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OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Transmittal of the Fact Sheet on "The Benefits of Integrating Reuse to Achieve Enforcement and Environmental Protection Goals"

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TO: Regional Counsel, Regions I-X
Enforcement Division Directors, Regions I-X
Superfund National Policy Managers, Regions I-X
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PURPOSE

This memorandum transmits the fact sheet titled, *The Benefits of Integrating Reuse to Achieve Enforcement and Environmental Protection Goals*. The fact sheet is intended to be a resource for EPA enforcement staff involved in contaminated site response decision-making and enforcement actions for the performance or payment of site response activities. The purposes of the fact sheet are to:

- Identify the benefits of site reuse that can help staff achieve enforcement and environmental protection goals;
- Encourage staff to evaluate the potential benefits of site reuse when planning and conducting enforcement activities; and
- Encourage staff to support Superfund, Resource Conservation and Recovery Act (RCRA), Brownfields, Underground Storage Tanks, and Federal Facilities program efforts to facilitate site cleanup and reuse.

To gain a better understanding of the Agency's efforts to support reuse, this fact sheet should be read in conjunction with the Office of Superfund Remediation and Technology Innovation's memorandum titled, *Considering Reasonably Anticipated Future Land Use and Reducing Barriers to Reuse at EPA-lead Superfund Remedial Sites* ("Superfund Reuse Directive"). The Superfund Reuse Directive is intended to further EPA's policy supporting, whenever practicable, reuse of all or a portion of National Priority List (NPL) sites where EPA has lead responsibility, consistent with the Comprehensive Environmental Response, Compensation, and Liability Act

(CERCLA, commonly referred to as “Superfund”), the National Contingency Plan, and existing Agency guidance.

Questions about this fact sheet may be directed to Hollis Luzecky at luzecky.hollis@epa.gov or 202-564-4217 or to Matthew Sander at sander.matthew@epa.gov or 202-564-7233 in OSRE.

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The Benefits of Integrating Reuse to Achieve Enforcement and Environmental Protection Goals

Office of Site Remediation Enforcement

Introduction

Currently, thousands of Superfund, RCRA, Brownfield, Underground Storage Tank, and Federal Facility properties have been remediated and are ideal for reuse. Over 500 Superfund NPL sites alone are in reuse or are protective and ready for reuse. Reuse opportunities offer a chance to spur the cleanup of contaminated sites and may return vacant, blighted community properties to productive reuse. The Agency has long supported site reuse because of its many benefits:¹

- Reuse may reduce blight and improve the appearance of a community.
- Reuse may raise property values, creates jobs, and boosts community morale.
- Reuse may restore a site to a valued community asset.
- Reuse may create open space for recreation and wildlife habitat.
- Reuse can be a sign of good government at work – federal, state, tribal, and local.
- Community support and involvement in the reuse process can foster good will, increase transparency, and make remedy selection and the settlement process easier.
- Reuse may promote urban redevelopment, encouraging the use of existing buildings and vacant lots.
- Reuse may promote sustainable smart growth communities.

In addition to these benefits, site reuse can also help EPA achieve enforcement and environmental protection goals, such as long-term site stewardship. This fact sheet identifies those and other benefits of integrating reuse into enforcement work, and serves as a resource for EPA enforcement staff involved in contaminated site response decision-making and enforcement actions for the performance or payment of site response activities. Enforcement's first priority is pursuing those responsible for contamination and ensuring the protection of human health and the environment. Often, reuse can support these enforcement and environmental protection goals and help remove obstacles to cleanups and revitalization.² Enforcement staff should consider future land use in conjunction with potential benefits of site reuse when planning and conducting enforcement activities and using site-specific enforcement tools.

¹ To gain a better understanding of the Agency's efforts to support reuse, this fact should be read in conjunction with the memorandum titled, "Considering Reasonably Anticipated Future Land Use and Reducing Barriers to Reuse at EPA-lead Superfund Remedial Sites," OSWER Directive 9355.7-19 (March 17, 2010) ("Superfund Reuse Directive"), available at <http://www.epa.gov/superfund/programs/recycle/pdf/reusedirective.pdf>.

² EPA is seeking to highlight revitalization success stories with an enforcement component. See "Request for Revitalization Success Stories with an Enforcement Component and the Checklist for Collecting Revitalization Success Stories with an Enforcement Component" (December 23, 2010), available at <http://www.epa.gov/compliance/resources/publications/cleanup/brownfields/success-checklist.pdf>.

Reuse Can Help Achieve Enforcement Goals and Save Federal and State Resources

- Considering reuse can lead to more cost-effective and efficient remedies tailored to a specific reuse, possibly saving EPA, state, tribal, local government, and potentially responsible party (PRP) money while protecting human health and the environment.
- A developer may conduct, finish, enhance, or maintain a cleanup and thus conserve Superfund resources.
- Developer reuse and financial support at a site may lower or eliminate state, tribal, or local government financial burdens (*e.g.*, operation and maintenance costs and 10% cost-share assurances) and facilitate state support for NPL listings and remedy selections.
- Allowing reuse of a portion of a site during a cleanup (remedial phasing) may attract Bona Fide Prospective Purchasers (BFPPs) or other developers to assist with the cleanup on additional portions of the site.
- Reuse by a BFPP is beneficial because a BFPP is obligated to cooperate (*e.g.*, implement or comply with institutional controls, provide access, not impede or interfere with the cleanup) in order to maintain its BFPP status.
- Potential reuse can help build partnerships with future users who may persuade PRPs to support cleanup and reuse by assuming cleanup obligations and/or maintaining the integrity of the remedy.
- A reuse project that incorporates sustainable elements into the cleanup, design, or construction may be a possible Environmentally Responsible Redevelopment and Reuse (ER3) project, which may include the use of an attractive enforcement tool, such as a comfort/status letter, BFPP Doing Work agreement, prospective purchaser/lessee agreement, or other enforcement incentive.³
- Superfund reuse assessments and other response actions may be funded with settlement dollars in special accounts, which may be made available to qualifying work parties.⁴

Achieve Enforcement Goals and Save Resources

- EPA Strategic Plan includes reuse
- Assistance with cleanup
- Achieve cleanup faster
- Obtain additional cleanup funding
- Efficient/tailored remedies
- Settlement tools available to support reuse

³ See EPA's ER3 website at <http://www.epa.gov/compliance/cleanup/revitalization/er3> and the ER3 HQ Team page at <http://intranet.epa.gov/oeca/osre/workgroup/er3.html>.

⁴ Special account funds can be used to finance response actions at a site, making them a powerful incentive to encourage work parties to assist EPA in cleanup. Regional counsel and program offices will need to determine if the work qualifies as a response action and the appropriate amount for disbursement, and negotiate for response work to be conducted using these funds. Special account guidance is located at http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund/index.cfm?action=3&sub_id=1235.

- Response costs such as cleanup and settlement expenses, and Superfund reuse assessment and reuse planning expenses, may be cost recovered by EPA or financed by developers or PRPs.⁵
- EPA may have a windfall lien if an EPA response action increased a property's fair market value.

Reuse Can Help Achieve Environmental Protection Goals

- Reuse helps achieve the objectives of EPA's Strategic Plan.⁶
- Reuse may lead to remedies that are more protective or to cleanup at an adjacent site that otherwise would not be addressed by EPA.
- Reuse discourages inappropriate activities, such as illegal dumping, which could ultimately undermine a remedy's function and protectiveness.
- Stakeholder involvement and potential reuse can help get sites cleaned up (and protective) faster. This can increase the number of sites EPA addresses and foster government efficiency.
- A BFPP must take reasonable steps to stop continuing releases and prevent future releases in order to maintain its BFPP status.
- Reuse helps to preserve "green space" and reduce urban sprawl, thus saving natural resources.

Other Benefits
➤ More protective remedies
➤ Improved institutional control implementation
➤ State and community support
➤ Availability of streamlined orders
➤ Reduction of blight, increase in property values and jobs
➤ Preservation of green space

Reuse Can Help Achieve Institutional Controls (ICs) and Long-Term Stewardship Goals

- Reuse can help ensure proper implementation and long-term effectiveness of ICs relied upon as part of a remedy.
- Reuse can help ensure that land will be used consistently with the selected remedy so the remedy does not need to be revised.

⁵ EPA's Superfund Redevelopment Initiative (SRI) program offers guidance, tools, and services to help communities overcome obstacles to reuse at Superfund sites, including reuse assessments and reuse planning. More information is available at <http://www.epa.gov/superfund/programs/recycle>.

⁶ "2011-2015 EPA Strategic Plan, Objective 3.3: Restore Land," 50 (September 30, 2010), available at http://www.epa.gov/ocfo/plan/2015/FY_2011-2015_EPA_Strategic_Plan_with_hyperlinks.pdf.

- Reuse can encourage the use of innovative tools to make a public area safe before cleanup is complete (*e.g.*, attempting to publicly register ICs or underground remedy components into state One-Call systems⁷).
- Reuse planning can help facilitate the implementation and oversight of ICs by local community and government stakeholders when there are clear benefits to the community.
- Reuse discourages inappropriate activities (*e.g.*, dumping, all-terrain vehicle recreation, vandalism), which could exacerbate contamination or increase contaminant exposure.
- Reuse parties have a vested interest in maintaining property, encouraging responsible stewardship of engineered remedies, and the implementation of ICs.

Reuse Incentives for PRPs/BFPPs Can Help Achieve Settlement

- Special account funds may be available to eligible work parties to conduct the cleanup at a site.
- Federal, state, and local grants and loans may be available for reuse projects.
- When appropriate, EPA may enter into agreements, such as BFPP Doing Work agreements, that support reuse to resolve concerns about potential liability where it otherwise would not because of the cleanup and environmental protection benefits.⁸
- EPA may provide streamlined orders which can smooth the settlement process.⁹
- If the project is ER3 eligible, press attention may benefit the cleanup where the developer conducts the cleanup and/or construction in a sustainable manner.
- A developer may negotiate a lower purchase price by agreeing to incur cleanup costs that would otherwise be incurred by the seller.
- Cleanup costs may be cost recoverable.
- EPA can resolve a lien on the property in exchange for cleanup.

⁷ States use One-Call systems (also known as “Dig Safe,” “Miss Utility,” or “Call Before You Dig” systems in some states) to help excavators identify the location of buried utility lines, prevent damage to underground facilities, and to protect the public and environment from uncontrolled excavations.

⁸ For example, a reuse project that contributes to a cleanup and includes a sustainable component may be eligible as an ER3 project and one of the enforcement incentives under the initiative. See ER3 website *available at* <http://www.epa.gov/compliance/cleanup/revitalization/er3>.

⁹ *Id.*

Enforcement's Role in Supporting Site Reuse

- Enforcement tools or incentives can address liability concerns of persons looking to cleanup, reuse, or redevelop Superfund, RCRA, Brownfield, UST, and Federal Facility properties
- Provide access to information about land use restrictions, land purchase, and reasonable anticipated future reuse options
- Inform developers of potential liabilities and available landowner protections
- Negotiate with developers for cleanup assistance early in the process
- Strive to eliminate barriers to reuse when it can help achieve enforcement and environmental goals (e.g., resolving a lien in exchange for cleanup or costs, revising an IC to support enhanced remedies or sustainable reuse)
- Engage community stakeholders in the planning process for cleanup actions that further reuse
- Request “green” elements as part of the cleanup and redevelopment
- Require oversight and transaction costs if reuse requires a remedy change
- Search for and support innovative solutions and partnerships
- Submit revitalization success stories to OSRE

Conclusion

Considering and facilitating site reuse may not seem like a traditional role for enforcement staff, but as demonstrated in this fact sheet, the potential environmental and enforcement benefits merit integrating site reuse into our work. Vigorously pursuing responsible parties under our “enforcement first” policy (ensuring polluters pay) while addressing potential liability associated with site reuse and facilitating long-term stewardship, as appropriate, are complementary goals, not contradictory. EPA enforcement staff are encouraged to integrate reuse into their work and utilize enforcement tools to remove perceived liability concerns and facilitate the revitalization of contaminated sites.

Questions about this fact sheet may be directed to Hollis Luzecky at luzecky.hollis@epa.gov or 202-564-4217 or to Matthew Sander at sander.matthew@epa.gov or 202-564-7233 in OSRE.

This fact sheet is intended exclusively to provide information to employees of the U.S. Environmental Protection Agency, and is not a rule and does not create any legal obligations or enforceable rights. Whether and how EPA applies this information to any particular site will depend on the facts at the site. Any decision regarding a particular remedy selection will be made based on the statute and regulations, and EPA decision-makers retain the discretion to adopt approaches that differ from the guidance in this fact sheet, where appropriate, on a case-by-case basis. This document does not affect determinations of CERCLA liability, and does not provide any relief from or limitation of liability.

EPA Reuse Resources on the Internet

Cleanup Enforcement Brownfields and Land Revitalization <http://www.epa.gov/compliance/cleanup/revitalization>

Environmentally Responsible Redevelopment and Reuse (ER3) <http://www.epa.gov/compliance/cleanup/revitalization/er3>

Superfund Redevelopment <http://epa.gov/superfund/programs/recycle>

Brownfield and Land Revitalization <http://www.epa.gov/brownfields>

EPA Land Revitalization Programs and Offices <http://www.epa.gov/landrevitalization>

RCRA Brownfield Prevention Initiative <http://www.epa.gov/rcrabrownfields>

Federal Facilities Restoration and Reuse Office <http://www.epa.gov/fedfac>

Underground Storage Tanks <http://www.epa.gov/oust>