Liability and Other Guidance

OVERVIEW

EPA has been working with States and municipalities to develop guidance that will provide some assurance that, under specified circumstances, prospective purchasers, lenders, and property owners do not need to be concerned with Superfund liability. These guidance clarify the liability of certain parties’ association with and activities at a site, and clearly state EPA’s decision to use its enforcement discretion not to pursue such parties. EPA anticipates that these clear statements of the Agency’s position will alleviate any concerns parties may have in becoming involved in the cleanup and redevelopment of previously used properties.

ACTIVITIES

EPA has developed the following guidance to address specific liability concerns.

- EPA issued a general policy statement regarding the liability of owners of uncontaminated property containing groundwater that has been contaminated by a neighboring property. This policy statement provides assurance that EPA does not anticipate suing the property owner for groundwater contamination if the owner did not cause or contribute to the contamination.

- EPA issued guidance regarding the increased consideration of anticipated future land uses in remedy selection decisions at National Priorities List (NPL) sites. The guidance encourages discussions among local land use planning authorities, other officials, and the community as early as possible in the site assessment process.

- EPA issued guidance that expands the circumstances under which EPA will enter into Prospective Purchaser Agreements. The guidance states the conditions under which EPA will not sue prospective purchasers for contamination that existed before the purchase.

- EPA issued the Policy on CERCLA Enforcement Against Lenders and Government Entities That Acquire Property Involuntary which outlines criteria for determining when lenders and municipalities are exempt from CERCLA enforcement provisions. The guidance was subsumed in large measure by the September 30, 1996 “Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996.”

- EPA issued a policy on the use of Comfort/Status Letters to assist parties who seek to clean up and reuse brownfields properties. The policy contains four sample comfort/status letters that address the most common inquiries for information EPA receives regarding contaminated or potentially contaminated property. The letters are intended solely for informational purposes; they relate only to EPA’s intent to exercise its response and enforcement authorities under Superfund at a particular property based on information presently known by EPA about that property. The letters do
not provide a release from CERCLA liability and
are not considered an assurance that no action will
be taken under Superfund law at the property (i.e.,
no action assurance).

• EPA issued a model comfort letter for closing
military bases that addresses various issues
concerning perceived National Priorities List (NPL)
stigmas and Superfund liability. The letter clarifies
some common misunderstandings about NPL listing
and CERCLA liability and highlights certain
provisions concerning Federal property transfer.
Additionally, it states that parcels of military bases
identified as uncontaminated under the Community
Environmental Response Facilitation Act (CERFA)
are not part of the NPL listing.

• The Office of the Comptroller of Currency issued
guidance that revises Community Reinvestment
Act (CRA) credit guidelines to include giving
credit to banks that provide loans for assessment,
cleanup, or redevelopment of brownfields.

• EPA issued soil screening guidance to help deci-
sion-makers quickly determine which portions of a
site require further study, and which pose little risk
to human health and therefore may be ready for
development without extensive cleanup.

• EPA issued a rule that limits the regulatory
obligations of financial institutions and others who
hold security interests in property on which
petroleum Underground Storage Tanks are located.
(NOTE: See The “Asset Conservation, Lender
Liability, and Deposit Insurance Protection Act of
1996.”)

• EPA issued a military base closure guidance that
addresses the approach EPA should use in
determining whether to concur that a parcel has
been properly identified by the military service as
“uncontaminated” and, therefore, is transferable
pursuant to CERCLA Section 120(h)(4).

• EPA’s State and Tribal Deferral Program is intended
to encourage qualified, interested States to address,
under State laws, the large number of sites now in
EPA’s listing queue in order to accelerate cleanup,
minimize duplicative State/Federal efforts, and offer
potentially responsible parties (PRPs) a measure of
confidence that only one agency will address the
site.

NEW LEGISLATION

On September 30, 1996, as a part of the Omnibus
Appropriations Bill for Fiscal Year 1997, Congress
passed and the President signed into law the “Asset
Conservation, Lender Liability, and Deposit Insur-
ance Protection Act of 1996” (the Act). The Act
includes lender and fiduciary liability amendments to
CERCLA, amendments to the secured creditor ex-
emption set forth in Subtitle I to RCRA, and valida-
tion of the portion of the CERCLA Lender Liability
Rule that addresses involuntary acquisitions by gov-
ernment entities. These amendments 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. In 1997, EPA will
issue a Fact Sheet that describes in more detail the
impact of the Act, how it differs from EPA policy,
and the portions of EPA policy that were left unad-
dressed by the Act.

In addition to specific guidance, EPA is exploring other
ways to address the fear that affected parties have about
incurring Superfund liability at previously used
properties. This analysis will form the basis for future
guidance, mapping out the relationship between the
types of sites and situation encountered as a result of the
Superfund liability scheme’s effect on redevelopment.

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