
U.S. Environmental Protection Agency
“WINDFALL LIEN” GUIDANCE
Frequently Asked Questions

Where can I obtain a copy of EPA’s Windfall Lien Guidance?

EPA’s July 16, 2003 guidance entitled, “*Interim Enforcement Discretion Policy Concerning “Windfall Liens” Under Section 107(r) of CERCLA,*” is available at:
<http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-windfall-lien.pdf>

What is a CERCLA § 107(r) “windfall lien?”

A CERCLA statutory lien on a property for the *increase in the fair market value* of that property attributable to EPA’s cleanup efforts. Unlike a CERCLA § 107(l) lien, it is not a lien for all of EPA’s unrecovered response costs. The windfall lien is limited to the lesser of EPA’s unrecovered response costs or the increase in fair market value attributable to EPA’s cleanup.

To what properties does the windfall lien apply?

Properties that are or may be acquired by a “bona fide prospective purchaser” as defined at CERCLA § 101(40).

Does EPA have a windfall lien on all contaminated properties?

No. A windfall lien can only arise on properties where the United States spends money cleaning up the property. Thus, at the vast majority of Brownfield sites, there is no windfall lien.

If EPA has spent money cleaning up a property, what are some of the factors it will consider in deciding whether to perfect a windfall lien?

Important factors include:

- substantial unreimbursed cleanup costs unlikely to be recovered from liable parties;
- whether a bona fide prospective purchaser will reap a significant windfall directly as a result of EPA’s expenditure of Superfund money at a Site (e.g., EPA conducts a cleanup at a site during a bona fide prospective purchaser’s ownership);
- a real estate transaction, or transactions, structured so as to either create bona fide prospective purchaser windfall at taxpayer expense, or allow a liable owner to avoid CERCLA liability.

Are there situations where EPA will generally not perfect a windfall lien, even when the Agency has unreimbursed response costs?

Yes, absent special circumstances, EPA will generally not perfect a windfall lien in the following situations:

- a bona fide prospective purchaser acquires the property at fair market value after cleanup;
- EPA has previously resolved the potential windfall through a settlement with the liable owner;
- EPA's only site expenditures are Brownfield grants or loans;
- EPA's only site response costs are preliminary site assessment or site investigation costs;
- a homeowner sells a residential property to another homeowner;
- the bona fide prospective purchaser is going to use the property for the creation of a public park or other similar public purpose;
- there is a substantial likelihood of full cost recovery from CERCLA liable parties;
- an existing EPA landowner enforcement discretion policy (e.g., the Contaminated Aquifers Policy) applies to the bona fide prospective purchaser.

When EPA does file a windfall lien on a property, how will EPA value the windfall lien?

Absent special circumstances, EPA will generally seek only the increase in fair market value attributable to a response action that occurs after a bona fide prospective purchaser acquires the property at fair market value.

How will EPA determine the increase in fair market value after a bona fide prospective purchaser acquires the property?

Generally, EPA will calculate the increase in fair market value attributable to EPA's cleanup by considering the fair market value of the property as if cleanup were complete versus the fair market value of the property when acquired, presumably the bona fide prospective purchaser's purchase price.

What happens if a bona fide prospective purchaser wishes to acquire a property with a CERCLA § 107(l) lien on the property?

Where a bona fide prospective purchaser acquires a property with a perfected CERCLA § 107(l) lien, EPA expects that, in most instances, the CERCLA § 107(l) lien will be paid off as part of the transaction between the liable owner and the bona fide prospective purchaser. If not, EPA may subsequently seek enforcement of the CERCLA § 107(l) lien against the property during the bona fide prospective purchaser's ownership.

How is EPA addressing windfall lien concerns of bona fide prospective purchasers where EPA will generally not perfect a windfall lien?

EPA believes today's enforcement discretion policy addresses many windfall lien concerns and limits the need for EPA involvement in private real estate transactions. However, in situations where it may be appropriate for EPA to provide more site-specific information to interested parties, an additional tool may be available. Consistent with EPA's existing "Comfort/Status Letter" policy, EPA Regions may provide a comfort/status letter for circumstances where EPA will generally not pursue a windfall lien. A sample letter is attached to the policy.

How can windfall liens be released or settled?

Where EPA is likely to pursue a windfall lien and a bona fide prospective purchaser wants to resolve any existing or potential windfall lien, EPA has developed a model windfall lien resolution document. The model is attached to the policy.

MORE QUESTIONS

Questions regarding this reference sheet or EPA's Windfall Lien Guidance should be directed to Greg Madden in OSRE's Policy & Program Evaluation Division (202-564-4229, Madden.Gregory@EPA.gov) or to the Landowner Liability Protection Subgroup Regional contacts listed below. Questions regarding windfall lien resolution agreements should be directed to Helen Keplinger in OSRE's Regional Support Division (202-564-4221), Keplinger.Helen@EPA.gov or to the Landowner Liability Protection Subgroup Regional contacts listed below.

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