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### "Brownfields in the Commercial Context: The Federal Perspective"

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#### **BROWNFIELDS IN THE COMMERCIAL CONTEXT: THE FEDERAL PERSPECTIVE**

Traditional Environmental Protection Agency (EPA) Superfund practice has involved a zealous cost recovery component mandated by Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9607. This often has had an unreasonably chilling effect on transactions relating to industrial properties that have or may enjoy EPA or state agency scrutiny under the Federal Superfund program or its state equivalent. In recognition of this, EPA initiated a series of administrative reforms to the Superfund program beginning in 1995, the second phase of which is known as the Brownfields Action Agenda.

The Agency defines brownfields as abandoned, idled, or under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination. A party interested in brownfield property is concerned primarily with whether or not the property has environmental contamination, and if it does, what are the potential associated liabilities and costs of cleaning up existing contamination. Equipped with this information, a party can make an informed decision regarding the purchase and/or development of the brownfield property.

#### **I.BACKGROUND**

Under CERCLA, a party who acquires a facility, from which a release, or suspected release, of a hazardous substance occurs, is liable for response costs incurred, or to be incurred, unless that party can avail itself of a limited set of defenses. Where a party knowingly acquires title to a contaminated property and manifests such indicia of ownership as the expense of capital costs associated with redevelopment for profit, that party faces potentially substantial joint and several liability as a facility owner under CERCLA Section 107(a)(1), 42 U.S.C. § 9607(a)(1). As a general rule, the Agency does not consider such a person to be entitled to any of the defenses to CERCLA liability found at CERCLA Section 107(b), 42 U.S.C. § 9607(b). In addition, although the Agency is currently entering into de minimis landowner settlements with "innocent landowners," such as owners of properties located on top of contaminated ground water, which contamination the owner did not cause, but who are threatened with third-party contribution actions by those responsible for the problem ( typically by generator potentially responsible parties (PRPs)), a person who knowingly acquires a contaminated property is not entitled to such treatment due to the knowledge element surrounding the acquisition. (That knowledge element eliminates the possibility of expedited settlement as a de minimis party with the U.S. pursuant to CERCLA Section 122(g), 42 U.S.C. §

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9622(g), which provides contribution protection from third party contribution actions and a covenant not to sue for covered matters.)

In the face of an apparently rigid liability scheme imposed by CERCLA and its numerous progeny under state law, the Agency has announced a number of Superfund administrative reforms intended to give EPA, and ostensibly states that follow EPA's lead in enforcement matters, discretion where state Superfund-like programs are modeled on EPA's Superfund legislation. These administrative, versus legislative, reforms afford leeway in enabling capital interests to return hazardous substance-contaminated properties to commerce where future land use will not dictate unnecessarily onerous cleanup standards.

In addition, and largely to provide certainty to parties who hold security interests in contaminated properties, the Agency and the Department of Justice (DOJ) published in the Federal Register on December 11, 1995, a statement regarding the scope of the "secured creditor exemption" to CERCLA liability following the D.C. Circuit Court of Appeal's vacation of the lender liability rule. 60 FR 63517. In Kelley v. EPA, 15 F.3d 1100 (D.C. Cir. 1994), the Court held that CERCLA did not grant the Agency express authority to promulgate such an interpretive rule. Following Kelley, the Agency recognized that the need for an understanding of the Agency's interpretation remained, and so it concluded the best method to articulate its interpretation, absent the authority to issue an interpretive rule, was to publish a notice in the Federal Register. That notice stated that the vacated rule reflects that Agency's, and most courts', interpretation of the secured creditor exemption to CERCLA liability found at CERCLA Sections 101(35)(A) and 107(b)(3), 42 U.S.C. §§ 9601(35)(A) and 9607(b)(3). (Basically, the vacated rule stated that where a secured creditor manifests indicia of ownership that do not extend beyond reasonable actions to preserve the collateral, the mere act of foreclosure will not instantly engender CERCLA owner liability. Therefore, a lender who may provide capital to someone wanting to do a brownfields deal will have assurances that he is not taking the kind of risk that lenders feared following the Fleet Factors decision, 901 F.2d 1550 (11th Cir.1990), which largely led the Agency to propose the rule in the first place.) In fact, recent judicial opinions indicate that a court facing lender liability issues is likely to apply principles and rationale that are consistent with EPA and DOJ's Lender Policy. See, e.g., United States v. Wallace, 893 F. Supp. 627 (N.D. Tex. 1995); Z & Z Leasing, Inc. v. Graying Reel, Inc., 873 F. Supp. 51 (E.D. Mich. 1995); Kemp Industries, Inc. v. Safety Light Corp., 857 F. Supp. 373 (D.N.J. 1994).

Concurrent with and complementing EPA's and DOJ's policy positions that foster the Brownfields Initiative, Congress enacted the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996 (the Act) as part of the Omnibus Consolidated Appropriations Bill for Fiscal Year 1997 signed by President Clinton on September 30, 1996. The Act includes lender and fiduciary liability amendments to CERCLA, amendments to the secured creditor exemption set forth in Subtitle I of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 et seq., which apply to underground storage tanks, and the validation of the portion of the CERCLA Lender Liability Rule that addresses involuntary acquisitions by government entities. The amendments made by the Act apply to all claims not finally adjudicated as of September 30, 1996, which include all cases that are in the process of being settled, and are generally based on the CERCLA Lender Liability Rule. However, the amendments do not explicitly describe the steps a lender can take to avoid liability after foreclosure. This legislation should provide a great deal of certainty to parties that fall within the scope of the secured creditor safe haven and that are engaged in loan workout or other activities geared toward dispossessing themselves of a contaminated property.

## II.COMFORT LETTERS

Among the administrative reforms that make up the Brownfield Initiative is a new policy that permits EPA to grant assurances in the form of "comfort letters," in appropriate circumstances, to those who are willing to invest capital into a project that will restore a contaminated yet potentially valuable commercial property to beneficial use. On January 25, 1995, EPA announced its Brownfields Action Agenda which outlined the Agency's activities and plans to encourage and facilitate cleanup and reuse of brownfields. A copy of that document is attached as Attachment 1. As part of this agenda, the Office of Site Remediation Enforcement (OSRE) focused on the identification of barriers to cleanup and reuse posed by federal environmental liability. In particular, OSRE has concentrated its efforts on the liability barriers posed by Superfund's

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requirements to identify, assess, and clean up the nation's high priority hazardous substance-contaminated sites. To allay the fear of potential Federal pursuit of parties for the clean up of brownfields, EPA may provide varying degrees of comfort by supplying information about EPA's intentions toward a particular piece of property. Comfort may range from a formal legal agreement containing a covenant not to sue that releases a party from liability for cleanup of existing contamination to Agency policy statements regarding the exercise of EPA's enforcement discretion as it relates to particular circumstances or activities of a party with respect to a contaminated property.

Therefore, on December 8, 1996, EPA issued the "Policy on the Issuance of Comfort Letters," attached as Attachment 2. That policy describes the most common situations about which parties inquire and the type of information EPA may provide to parties to assist them in assessing the probability of incurring liability under CERCLA. It is not EPA's intention to become involved in purely private real estate transactions. Rather, EPA intends to limit the use of such comfort to where it will facilitate the cleanup and redevelopment of brownfields and where there is the realistic probability of incurring Superfund liability. The policy statement contains four sample letters that address these common inquiries for information that EPA receives regarding contaminated or potentially contaminated properties.

The key to enabling a party to become involved in a transaction involving hazardous substance-contaminated properties is to reduce the risk that CERCLA or CERCLA-like liability may be imposed once he manifests indicia of ownership as an owner or operator of such a property. In addition, a prospective purchaser must have assurances that an economically feasible cleanup strategy is available to him that is acceptable to both EPA and the state sovereign. Finally, prospective purchasers who are not self-insured or self-financed often cannot receive financing absent some assurance that their lenders will not acquire CERCLA-like liability stemming from the condition of the collateral. EPA regional offices and Headquarters often receive requests from various parties for some level of comfort that if they purchase, develop, or operate a brownfield property, EPA will **not** pursue them for the costs to clean up any contamination resulting from the previous use.<sup>1</sup> EPA believes that the majority of the concerns raised by these parties can be addressed through the dissemination of information about a specific property known by EPA and an explanation of what the information means to EPA. While the sample letters do not account for every possible situation, EPA believes that the letters contained in this guidance will address the most common requests for information. Facts and circumstances, however, will vary and information may be disseminated through different means including other written communication, public or individual meetings, or reference to public information repositories and EPA databases.

Comfort letters are provided solely for informational purposes and relate only to EPA's intent to exercise its response and enforcement authorities under Superfund at the property based upon the information presently known to EPA. EPA encourages the release of as much information as possible to enable the party to better understand the applicability of CERCLA to individual parcels of property and make informed judgments. For example, EPA may need to take Superfund action at the property if conditions at the property change, or if new information concerning present conditions becomes available. The letters generally are not intended to express EPA's opinion as to possible contamination or extent of contamination at the property or provide any information on obligations associated with ownership or operation of the site. Additionally, the letters are not intended to limit or affect EPA's authority under CERCLA or any other law or provide a release from CERCLA liability.

Regional offices may issue comfort letters, at their discretion, upon receiving a request from an interested party for information when there is a realistic probability of incurring Superfund liability and such comfort will facilitate cleanup and redevelopment of a brownfield property. With the information provided by EPA, the party inquiring about the property can decide whether the risk of EPA action is enough to forego involvement, whether to proceed as planned, whether additional investigation into site conditions is necessary, or whether additional information from EPA or other agencies is needed. The comfort letter guidance is not intended to supersede EPA's Policy Against "No Action" Assurances issued November 16, 1984, which describes EPA's policy against giving definitive assurances outside the context of a formal enforcement proceeding that EPA will not proceed with a particular enforcement response. Consistent with that policy, EPA may only provide site-specific assurances regarding enforcement prerogatives with the approval of the Assistant Administrator of the Office of Enforcement and Compliance Assurance. Therefore, the letters attached to the comfort letter policy are consistent

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with the "Policy Against No Action Assurances" and do not need further approval by the Assistant Administrator.

EPA has developed four sample letters to address the most common inquiries. The letters are structured with opening and closing paragraphs applicable to all scenarios falling under that category of letter. Regions may then choose and combine the applicable substantive paragraphs to tailor the sample letter to address a party's particular request. A brief summary of the sample letters is found below.

- 1) No Previous Federal Superfund Interest Letter - provided to parties when there is no historical evidence of Federal Superfund program involvement with the property/site in question (i.e., site is not found in the CERCLA information system database, also known as "CERCLIS");
- 2) No Current Federal Superfund Interest Letter - provided when the property/site either has been archived and is no longer part of the CERCLIS inventory of sites affected or partially affected by the Superfund program, has been deleted from the National Priorities List (NPL), or is situated near an NPL site but currently is not within the NPL site's boundaries;
- 3) Federal Interest Letter - provided at sites where EPA either plans to respond in some manner or is already responding at the site. This letter is intended to inform the recipient of the status of EPA's involvement at the property; and,
- 4) State Action Letter - provided when the state has primary responsibility for overseeing the response action (e.g., deferred sites.)

### III. PROSPECTIVE PURCHASER AGREEMENTS

The Agency and the Department of Justice have recognized that there are instances where greater assurances, in the form of a legally binding covenant not to sue, may be necessary to facilitate the purchase and redevelopment of contaminated properties. Therefore, EPA and DOJ have developed a model prospective purchaser agreement that provides a covenant not to sue for past liabilities and contribution protection from third-party suits. This settlement document invokes the organic settlement authorities found at CERCLA Section 122, 42 U.S.C. § 9622, and the Attorney General's inherent authority to resolve matters under color of Federal law. In addition to the model prospective purchaser agreement, EPA and DOJ issued a formal policy statement regarding the use of prospective purchaser agreements, attached as Attachment 3.

The prospective purchaser policy amends EPA policy on agreements with prospective purchasers of contaminated property as set forth in the June 6, 1989, policy document entitled "Guidance on Landowner Liability under Section 107(a) of CERCLA, De Minimis Settlements under Section 122(g)(1)(B) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property"<sup>2</sup> (the 1989 guidance). The modifications reflect both Agency experience with the guidance and changes in EPA policy. While this new guidance keeps the above-cited statements largely intact, it revises two of the original criteria used to determine whether a prospective purchaser agreement is appropriate, and provides further definition to the other three criteria. Therefore, the "model" prospective purchaser agreement was developed to be used as a starting point for negotiation of such agreements where they are deemed to be appropriate.

The 1989 guidance limited EPA's consideration of agreements with prospective purchasers to situations where: 1) the Agency anticipated taking an enforcement action at the site; 2) the prospective purchaser participated in the cleanup; and 3), the performance of or payment for cleanup would not otherwise have been available except from the Superfund. The 1989 guidance set forth minimal standards to meet before the Agency would enter into an agreement containing an administrative covenant not to sue a prospective purchaser. It also required EPA to reject any request for such an agreement unless EPA determined that it was sufficiently in the public interest to warrant expending the resources necessary to reach the agreement.

As was the case with comfort letters, EPA's experience has shown that prospective purchaser agreements have not only benefitted the Superfund program by obtaining cleanup or funds for cleanup, but have also benefitted the community where the site is located by encouraging the reuse or redevelopment of property at which the fear of Superfund liability may have

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been a barrier to redevelopment. Although negotiating such covenants has proven resource-intensive, the Agency wants to provide greater flexibility in offering covenants not to sue in appropriate circumstances. Therefore, the prospective purchaser policy builds upon and expands the existing policy criteria. EPA will continue to interpret the evaluating criteria regarding health risks, financial viability, and facility operations consistent with the 1989 guidance. The remaining criteria are expanded to reflect EPA's commitment to economic growth and fairness.

EPA will continue to consider the effect of ongoing facility operations or new development on existing site contamination. EPA will only provide covenants not to sue to prospective purchasers where the proposed use will not exacerbate or contribute to the existing contamination with the exercise of due care. In its evaluation of this criterion, EPA will also consider the potential for these activities to generate new contamination at or around the property. In addition, EPA believes it is important to consider the environmental implications (e.g., air emissions, waste minimization, risk of industrial accidents) of site operations on the surrounding community. Therefore, the Agency will likely not enter into an agreement where the proposed activities result in an increased risk to the community. Likewise, to ensure that site redevelopment is conducted properly, EPA will continue to require the prospective purchaser to demonstrate that he is financially viable and capable of fulfilling any obligation under the agreement. EPA may, in certain circumstances, structure payment or work to be performed so that there will not be an undue burden on the purchaser.

An important modification of past Agency practice articulated in the prospective purchaser guidance relates to the nature of Federal action at a facility anticipated by EPA. The 1989 guidance stated that prospective purchaser agreements will be considered only when an enforcement action is anticipated by EPA at the site. One of the reasons EPA limited the situations where it would issue such an agreement was to prevent the Agency's involvement in purely private real estate transactions. While it is still the Agency's intention to avoid undue involvement in such transactions, EPA recognizes the potential benefits in terms of clean up and public welfare that could be realized with broader application of this tool. Through the prospective purchaser guidance, the Agency provides a screening process that expands the circumstances under which prospective purchaser agreements may be considered. Therefore, a non-enforcement related Federal action contemplated for a facility, such as the conduct of a Superfund-financed removal action, will satisfy the federal action criterion of the policy.

In addition to the factors discussed above, the prospective purchaser guidance directs EPA to evaluate the realistic vulnerability a prospective owner or developer has to Superfund liability when determining the appropriateness of entering into a prospective purchaser agreement. Such an evaluation should clearly show that Federal involvement is essential and include the following components:

- EPA must possess information regarding releases or potential releases of hazardous substances at the site that indicates that there is a real problem of contamination that would justify EPA's involvement. If such information is not available through EPA's data systems, such as CERCLIS, the prospective purchaser can furnish information it may possess or gather, such as the results of a Phase I audit.
- EPA must determine that other available avenues (e.g., state programs or private indemnification agreements) do not exist to alleviate the threat of liability without the need for EPA involvement.

Prospective purchaser agreements are not appropriate at sites screened out using the above criteria except in extremely unusual circumstances where the public interest would not be served any other way. Therefore, the Agency prefers that a party address its liability concerns through the comfort letter process for sites designated by EPA as a No Further Response Action Planned (NFRAP) site and removed from the CERCLIS data base. Additionally, EPA may find it appropriate to decline considering an agreement at a site that passed the screening evaluation but is currently undergoing cleanup by a state program. The Agency's first priority for prospective purchaser agreement consideration is sites proposed or listed on the National Priorities List (NPL) or where EPA has undertaken a removal, versus remedial, action.

Finally, the prospective purchaser guidance modifies the criterion that required that the Agency receive a substantial benefit for cleanup, not otherwise available. That criterion is now interpreted as requiring that the Agency must receive some benefit for cleanup, not otherwise available, but may accept a reduced benefit where the indirect benefits are substantial.

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This criterion, a cornerstone of the evaluation process, was intended to ensure that a settlement with a prospective purchaser produced a substantial monetary or cleanup benefit that the Agency would not have received without expenditure of Superfund Trust Fund dollars. However, the Agency has realized that limiting prospective purchaser agreements to those situations where substantial benefit was measured in terms of cost reimbursement or work performed may have decreased the effectiveness of this tool. Thus, EPA has recognized that benefits to a community are an important consideration and may justify the commitment of the resources necessary to negotiate a prospective purchaser agreement. Therefore, the Agency has provided a more balanced evaluation where both direct and indirect benefits of a prospective purchaser agreement are considered.

EPA will continue to provide a covenant not to sue in return for a substantial direct monetary or cleanup benefit. However, consistent with the purpose of the Brownfields Initiative, the Agency is now willing to consider agreements for less than substantial but still some direct benefits if the public receives substantial indirect benefits. Examples of indirect measurable benefits to the community include risk reduction, community services, improved transportation and infrastructure, or creation of jobs related to the environmental cleanup or new development. EPA may also consider a prospective purchaser agreement where the productive use or redevelopment of presently abandoned property would not otherwise occur but for the offering of the prospective purchaser agreement. It is essential, however, that the agreement yield enough direct benefit to the Agency to ensure that there is *bona fide* consideration (or *quid pro quo*) for the covenant not to sue.

As the discussion of the prospective purchaser policy indicates, securing a prospective purchaser agreement is a resource-intensive process for both EPA and the Department of Justice, which must be involved in the process since approval of the agreement by the Assistant Attorney General for the Environment and Natural Resources Division is required. Due to the fact that high-level EPA Headquarters concurrence upon the agreement is also necessary, a party must evaluate attendant transaction costs involved in securing the agreement with the value of the liabilities the agreement addresses.

#### IV. FRAMEWORK FOR STATE ASSURANCES

While the scope of this paper is intended to be limited to Federal brownfields issues, a final issue addressed in the Brownfields Initiative relates to coordinate state assurances. Because CERCLA is not technically a regulatory statute, but rather is remedial in nature, it lacks the provision for state delegation one sees for example, in the Clean Water Act (CWA), 33 U.S.C. § 1251 *et seq.*, or the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 *et seq.* Therefore, any potential venturer interested in the restoration of a contaminated property may require persuasive, and potentially defensible, assurances from both the Federal and state sovereigns. As discussed above, CERCLA lacks a state delegation provision, and so liability resolution under CERCLA does not have a collateral impact under the law of the state where a subject site may be located. Therefore, in order to foster an atmosphere conducive of capital investment with minimal CERCLA, or CERCLA-like, risk, some form of formal general programmatic or site-specific understanding between the Federal and state enforcement authorities should be in place. The attached EPA Region 6/Texas Natural Resource Conservation Commission (TNRCC) Voluntary Cleanup Program MOU (Attachment 4) is a good example of such a state/Federal formal agreement. That MOU expressly contemplates a dual-track process, where both Federal and State concerns are addressed under CERCLA and the Texas Voluntary Cleanup Program (VCP), and where both EPA Region 6 and the TNRCC issue appropriate comfort letters.

However, from a practical standpoint, in states lacking CERCLA-like legislation, and therefore lacking in specific statutory enforcement authorities and programs like Texas' VCP, state agencies often are satisfied with the manner in which EPA resolves a Superfund matter. One should nonetheless ensure that appropriate state actors are aware of how EPA is proceeding with the assurance process and should build a record of state acquiescence to handling of the matter to avoid potential problems with state regulatory officials. Nonetheless, EPA's Brownfields Initiative represents a sincere effort by the Agency to address administratively the more draconian aspects of CERCLA's liability scheme in a manner that advances the statute's remedial goals. The development of administrative tools such as the brownfields comfort letters, the relaxing of the policy pertaining to eligibility for the legal protections afforded by prospective purchaser agreements, and Congress'

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recent enactment of lender liability legislation all represent great steps forward in facilitating the beneficial reuse and redevelopment of contaminated industrial real estate.

### NOTES

1) The terms "purchase" and "operate" also may refer to lessees.

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2) OSWER Directive No. 9835.9 and 54 F.R. 34235 (Aug. 18, 1989).

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