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EPA's Updated CERCLA "Common Elements" Guide: Enforcement Discretion Guidance Provides Important Direction on Landowner Liability Protections

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IN THIS ISSUE

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) imposes strict, joint and several, retroactive liability on property owners and operators for releases of hazardous substances. To achieve and maintain one of the three statutory landowner liability protections, a prospective property owner or operator must take certain steps. In July 2019, the U.S. Environmental Protection Agency (EPA) released its long-awaited *Enforcement Discretion Guidance Regarding Statutory Criteria for Those Who May Qualify as CERCLA Bona Fide Prospective Purchasers, Contiguous Property Owners, or Innocent Landowners ("Common Elements")* (Common Elements Guide or 2019 Guide).[1] The 2019 Guide supersedes EPA's 2003 interim guidance on this topic and provides significant clarifications on several key elements of the landowner limitations on CERCLA liability, particularly what steps must be completed subsequent to purchase to maintain the liability protections. EPA developed the Common Elements Guide as part of EPA's Superfund Reform Task Force initiative.[2]

Introduction

In 1986 and 2002 amendments to CERCLA, Congress established limitations to CERCLA joint and several, retroactive liability for prospective owners and operators[3] of properties

[1] U.S. Envtl. Prot. Agency (EPA), Enforcement Discretion Guidance Regarding Statutory Criteria for Those Who May Qualify as CERCLA Bona Fide Prospective Purchasers, Contiguous Property Owners, or Innocent Land Owners ("Common Elements") (July 29, 2019) [hereinafter Common Elements Guide], https://www.epa.gov/sites/production/files/2019-08/documents/common-elements-guide-mem-2019.pdf.

[2] *See* EPA, Superfund Task Force Recommendations 18 (July 25, 2017), https://www.epa.gov/sites/production/files/2017-07/documents/superfund_task_force_report.pdf.

[3] Recent federal legislation—the Brownfields Utilization, Investment, and Local Development Act of 2018 or BUILD Act—has clarified that the bona fide prospective purchaser (BFPP) exemption can apply to tenants who meet the threshold conditions outlined in this article. *See* Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, div. N, § 5, 132 Stat. 347, 1053 (codified at 42 U.S.C. § 9601(40)).

that were historically impacted by hazardous substances.[4] As a result, CERCLA provides for three classes of landowners that are shielded from liability—the bona fide prospective purchaser (BFPP), the contiguous property owner (CPO), and the innocent landowner (ILO). The key difference between these three landowner liability protections (LLPs) is generally what type of knowledge the prospective purchaser had prior to closing. While BFPPs may acquire property with knowledge of contamination and maintain their protection from liability, the contiguous property owner liability protection and the innocent landowner liability protection require that the property owner or operator, or the adjacent property owner in the case of the CPO, had no knowledge of the contamination at issue prior to closing. Regardless of this difference in knowledge regarding the contamination, each type of landowner must satisfy certain requirements (or "common elements") to establish and maintain the statutory limitation on strict liability under CERCLA.[5]

The *threshold criteria* for owners and operators to satisfy prior to purchase or operation include:

- performing "all appropriate inquiries" into the previous ownership and uses of the property, which generally means performance of a Phase I Environmental Site Assessment in accordance with CERCLA regulations.[6]
- having no "affiliation" with the party liable for response costs (for BFPPs and CPOs).[7]

Following purchase, the *continuing obligations* include:

- demonstrating that no disposal of hazardous substances occurred at the facility after acquisition (for BFPPs and ILOs).
- complying with land use restrictions and not impeding the effectiveness or integrity of institutional controls.[8]
- taking "reasonable steps" with respect to releases of hazardous substances affecting the property.[9]
- providing cooperation, assistance, and access to persons who are authorized to conduct response actions at the property.[10]
- complying with information requests and subpoenas issued by EPA (for BFPPs and CPOs).[11]
- providing legally required notices with respect to the discovery or release of any hazardous substances at the facility (for BFPPs and CPOs).[12]

As is common with CERCLA, the 2002 amendments did not clearly define what exactly a prospective owner or operator should do to satisfy many of the continuing obligations. In response to requests by many developers, in 2003 EPA issued interim guidance stating how EPA intended to interpret and apply the new landowner liability protections.[13] Soon after the issuance of the interim guidance, developers began to ask for more clarity from EPA to make sense of EPA's enforcement decisions as well as the refinements of these elements through caselaw over the years. In July 2019, 16 years after the issuance of EPA's interim guidance, EPA released the long-awaited Common Elements Guide.[14]

The updated Common Elements Guide provides important clarifications on several key elements of these defenses, particularly what steps must be completed subsequent to purchase. Notably, EPA discusses what constitutes a "disposal" prior to acquisition and what is meant by a "land use restriction." EPA also clarifies what "reasonable steps" should be taken after purchase with respect to existing or identified hazardous substances, and what EPA expects in the form of adequate "cooperation/access" with regulatory agencies.

Significant Changes in the Guide

The 2019 Guide did not make any significant changes in EPA's view of the *threshold criteria*. However, the 2019 Guide addresses a number of concerns that have been raised over the years about the continuing obligations and how performance or

[4] Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (2002); Superfund Amendments and Reauthorization Act, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

[5] *See* 42 U.S.C §§ 9601(35), (40), 9607(b)(3), (q).

[6] *See* 40 C.F.R. part 312. EPA recognizes ASTM E1527-13 and E2247-16 as meeting all appropriate inquiry requirements. *See* 40 C.F.R. § 312.11; *see also* 42 U.S.C. § 9601(35)(B)(iv)(II).

[7] 42 U.S.C. §§ 9601(40)(B)(vii), 9607(q)(1)(A)(ii); *see also* U.S. Enforcement Discretion Guidance Regarding the Affiliation Language of CERCLA's Bona Fide Prospective Purchaser and Contiguous Property Owner Liability Protections (Sept. 21, 2011), https://www.epa.gov/sites/production/files/2013-11/documents/affiliation-bfpp-cpo.pdf.

[8] 42 U.S.C. §§ 9601(35)(A), (40)(B)(vi), 9607(q)(1)(A)(v).

[9] 42 U.S.C. §§ 9601(35)(B)(i)(II), (40)(B)(iv), 9607(q)(1)(A)(iii).

[10] 42 U.S.C. §§ 9601(35)(A), (40)(B)(v), 9607(q)(1)(A)(iv).

[11] 42 U.S.C. §§ 9601(40)(B)(vii), 9607(q)(1)(A)(vi).

[12] 42 U.S.C. §§ 9601(40)(B)(iii), 9607(q)(1)(A)(vii).

[13] EPA, 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 (Mar. 6, 2003), https://19january2017snapshot.epa.gov/sites/production/files/documents/common-elem-guide.pdf.

[14] *See* Common Elements Guide, *supra* note 1.

lack thereof impacts a prospective purchaser's or operator's ability to qualify for the LLPs. The 2019 Guide provides a number of clarifications regarding the *continuing obligations*, as follows:

1. **No disposal after acquisition.** The 2019 Guide outlines two types of disposals—"initial" and "secondary"—and what "reasonable steps" should be taken depending on which type of disposal has been identified. The 2019 Guide suggests that a disposal resulting from earthmoving or construction activities should not disqualify a party from receiving the landowner liability protections if the disposal occurred as a direct result of a party undertaking "reasonable steps." EPA indicated that it will assert its enforcement discretion when determining what constitutes a "disposal," while acknowledging that the courts have the ultimate authority to make that determination.

2. **Compliance with land use restrictions and not impeding the effectiveness or integrity of institutional controls (ICs).** EPA clarified that land use restrictions are a subset of ICs. EPA indicated that it believes that parties seeking a liability exemption in situations where a land use restriction was not in place at the time of purchase have an obligation to cooperate with EPA and the state or local government to implement any restriction or IC established in connection with the cleanup remedy. EPA also clarified that it considers land use restrictions as *legally binding* restrictions or limitations on the use of land or resources for both current and future owners and users. Purchasers are expected to search government records, property records, historical documents, chain of title documents, and land use records as part of "all appropriate inquiries" (AAI) to ensure compliance with land use restrictions. *Many parties do not currently comply with this aspect of AAI and may lose their liability exemptions if they do not place greater emphasis on this key element of AAI.*

   The Common Elements Guide discusses what actions EPA might consider as rising to the level of impeding the integrity or effectiveness of an institutional control. For example, EPA indicated that property owners could lose their landowner liability protection if they remove or void a notice about an IC or apply for a zoning change or variance where the remedy relied on the designated zoning use as an IC. An owner's refusal to agree to an easement or covenant might be another example of impeding the effectiveness or integrity of an IC.

Importantly, however, EPA clarified that a property owner may seek changes to land use restrictions and ICs so long as it follows the procedures required by the regulatory agency that oversaw the original response action, as the controls may not need to remain in place in perpetuity.

EPA also highlighted that monitoring the integrity or effectiveness of the IC may be another way to ensure compliance with the land use restriction and to avoid impeding the integrity or effectiveness of the IC. EPA generally recommends that ICs be monitored annually, but it pointed out that shorter intervals may also be appropriate. EPA referenced technologies and approaches for actively monitoring ICs. In particular, EPA pointed users to its 2012 guidance on planning, implementing, maintaining, and enforcing (PIME) institutional controls[15] and to its 2018 memo on *Advanced Monitoring Technologies and Approaches to Support Long-Term Stewardship*.[16]

EPA views compliance with ICs to be related to the continuing obligation to provide cooperation and assistance to regulatory agencies. So if an IC has not been fully implemented prior to purchase, the person seeking to assert the liability defense must continue to cooperate in the implementation of the IC post-closing.

Important language in the 2019 Guide related to EPA's new linkage of these continuing obligation components includes the following:

> If the PRP [potentially responsible party]-landowner later transfers the property and a future party, such as a potential BFPP, acquires the property, that party *must cooperate with and assist the EPA in implementing that IC as part of attaining BFPP status*. Similarly, if, for example, a potential BFPP or ILO acquires property and an IC selected as part of a remedy was not implemented because the previous owner could not be located, then *the new owner must cooperate with and assist the EPA by signing and implementing that IC*.[17]

EPA also views the IC "continuing obligation" to be related to the "reasonable steps" continuing obligation. EPA stated that "cooperating with and assisting the EPA in implementing ICs not yet in place may be appropriate 'reasonable steps' to achieving and maintaining a landowner liability protection."[18]

[15] EPA, Institutional Controls: A Guide to Planning, Implementing, Maintaining, and Enforcing Institutional Controls at Sites (Dec. 2012), https://semspub.epa.gov/work/HQ/175446.pdf.

[16] EPA Office of Site Remediation Enforcement, Advanced Monitoring Technologies and Approaches to Support Long-Term Stewardship (July 20, 2018), https://www.epa.gov/sites/production/files/2018-07/documents/adv-mon-lts-mem-final-2018.pdf.

[17] Common Elements Guide, *supra* note 1, at 16 (emphasis added).

[18] Common Elements Guide, *supra* note 1, at 16.

3. **Taking "reasonable steps" with respect to releases of hazardous substances.** EPA reiterated that a person asserting an LLP defense[19] is generally not expected to undertake the same types of "reasonable steps" as a responsible party would have to take. EPA emphasized that a prospective purchaser's knowledge of contamination and its opportunity to plan prior to purchase would be important factors in EPA's evaluation of whether appropriate reasonable steps (for BFPPs in particular) were undertaken. EPA suggested that purchasers seeking to satisfy the BFPP defense should consult with environmental professionals and legal counsel when determining what the "reasonable steps" might be. EPA pointed to ASTM E2790, *Standard Guide for Identifying and Complying with Continuing Obligations*, as one resource that might be helpful in making that determination.[20]

   EPA also explained that the third-party defense—which predates the 2002 amendments and has a line of cases analyzing the "due care" element of the defense—is a distinct analysis from the "reasonable steps" and "appropriate care" language in the amendments. Accordingly, EPA concluded that the due care line of cases is not dispositive of whether a party seeking to qualify for an LLP has met its "reasonable steps" obligations. Instead, EPA noted that the pre-2002 factors are relevant in a site-specific, fact-based analysis of evaluating whether the landowner acted reasonably.

   The 2019 Guide includes an Attachment B, which identifies examples of reasonable steps taken from prior cases and previously issued EPA comfort/status letters. The examples given are intended to be illustrative and for general guidance only. EPA encourages parties to review its *Policy on the Issuance of Superfund Comfort/Status Letters*, which was updated in August 2019.[21] EPA explains that its analysis of whether "reasonable steps" were taken may boil down to what a similarly situated reasonable and prudent person would have done in light of all facts and circumstances.[22] Courts have generally examined whether the landowner took timely and reasonable action based on the available information, whether it protected others from exposure to the chemicals of concern, and whether it prevented the migration of the contamination.

4. **Providing cooperation, assistance, and access.** CERCLA requires that persons seeking to avail themselves of the landowner liability protections provide full cooperation, assistance, and access to parties authorized to conduct response actions at a facility.[23] EPA indicated that it interprets these provisions broadly, together with other continuing obligations needed to establish the LLPs.

5. **Complying with information requests/subpoenas.** EPA expects *all* recipients of Section 104(e) information requests to provide timely, accurate, and complete responses but noted that minor errors (such as missing a deadline by a day or sending the response to the wrong address) are not likely to defeat the LLP defenses.

6. **Providing legally required notices.** EPA indicated that the burden is on BFPPs and CPOs to determine what "legally required notices" may exist. EPA also stressed that this is an ongoing obligation. EPA may require parties to self-certify in the form of a letter signed by the landowner that all applicable notice requirements have been met.

Conclusion

To avoid CERCLA liability, due diligence cannot begin and end with a Phase I Environmental Site Assessment. EPA's guidance serves as a reminder that purchasers and operators of properties must promptly address any existing or subsequent contamination, comply with ongoing land use restrictions, not impede the effectiveness or integrity of institutional controls, and cooperate with regulatory agencies. In conclusion, the following immediate practice pointers can be gleaned from the 2019 Guide:

1. **Implement institutional controls to satisfy the cooperation prong.** For the first time, EPA is linking the implementation of ICs with the post-closure requirement to cooperate with agencies. To satisfy the "cooperation" prong of these defenses, parties must now pay close attention to whether an IC was selected as part of a response action but has not yet been implemented. The purchaser might lose its defense if it resists implementing a previously contemplated IC post-closing.

2. **Evaluate and document reasonable steps.** EPA suggests that parties evaluate and document "reasonable steps" undertaken to stop any continuing releases and to prevent any threatened future releases in accordance with ASTM E2790. EPA further suggests that parties discuss these steps with legal counsel prior to purchase.

[19] Only a BFPP may purchase property with prior knowledge that it is contaminated. Persons claiming the contiguous property owner or innocent landowner defense must not know, or have any reason to know, that contamination may be present on the property.

[20] Author Amy L. Edwards has been an active participant on the ASTM Continuing Obligations Task Force from its inception. ASTM E2790 is currently out for ballot, and is likely to undergo further changes next year. More user input is needed.

[21] EPA, Transmittal of the 2019 Policy on the Issuance of Superfund Comfort/Status Letters (Aug. 21, 2019), https://www.epa.gov/sites/production/files/2019-08/documents/comfort-status-ltr-2019-mem_0.pdf.

[22] Common Elements Guide, *supra* note 1, attachment B at 2.

[23] 42 U.S.C. §§ 9601(35)(A), (40)(B)(v), 9607(q)(1)(A)(iv).

3. **Due care cases are not dispositive.** EPA determined that the pre-2002 "due care" line of cases is not necessarily dispositive in determining whether a party has satisfied the "appropriate care/reasonable steps" prong of the landowner liability protections. Nevertheless, prospective purchasers and operators must be aware of these earlier cases as they may be applied in a site-specific analysis.
4. **New list of reasonable steps.** Attachment B to the 2019 Guide provides concrete examples of what EPA considers to be "reasonable steps" under specific circumstances. According to EPA, what constitutes a reasonable step may boil down to what a similarly situated reasonable and prudent person would have done in light of all the facts and circumstances.

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