

# Alert

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## EPA Issues New CERCLA Guidance on Liability Protections for Current/Potential Impacted Site Owners

If you're back to work navigating the complexities of cleaning up a brownfields site, you're in luck. The U.S. Environmental Protection Agency (EPA) issued a 31-page update to "Enforcement Discretion Guidance" for enforcement personnel as it relates to liability protections under the 2002 Brownfields Amendments to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) this summer. While styled as a memorandum to agency enforcers, this guidance and its predecessor documents are also offered by EPA as "general information to landowners, developers, lenders, investors, or other third-party stakeholders who may wish to become involved with impacted properties." The guidance is available [here](#).

The guidance specifically targets bona fide prospective purchasers (BFPPs), CERCLA Section 107(r); contiguous property owners, CERCLA Section 107(q); and innocent landowners (ILOs), CERCLA Sections 107(b)(3) and 101(35). Persons or entities meeting these definitions are not liable under CERCLA and, collectively, the statutory criteria for meeting these definitions is referred to as the "Common Elements."

Most notably, the guidance attempts to provide an enforcement framework for the many factual scenarios that arise in a CERCLA cleanup as it relates to the Common Elements. For example, during redevelopment, property owners and/or their consultants often face the issue of secondary disposals which might invalidate statutory protections. Both BFPPs and ILOs risk losing liability protection if they engage in disposal at the site. A secondary disposal is a distinct type of disposal based upon "movement or dispersal of already-once disposed hazardous substances through earthmoving or construction activities."

Within the guidance document, EPA has categorized at least two scenarios where a secondary disposal may inadvertently occur during redevelopment activities: (1) "while an owner/developer is taking steps to manage the existing on-site contamination, such as the 'reasonable steps' required by the BFPP and ILO provisions"; or (2) "during other redevelopment activities, e.g., grading the site, digging foundations, or other activities." The guidance attempts to address the available case law as applied to these secondary disposals, both in the statutory context and in connection with reasonable steps obligations regarding existing contamination. Dependent on the relevant circuit, it may be worth reviewing these cases, in addition to the guidance document, to ensure a qualified BFPP or ILO will not inadvertently lose its CERCLA protection based solely on redevelopment activities. With respect to enforcement, EPA has advised its staff that "EPA personnel should consider exercising their discretion not to pursue the owner as a [potentially responsible party] as a result of that post-acquisition disposal if the owner undertook the activities in a reasonable manner given the type, amount, and location of the contamination at the site, and the owner proactively and subsequently took reasonable steps to manage the release." Because what is reasonable is often subject to debate, facts used in the case law cited and relied upon by EPA in the new guidance document may prove to be a useful tool in discussions with EPA.

In addition to the issue of secondary disposals, the guidance works through many of the traditional CERCLA issues encountered in the acquisition or sale of a contaminated site: the pre-purchase "all appropriate inquiry" stage, the non-affiliation element, "no subsequent disposal" issues, and the



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full range of continuing duties, including what constitutes reasonable steps sufficient to offer CERCLA protection. All of these stages have been the subject of predecessor guidance, and some areas of problems in implementation and in the courts are highlighted and specifically discussed by EPA. The guidance collects the available body of case law and field experience in each area (for example, how to analyze affiliated entities or obligations to implement institutional controls). More importantly, it provides insight into EPA's approach to these common CERCLA issues and, by extension, when CERCLA enforcement action would be appropriate.

Overall, the update combines various agency guidance documents, making it more user friendly for owners or prospective buyers of contaminated sites, and their counsel or consultants. In addition, as compared to any one previous version, the new guidance document is more comprehensive and does more to address the complex implementation of the various CERCLA provisions as applied to a contaminated site. The 2002 Brownfields Amendments were designed to ease the strict application of ownership liability for contaminated sites, to encourage redevelopment, and are generally regarded as a major success story. Largely self-executing (requiring no governmental intervention), these provisions are credited with facilitating commerce in and around impacted properties without burdening governmental resources. The current guidance echoes that sentiment by offering key insights into EPA's view of some of the most commonly used and factually complex CERCLA provisions.

The new compilation of guidance will be a valuable tool for current and future owners of impacted properties and for their counsel and consultants. As stated by EPA, however, "landowner liability obligations are highly fact specific and individual requirements may change based on site conditions." Recognizing this, EPA explicitly encouraged parties to consult with their own counsel and environmental professionals prior to and during property ownership several times within the new guidance document. We echo that advice to anyone presently owning or purchasing impacted properties.

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