

¹⁵⁰The entire memo from which these clarifications come is available on the internet at: <http://www.epa.brownfields>, last checked July 1997. See also, Clifford memo, *infra*.

¹⁵¹*Id.*

¹⁵²*Id.*

¹⁵³*Id.*

¹⁵⁴*Id.*

¹⁵⁵*Id.*

¹⁵⁶*Id.*

¹⁵⁷*Id.*

¹⁵⁸*Id.*

¹⁵⁹*Id.*

¹⁶⁰Guidance on Agreements with Prospective Purchasers of Contaminated Property, Memorandum from Steven A. Herman, USEPA Assistant Administrator, Office of Enforcement Compliance Assurance, May 24, 1995. (Hereinafter, Herman Memo).

¹⁶¹There have been only 47 prospective purchaser agreements in the past 10 years, although the EPA has shown significant interest in utilizing them over the last three years.

¹⁶²*Id.*

¹⁶³*Id.*

¹⁶⁴*Id.*

¹⁶⁵The 1989 guidance required EPA to receive substantial benefits in terms of work or reimbursement of response costs that otherwise would not have been available. While some agreements required performance of cleanup work on contaminated parcels prior to their redevelopment, others provided covenants not to sue for purchase of uncontaminated portions of larger Superfund sites.

¹⁶⁶Herman Memo.

¹⁶⁷*Id.*

¹⁶⁸e.g., through job creation or productive use of abandoned property.

¹⁶⁹Herman Memo.

¹⁷⁰*Id.*

¹⁷¹*Id.*

¹⁷²*Id.*

¹⁷³*Id.*

¹⁷⁴*Id.*

¹⁷⁵*Id.*

¹⁷⁶*Id.*

¹⁷⁷*Id.*

¹⁷⁸*Id.*

¹⁸⁰*Id.*

¹⁸¹*Id.*

¹⁸²*Id.*

¹⁸³*Id.*

¹⁸⁴*Id.*

¹⁸⁵*Id.*

¹⁸⁶*Id.*

¹⁸⁷Both the EE/CA and the RI/FS are EPA terms that refer to cleanup alternatives analyses associated with two different administrative processes.

¹⁸⁸*Id.*

¹⁸⁹*Id.*

190|*d.*

191|*d.*

192|*d.*

193|*d.*

194|*d.*

195|*d.*

196|*d.*

197|*d.*

198 e.g., whether the purchaser is a large commercial or industrial venture, a small business, a non-profit or community-based activity.

199|*d.*

200 e.g., demolition of structures, implementation of institutional controls.

201|*d.*

202|*d.*

203|*d.*

204|*d.*

205|*d.*

206|*d.*

207|*d.*

208|*d.*

209|*d.*

210|*d.*