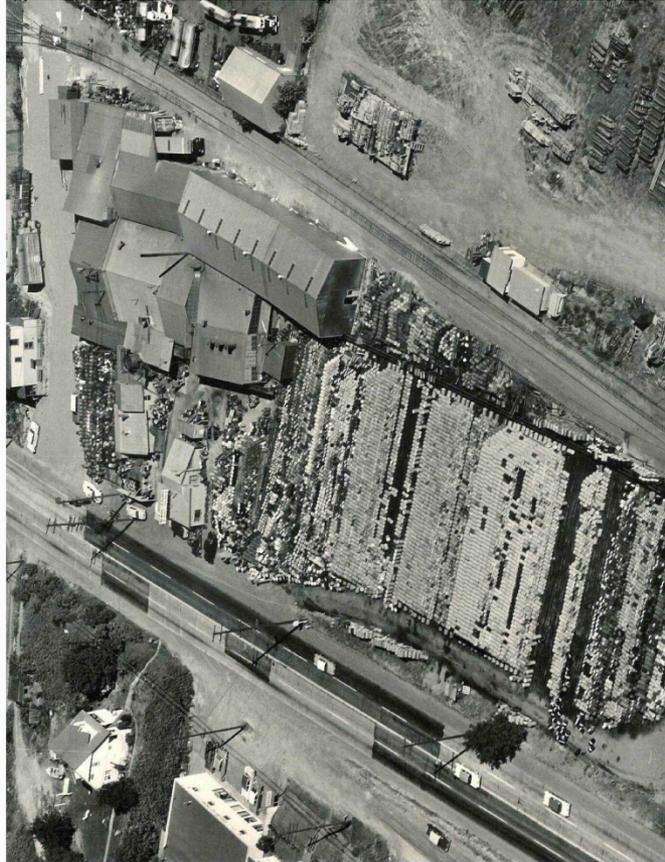


# Minimizing Environmental Liabilities in Property Transactions

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# Contaminated Property Liabilities



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# CERCLA

- CERCLA created a comprehensive liability scheme to require certain categories of parties to conduct or pay for cleanup of such releases.
- Remedial responses financed by the Hazardous Substance Trust Fund are undertaken only at sites on the EPA's National Priorities List (NPL). The National Contingency Plan (NCP), 40 C.F.R. Part 300, provides the “blueprint” for conducting removal and remedial actions under CERCLA.
- Most Superfund Sites involve PRP Groups and Natural Resource Trustees
- The investigation and cleanup can take years or longer
- 2002 Brownfield Amendments

# RCRA

- RCRA governs the use, handling, storage and disposal of hazardous wastes at a facility, as well as its transportation
- RCRA investigations involve similar tools as Superfund sites to address soil and groundwater contamination
- RCRA cleanups can occur at operating facilities under the RCRA corrective action program.
- EPA and states jointly administer RCRA and state dangerous waste statutes and regulation.
- 2002 Brownfield Amendments
- EPA RCRA Brownfields Prevention Initiative

# Categories of Liability under CERCLA

CERCLA liability ensures that potentially responsible parties (PRPs), rather than the general public, pay for cleanups. Under Section 107(a), there are four categories of persons that may be held liable for the costs or performance of a cleanup:

- (1) The current owner or operator of a facility;
- (2) An owner or operator at the time of disposal;
- (3) A person who arranged for the disposal or treatment of hazardous substances (generator or arranger); and
- (4) A person who accepted a hazardous substance for transport to a disposal or treatment facility or to a site and such person selected the facility or site.

# CERCLA liability for the costs of cleanup is:

- CERCLA created a comprehensive liability scheme to require certain categories of parties to conduct or pay for cleanup of such releases.
- Remedial responses financed by the Hazardous Substance Trust Fund are undertaken only a Strict - A party is liable if it falls within one of the above categories in CERCLA § 107(a) regardless of whether its conduct was negligent, intentional, or in compliance with industry standards.
- Joint and Several - If two or more parties are responsible for the contamination at a site, any one or more of the parties may be held liable for the entire cost of the cleanup, regardless of its share of the waste contributed, unless a party can show that the injury or harm at the site is divisible.
- Retroactive - A party may be held liable even if the hazardous substance disposal occurred before CERCLA was enacted in 1980.

# The three categories of landowners addressed in the Brownfields Amendments are:

1. Bona fide prospective purchasers (BFPPs);
2. Contiguous property owners (CPOs); and
3. Innocent landowners.

All have statutory protection under CERCLA

# Bona Fide Prospective Purchasers

- Until 2002, prospective purchasers of contaminated property could not avoid the CERCLA liability as a current owner if they purchased with knowledge of contamination, except in the rare cases where they could convince EPA to enter into a prospective purchaser agreement and get a covenant not to sue.
- Now, EPA cannot seek to hold a bona fide prospective purchaser liable. This protection is self-implementing and EPA does not have to make a determination whether a party qualifies for BFPP status so long as they meet the statutory criteria.
- Under Section 107(r), a BFPP is not liable as an owner/operator liability if the party acquires property after January 1, 2002, and meets the criteria in CERCLA § 101(40) and § 107(r).
- These criteria include the performance of “all appropriate inquiries” (AAI) before acquiring the property.
- The party cannot otherwise be a PRP at the site or have an “affiliation” with a liable party at the site.

# BFPPS

There are also additional obligations of a new owner, including:

- Complying with land use restrictions and not impeding the effectiveness or integrity of institutional controls;
- Exercising appropriate care with respect to hazardous substances found at the property by taking “reasonable steps” to stop any continuing release and to prevent any threatened future release;
- Providing cooperation, assistance, and access
- Complying with information requests and administrative subpoenas;
- Not impeding the cleanup, and
- Providing legally required notices. CERCLA § 101(40).

# Windfall Liens

Caveat - The property acquired may be subject to a windfall lien if the cleanup increases the fair market value of the property. In such case, the U.S. may have a windfall lien on the property for the lesser of the unrecovered response costs or the increase in fair market value at the property attributable to the cleanup. CERCLA § 107(r).

# BFPP PROTECTIONS MAY APPLY TO TENANTS

- Under current CERCLA case law, a tenant is not necessary liable as an owner or operator under CERCLA § 107(a).
- EPA has recognized the uncertainty regarding the potential liability of tenants and the potential applicability of the BFPP provision regarding tenants in Section 101(40).
- In 2012, EPA published its *Revised Enforcement Guidance Regarding the Treatment of Tenants Under the CERCLA Bona Fide Prospective Purchaser Provision*. This guidance discusses the potential applicability of the BFPP provision to tenants who lease contaminated or formerly contaminated properties, and how EPA intends to exercise its enforcement discretion on a site-specific basis to treat certain tenants as BFPPs under CERCLA.

# BFPP PROTECTIONS MAY APPLY TO TENANTS

- This new guidance addresses when a tenant may be a BFPP by virtue of leasing the property from an owner who is a BFPP.
- EPA will also now consider, on a site-specific basis, when a tenant of an owner who has lost BFPP status may retain its BFPP status when the tenant meets the elements of the BFPP in CERCLA §§ 101(40)(A)-(H) and 107(r)(1) with the exception of the AAI provision or in cases where the can meet those provisions.

# Owners of Property Impacted by Contamination from an Off-Site Source

- In 1995, EPA issued a *Final Policy Toward Owners of Property Containing Contaminated Aquifers* to address the migration of contaminated groundwater to adjacent properties not otherwise responsible for the contamination.
- EPA stated that it would not hold such owners liable if they did not cause or contribute to the contamination.
- It also stated that if a third party sued or threatened to sue, the EPA would consider entering into a settlement with the landowner covered under the policy to prevent third party damages being awarded.

# Owners of Property Impacted by Contamination from an Off-Site Source

- The 2002 Brownfields Amendments added a statutory protection for contiguous property owners. Section 107(q) now excludes from the definition of “owner or operator” a person who owns property that is “contiguous,” or otherwise similarly situated to, a facility that is the only source of contamination found on the person’s property.
- In 2009, EPA issued the *Model CERCLA Section 107(q)(3) Contiguous Property Owner Assurance Letter* in accordance with the 2004 enforcement discretion guidance mentioned above to be used under specified circumstances. Since the policy and Section 107(q) is self-implementing, EPA’s issuance of such letters is limited.

# Owners of Property Impacted by Contamination from an Off-Site Source

To qualify as a contiguous property owner, a landowner must meet the criteria set forth in CERCLA § 107(q)(1)(A).

- A contiguous property owner must perform AAI before acquiring the property and demonstrate that it is not affiliated with a liable party.
- Persons who know, or have reason to know, that the property is or could be contaminated cannot qualify for the contiguous property owner liability protection.
- Contiguous property owners must also satisfy ongoing obligations similar to those for BFPPs. These parties, however, may still be entitled to rely on the BFPP statutory protection or the EPA may exercise its enforcement discretion not to pursue such persons as set forth in the EPA's 1995 Contaminated Aquifer Policy.

# Owners of Property Impacted by Contamination from an Off-Site Source

In 2004, EPA issued its *Interim Enforcement Discretion Guidance Regarding Contiguous Property Owners* (Contiguous Property Owner Guidance), which addresses:

1. the statutory criteria in in CERCLA §107(q);
2. its application to current and former owners of property;
3. the relationship between CERCLA § 107(q) and the EPA's Residential Homeowner Policy and Contaminated Aquifers Policy; and
4. the discretionary mechanisms the EPA may use to address remaining liability concerns of contiguous property owners.

# Third Party Defense and Innocent Landowners

- In addition to the BFPP defense, persons or entities that acquire property without knowledge of the contamination may be eligible for CERCLA's third party defense, or the innocent landowner defense.

# Third Party Defense

Under Section 107(b), a person is not liable if they can show, by a preponderance of the evidence, that the contamination was solely caused by:

1. An act of God (CERCLA § 107(b)(1));
2. An act of war (CERCLA § 107(b)(2)); or
3. *The act or omission of a third party* (CERCLA § 107(b)(3)).

# Third Party Defense

- The third party's act or omission must not occur “in connection with a contractual relationship.”
- In addition, they must show that: (a) it exercised due care with respect to the contamination; and (b) it took precautions against the third party's foreseeable acts or omissions and the consequences that could foreseeably result from such acts or omissions.

# Innocent Landowners

- The Superfund Amendments and Reauthorization Act of 1986 expanded the third-party defense by creating innocent landowner exclusions to the definition of a “contractual relationship.”
- Previously, the deed transferring title between a PRP and the new landowner was a “contractual relationship” that prevented the Section 107(b)(3) third party defense.
- The “innocent landowner defense” is subject to the criteria set forth in Section 101(35), which distinguishes among three types of innocent landowners.

# Innocent Landowners

1. Purchasers who acquire property without knowledge of contamination and who have no reason to know about the contamination, Section § 101(35)(A)(i);
2. Governments “which acquired the facility by escheat, or through any other involuntary transfers or acquisition, or through the exercise of eminent domain authority by purchase or condemnation,” Section § 101(35)(A)(ii); and
3. Inheritors of contaminated property, Section § 101(35)(A)(ii).

# Innocent Landowners

- For all three types of landowners, the facility must be acquired after the disposal or placement of the hazardous substances on, in, or at the facility. Further, the landowner must satisfy the continuing obligations similar to a BFPP.
- For purchasers who acquire property without knowledge of contamination after 2002, an owner must have conducted AAI before purchase and complied with other pre- and post-purchase requirements.

# EPA Common Elements Guidance

- In 2003, the EPA issued its “Common Elements” guidance for the three property owner classes -- bona fide prospective purchaser (BFPP), contiguous property owner, and innocent landowner.
- *Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability (“Common Elements”).*
- The guidance addresses the threshold criteria and ongoing obligations that these types of landowners must meet to obtain the liability protections under CERCLA. Because many of these obligations are overlapping, EPA addresses all three in its “Common Elements” guidance and accompanying “*Common Elements*” *Guidance Reference Sheet*, which highlights the significant points of the guidance.

# EPA Common Elements Guidance

The Common Elements guidance first discusses the threshold criteria BFPPs, contiguous property owners, and innocent landowners must meet to assert these liability protections.

- First, the landowner must perform all appropriate inquiries (AAI) before purchasing the property. CERCLA §§ 101(40)(B), 107(q)(1)(A)(viii), 101(35)(A)(i), and (B)(i).
- Second, the BFPP and contiguous property owner protections require that the purchaser not be “affiliated” with a liable party, (CERCLA §§ 101(40)(H), 107(q)(1)(A)(ii)). For the innocent landowner defense, the act or omission that caused the release or threat of release of hazardous substances and the resulting damages must have been caused by a third party with whom the purchaser does not have an employment, agency, or contractual relationship. CERCLA §§ 107(b)(3), 101(35)(A).

# EPA Common Elements Guidance

Third, the Common Elements guidance discusses the common ongoing obligations to maintain the landowner liability protection, including:

- Complying with land use restrictions and not impeding the effectiveness or integrity of institutional controls;
- Taking “reasonable steps to prevent releases” with respect to hazardous substances affecting a landowner’s property;
- Providing cooperation, assistance, and access to the property;
- Complying with information requests and subpoenas; and
- Providing legally required notices.

The guidance also includes:

- (1) A chart and matrix of the common statutory obligations;
- (2) A questions and answers fact sheet pertaining to the “reasonable steps” requirements; and
- (3) A model comfort/status letter with site-specific suggestions as to reasonable steps.

# EPA Common Elements Guidance

- Prospective purchasers or owners of contaminated property should look to the Common Elements guidance to understand the different liability protections that may be available and their requirements.
- As stated in EPA's Common Elements Guidance, "It appears that Congress intended the affiliation language to prevent a potentially responsible party from contracting away its CERCLA liability through a transaction to a family member or related corporate entity."

# EPA Common Elements Guidance

To promote sale of real estate and business transactions, EPA has identified certain relationships which, in the exercise of its enforcement discretion, it generally intends *not* to treat as disqualifying affiliations. They include:

1. Relationships at Other Properties: relationships that occur between an entity seeking BFPP or CPO status with a PRP for properties other than the one impacted by the contamination or the source property.
2. Post-Acquisition Relationships: relationships between the purchaser and a PRP that arose after the purchase and sale of the property.
3. Relationships Created During Title Transfer: contractual or financial documents or relationships that are often executed or created at the time that title to the property is transferred.
4. Tenants Seeking to Purchase Property They Lease: relationships established between a tenant and an owner during the leasing process.

# EPA Revitalization Handbook

- "The Revitalization Handbook - Revitalizing Contaminated Lands: Addressing Liability Concerns" summarizes the federal statutory provisions and EPA policy and guidance documents that address the potential liability concerns of parties involved in the cleanup and revitalization of contaminated sites.
- It is designed for use by parties involved in the assessment, cleanup, and revitalization of sites, and provides a basic description of the tools that may be available to address liability concerns associated with several environmental statutes.
- The Revitalization Handbook discusses the statutory protections under CERCLA and RCRA.

# CERCLA Contribution Claims

- The issue before the Supreme Court in *Cooper Industries* was whether a private party who had not been sued in a Section 106 or 107 civil action could nevertheless obtain contribution under Section 113(f)(1) from other parties who are liable under Section 107(a). The first sentence of Section 113(f)(1), the enabling clause, provides that contribution suits "may" be brought by "any person" against "any other person who is liable or potentially liable" under Section 107(a) " *during or following* any civil action" under Sections 106 or 107 (emphasis supplied).
- September 2014, EPA's new guidance on Contribution Protection in EPA CERCLA settlements

# Minimizing Liability in Transactions

- CERCLA
- RCRA
- MTCA - Model Toxics Control Act, RCW 75,105D
  - 1) Voluntary Cleanups
  - 2) No Further Action Determinations
- Indemnity Agreements
- Stormwater Permits and Compliance
- UST liability
- Insurance Coverage

# Voluntary Cleanups

The EPA has historically supported the use of VCPs and continues to provide grant funding to establish and enhance VCPs. The EPA also continues to provide general enforcement assurances to individual states to encourage the assessment and cleanup of sites addressed under VCP oversight.

- No Further Action Determinations
- Groundwater Monitoring Requirements
- Residual Contamination Issues, Property Damage Claims, Third Party Claims
- Contaminated media disposal costs

# Voluntary Cleanups

## Disappearing NFAs

- Ecology is revisiting NFAs issued in the 1990s
- Including within Superfund Sites like the Duwamish River
- Ecology has revoked NFAs based on new information or incomplete cleanups and noncompliance with MTCA's cleanup standards

## Redevelopment or Cleanup?

- Equitable allocation of costs for excavation and disposal of contaminated soils
- Including within Superfund Sites like the Duwamish

# Indemnification

Indemnity Agreements are only as good as the person or entity issuing them, and their clarity and enforceability

Basic Issues include:

1. Pre-existing contamination, uncertainty and unknown contamination
2. Baseline sampling, reports, data, records in Ecology's database
3. Dealing with the dealmakers and naysayers
4. Newly discovered contamination
5. Post transaction releases
6. Indemnity duration issues
7. Reverse Indemnification

# Current Environmental Insurance Policies

- Pollution Legal Liability
  - Claims made
  - Third party claims
- Remediation Liability
  - New or unknown contamination
  - Cost Cap protection

# Historical Insurance Coverage

- Occurrence based coverage
- Locating and identifying CGL policies
- Tendering claims
- Anticipating defenses for defense and indemnification liabilities
- Follow up and Persistence
- Settlements

# Stormwater Liability

- Construction Stormwater General Permit
- Industrial Stormwater General Permit
- Getting Coverage
- Avoiding Liability
- Inspections

# Stormwater Inspections



# Response to Ecology Warning Letters, NOVs, Orders

- First line of defense is timely compliance
- Second line of defense is the written response
- Pay me now or pay me later
  - CESCL (Stormwater manager)
  - Lawyer
  - Consultant

# FIVE POINT COMPLIANCE SUMMARY

1. Obtain Permit and Develop SWPPP Before Construction
2. Implement and Maintain BMPS
3. Undertake Corrective Action and Update BMPs (and SWPPP) as necessary
4. Respond timely to inspection reports, warning letters, orders and NOVs
5. Terminate or transfer permit as soon as possible

