## COMMON ELEMENTS CHECKLIST

The landowner liability protection "common elements" are the following:

### Threshold Criteria:

- ☐ All appropriate inquiry
- ☐ Not a potentially responsible party and not affiliated with a potentially liable party

### Ongoing Obligations:

- ☐ Complying with and not impeding land use restrictions and institutional controls
- ☐ Exercising appropriate care by taking reasonable steps with respect to hazardous substances on property
- ☐ Cooperation, assistance and access
- ☐ Compliance with information requests and administrative subpoenas
- ☐ Providing legally required notices

## REASONABLE STEPS CHECKLIST

Taking reasonable steps with respect to hazardous substances on property includes:

- ☐ Stopping continuing releases
- ☐ Preventing threatened future releases
- ☐ Preventing or limiting human, environmental, or natural resource exposure to earlier hazardous substance releases

## WANT TO LEARN MORE?

To access copies of the guidance documents and for more information please visit EPA's Web site at:

www.epa.gov/enforcement/brownfields

For more information about revitalizing contaminated sites and addressing potential liability concerns, please see OSRE's *Revitalization Handbook* at:

www.epa.gov/compliance/resources/publications/cleanup/brownfields/handbook

or contact the
Office of Site Remediation Enforcement
at
(202) 564-5110

or

U.S. Environmental Protection Agency
Office of Enforcement and Compliance Assurance
Office of Site Remediation Enforcement
MC 2273-A
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

EPA Publication No. 330-F-08-002

## Office of Site Remediation Enforcement

# LANDOWNER PROTECTIONS UNDER CERCLA

This brochure describes the 2002 Brownfields Amendments' liability protections for landowners at Superfund and Brownfields sites.

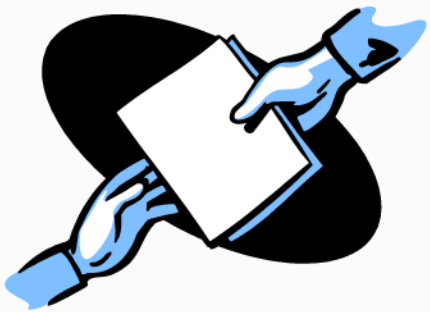
# IMPLEMENTATION OF THE BROWNFIELDS AMENDMENTS

The Small Business Liability Relief and Brownfields Revitalization Act, a.k.a. "Brownfields Amendments," was signed into law on January 11, 2002.

The Brownfields Amendments provide important liability protections and clarifications for certain landowners who are not responsible for site contamination. Potential liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), a.k.a. "Superfund," was often perceived as a deterrent to reuse of contaminated properties. CERCLA landowner liability protections help to serve as an essential component of the successful reuse of previously contaminated properties in an environmentally responsible manner.

EPA's Office of Site Remediation Enforcement (OSRE) is responsible for the management of EPA's Superfund enforcement program. OSRE actively worked with EPA's Regional Offices and the Department of Justice to develop guidance documents that help with the implementation of the landowner liability provisions provided by the Brownfields Amendments.

Several of the guidances are interim because EPA recognized that experience in implementing the Brownfields Amendments may require modifying the guidances in the future. OSRE welcomes comments on all of the guidances identified in this brochure.



# EPA GUIDANCE DOCUMENTS

## Landowner Liability Protection "Common Elements"

Explains EPA's approach to applying criteria common to the new landowner liability protections, a.k.a. "common elements." The criteria apply to the bona fide prospective purchaser, contiguous property owner, and innocent landowner liability protections. The guidance discusses the appropriate care/reasonable steps and institutional control/land use criteria, two of the most asked questions about provisions of the liability protections. The guidance includes a sample reasonable steps comfort/status letter that may be used to facilitate property reuse. (See reverse side of this flyer for "Common Elements Checklist.")

## Contiguous Property Owner Liability Protection

Discusses Section 107(q), which provides a liability exemption for contiguous property owners or others similarly situated who own real property contaminated as a result of pollution migration from another's property. The guidance explains EPA's enforcement approach towards such parties.

## Bona Fide Prospective Purchaser Liability Protection

Discusses the liability protection for a bona fide prospective purchaser. This protection largely eliminates the need for federal CERCLA covenants not to sue in prospective purchaser agreements (PPAs). The guidance describes the limited circumstances where EPA involvement might be appropriate to facilitate beneficial reuse of the property.

## Bona Fide Prospective Purchaser Removal Model Agreement

Responds to requests for liability protection from would-be purchasers of contaminated property who will achieve bona fide prospective purchaser status but want to perform cleanup under EPA oversight and beyond the reasonable steps to prevent releases requirement. EPA may enter into a removal agreement providing a federal CERCLA covenant not to sue and contribution protection to a bona fide prospective purchaser when EPA can receive, among other things, oversight costs. The model agreement addresses potential liability concerns when substantial cleanup work is performed by the bona fide prospective purchaser. The model includes appropriate provisions for the performance of removal work and the release and waiver of any windfall lien.

## Windfall Lien Interim Policy

Explains when the United States would, and would not, use the windfall lien provision. This provision gives EPA a lien on a bona fide prospective purchaser's property for an increase in fair market value attributable to EPA's cleanup action. The guidance also describes EPA's general approach to resolving windfall liens and includes sample documents to facilitate property reuse: a sample windfall lien comfort/status letter and a model windfall lien resolution.

## Windfall Lien Administrative Procedures

Explains the timing for filing a notice of a windfall lien on a property after acquisition by a bona fide prospective purchaser. The guidance also describes the administrative procedures for filing the notice and includes a model pre-filing notice letter.

## Eligible Response Site Guidance

Explains EPA's process for using a site risk assessment pre-score to determine which sites are, and are not, eligible response sites as defined under Section 101(41). Generally, this site status protects a party conducting a cleanup in compliance with a State response program from federal enforcement under CERCLA.