UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY 17 2019

ASSISTANT ADMINISTRATOR
FOR ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Transmittal of Revised Policy Towards Landowners and Transferees of Federal Facilities to Encourage Cleanup and Reuse at Federal Facilities on the National Priorities List (NPL)

FROM: Susan Parker Bodine

TO: Regional Administrators
Office of Regional Counsel
Superfund National Program Managers
ECAD Directors

As part of Recommendation 30 of the EPA's July 25, 2017, Superfund Task Force Report (Report),[1] the EPA is transmitting its revision of the 1997 "Policy Towards Landowners and Transferees of Federal Facilities". Recommendation 30 directed the revision of the 1997 policy as part of the Report's Goal 3, "Encouraging Private Investment." Formerly, the 1997 policy indicated that prospective purchaser agreements would not be necessary for landowners and transferees of federal facilities. In addition, it did not encourage the use of various tools, such as comfort letters, that can give transferees confidence that the EPA would generally not take CERCLA enforcement action against them.

This revised policy supports the use of these tools to address potential liability concerns of landowners and transferees who acquire federal property to encourage reuse and redevelopment. The EPA shared the proposed revision with several federal agencies seeking their comments on the revised policy and the EPA received constructive comments. The revised policy is intended to help support the use of tools to alleviate uncertainty regarding potential enforcement by the agency against landowners and transferees for contamination existing as of the date of property acquisition.

This policy applies only to the transfer of federally-owned property at federal facility sites. The EPA's April 17, 2018, memorandum "Agreements with Third Parties to Support Cleanup and Reuse at Sites on the Superfund National Priorities List" addresses the EPA's policy on agreements with third-party transferees of non-federal property.[2]

[1] Available at https://www.epa.gov/superfund/superfund-task-force-recommendations.
[2] Available at https://www.epa.gov/sites/production/files/2018-04/documents/sftf25-memo-ppa-bfpp-final-2018_2.pdf.

POLICY TOWARDS LANDOWNERS AND TRANSFEREES OF FEDERAL FACILITIES TO ENCOURAGE CLEANUP AND REUSE AT FEDERAL FACILITIES ON THE NATIONAL PRIORITIES LIST (NPL)[1]

1. PURPOSE

Recommendation 30 of EPA's July 25, 2017, Superfund Task Force Report (Report),[2] directed the revision of EPA's 1997 "Policy Towards Landowners and Transferees of Federal Facilities" as part of the Report's Goal 3, "Encouraging Private Investment." This policy revises and supersedes EPA's 1997 policy.[3] As under the 1997 policy, EPA maintains its position that, generally, it will not take enforcement action against a person who acquires from the United States property that is subject to the covenants provided in the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) Sections 120(h)(3) and 120(h)(4)[4] and in some cases, the indemnity provided in Public Law 102-484, as amended by Public Law 103-160.[5]

Although the intent of the 1997 policy remains the same, this policy modifies EPA's earlier position that it will not enter into prospective purchaser agreements (PPAs) because they were not considered necessary for landowners and transferees of federal facilities given the indemnity assurances for certain Department of Defense (DoD) transfers and the CERCLA Section 120(h) statutory covenant(s). Further, the 1997 policy did not encourage the use of various tools, such as comfort letters, that can give transferees confidence that EPA generally would not take enforcement action against them under CERCLA for pre-existing contamination. Today's revised policy is intended to encourage reuse and redevelopment by landowners and transferees who acquire federal facility property by supporting the use of these tools and agreements to address potential liability concerns with regard to contamination that was caused by the federal agency.

As with the 1997 policy, this policy is designed to help promote the expeditious transfer and reuse of real property where the United States has ceased federal government operations. It also furthers the EPA's initiative to facilitate the cleanup of contaminated property under CERCLA

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[1] While CERCLA Section 120(h) applies to both NPL and non-NPL facilities, for purposes of this policy, EPA is focusing on NPL sites where EPA is the lead oversight agency. At non-NPL sites, state laws regarding removal and remedial actions, including enforcement, apply to federal facilities. *See* CERCLA Section 120(a)(4), 42. U.S.C. § 9620(a)(4).

[2] Available on EPA's website at https://www.epa.gov/superfund/superfund-task-force-recommendations.

[3] In 2006, EPA issued an addendum to the 1997 policy discussing Bona Fide Prospective Purchasers (BFPPs). The 2006 Addendum addresses real property transfers of federal property to private parties and we recommend Regions continue to consider it. It is available on EPA's website at https://www.epa.gov/sites/production/files/documents/addendum_to_epa_1997_policy_towards_landowners_and_transferees_of_ff1.pdf.

[4] These covenants make clear that, post-transfer, federal agencies shall conduct "any additional remedial action found to be necessary after the date of such transfer." *See* 42 U.S.C § 9620(h)(3). Similarly, under CERCLA Section 120(h)(4), federal agencies provide a covenant warranting that "any response action or corrective action found to be necessary after the date of such sale or transfer shall be conducted by the United States." The covenants are discussed in more detail on page 3 infra. *See* Section 3.c.i., *Statutory Covenants for Federal Facilities.*

[5] This indemnification law applies only to DoD base closure facilities.

so that it can be redeveloped and reused. Concern over potential environmental liability may deter purchasers from developing or reusing such property. This policy is intended to help alleviate such concerns at federal facility sites and reduce uncertainty regarding the potential for CERCLA enforcement actions by the Agency. This policy addresses the transfer by deed of federally-owned property at federal facility NPL sites. EPA's April 17, 2018, policy memorandum entitled "Agreements with Third Parties to Support Cleanup and Reuse at Sites on the Superfund National Priorities List" ("2018 Policy") addresses EPA's policy on agreements with third-party transferees of non-federal property.[6]

2. STATEMENT OF POLICY

As a matter of enforcement discretion, it is the Agency's policy that, where a person or entity acquires property from the United States that is covered by covenants pursuant to Sections 120(h)(3) or 120(h)(4) of CERCLA, and, in some cases the indemnity provided in Public Law 102-484, as amended by Public Law 103-160 pertaining to transfers by DoD, EPA generally will not take enforcement action against that person or entity, or its transferees or successors (hereinafter referred to as "landowners or transferees"), to require the performance of response actions or the payment of response costs incurred to respond to contamination already existing as of the date that person or entity acquires the property from the United States. However, EPA may take a CERCLA enforcement action against landowners and transferees who cause, contribute to, or exacerbate the release or threat of release of any hazardous substances, through an act or omission. In addition, as provided in CERCLA Section 104(e), EPA may also seek information and access from any person regarding the presence of a hazardous substance or pollutant or contaminant.[7]

EPA recognizes that to foster cleanup and reuse, a site-specific agreement may be useful at some sites to address potential liability concerns of a BFPP,[8] prospective purchaser, or other third party who is considering acquiring property from the United States. If requested by landowners and transferees, EPA will consider, on a case-by-case basis, the need for BFPP agreements, PPAs, or the use of other tools such as comfort letters to communicate information about the property's conditions, its cleanup status, and any potential associated liabilities or protections, so that a party can make a more informed decision regarding the purchase, lease, or redevelopment of the property.

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[6] *Agreements with Third Parties to Support Cleanup and Reuse of Sites on the Superfund National Priorities List*, (Apr. 17, 2018), https://www.epa.gov/sites/production/files/2018-04/documents/sftf25-memo-ppa-bfpp-final-2018_2.pdf.

[7] Note that the Section 120(h) covenant applies only to CERCLA hazardous substances, as defined in Section 101(14). Nevertheless, Section 104(a) of CERCLA also provides the President, as delegated under Executive Order No. 12580, response authority to address pollutants and contaminants, as defined in Section 101(33) of CERCLA, which may present an imminent and substantial danger to the public health or welfare.

[8] To qualify as a BFPP or innocent landowner (ILO), a landowner must meet certain specific statutory criteria; EPA has issued guidance discussing the BFPP and ILO provisions in CERCLA (*See e.g.*, *Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchasers, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability ("Common Elements")* (March 6, 2003), *available at* https://www.epa.gov/sites/production/files/documents/common-elem-guide.pdf).

3. DISCUSSION

a. *Background*

i. *CERCLA Liability for Owners*

Section 107(a)(1) of CERCLA defines who may incur liability as an "owner" of a "facility." In general, although an owner may not have had any participation in the handling of hazardous substances or taken any action to exacerbate the release, any such owner of property on which hazardous substances are found may seek more certainty about potential liability.

ii. *Federal Facilities*

As described below, with respect to federal facilities, federal law requires the United States to provide to non-federal purchasers of parcels transferred from the United States certain deed covenants and, in some cases, indemnification regarding environmental liability for past contamination. Despite the existence of deed covenants and indemnifications, however, some prospective purchasers or lenders still view potential EPA CERCLA enforcement actions as a significant risk. The Agency is aware that such concerns may impact the ability or desire of local communities and other purchasers to develop or reuse such property.

iii. *This Policy*

This policy reemphasizes the intent of the 1997 policy to reduce the potential risks associated with CERCLA liability (or the perception of such potential liability) on the marketability of federal facilities that are listed on the NPL. Accordingly, EPA, in an exercise of its enforcement discretion and considering the factors described below, generally will not take an enforcement action under CERCLA against landowners and transferees for contamination that occurred prior to the date of their acquisition of a portion of such federal facilities. In a departure from the 1997 policy, this policy also addresses the potential EPA CERCLA enforcement concerns of lenders, prospective purchasers, or landowners and transferees who may acquire portions of federal facilities that are listed on the NPL by recognizing the value of BFPP Agreements, PPAs and comfort letters at federal facilities.

b. *Existing Related Agency Guidance and Policy*

In addition to EPA's April 17, 2018 Policy referenced earlier, the Agency has released other similar guidance documents where EPA has described its enforcement discretion policies.[9] See

[9] *See*, e.g., *Policy Towards Owners of Residential Property at Superfund Sites*, OSWER Directive #9834.6 (July 3, 1991), *available at* https://www.epa.gov/sites/production/files/documents/policy-owner-rpt.pdf (stating Agency policy not to take enforcement actions against an owner of residential property unless a homeowner's activities led to the release); *Final Policy Toward Owners of Property Containing Contaminated Aquifers*, 60 Fed. Reg. 34790 (July 3, 1995), *available at* https://www.epa.gov/sites/production/files/2013-09/documents/contamin-aqui-rpt.pdf (stating Agency policy not to take enforcement action against owners of property contaminated solely by migrating groundwater).

also Section 3.d. below for examples of EPA guidances and policies on tools to facilitate cleanup and reuse.

c. *Basis for the Policy*

This policy reflects certain existing statutory protections afforded landowners or transferees of federal facilities and further encourages the use of tools, like PPAs or comfort letters, consistent with those protections. Consistent with such statutory protections, the Agency intends to exercise its enforcement discretion and generally not take enforcement action against landowners and transferees of federal facilities where the United States has provided them with certain statutorily-mandated protections described below:

i. *Statutory Covenants for Federal Facilities*

a) Contaminated Real Property

Section 120(h)(3) of CERCLA places certain restrictions on the conveyance of United States-owned property on which hazardous substances have been stored, released, or disposed of.[10] Consistent with CERCLA, the United States, specifically the federal department, agency, or instrumentality that owned or operated the facility ("federal owner/operator"), usually must take all remedial action necessary to protect human health and the environment with respect to any hazardous substances on a property before it can convey the property by deed to another person. Any deed transferring federally-owned property typically must include a covenant[11] that all necessary remedial action "has been taken" before the date of transfer and that the United States will conduct any additional remedial action found to be necessary after the transfer.[12] For NPL federal facilities, a CERCLA remedial action "has been taken" by the federal owner/operator when the construction and installation of an approved remedial design has been completed and the remedy has been demonstrated to EPA to be operating properly and successfully. The requirement to include a covenant regarding remedial action does not apply where the property is transferred to a person who is a potentially responsible party as to that property.[13]

Under certain circumstances, however, contaminated property may be conveyed by deed before all remedial action has been taken. Section 120(h)(3)(C) of CERCLA sets forth the conditions under which either the EPA Administrator with the concurrence of the Governor of the state where the facility is located (for property on the NPL) or the Governor (for property not on the NPL) may defer the CERCLA Section 120(h)(3)(A)(ii)(I) requirement of providing a covenant that all necessary remedial action has been taken prior to the date of transfer. In such cases, a transferee of property conveyed under Section 120(h)(3)(C) also receives assurances at the time of transfer that all necessary remedial action will be taken in the future.[14] Once the United States

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[10] *See* 42 U.S.C § 9620(h)(3).
[11] In the case of an early transfer, this deed covenant is deferred, as described in the next paragraph.
[12] *See* 42 U.S.C § 9620(h)(3)(A)(ii). Section 120(h)(3)(A)(iii) also states that the deed must include a clause granting the United States access if such remedial action is found to be necessary after transfer.
[13] *See* 42 U.S.C. § 9620(h)(3)(B).
[14] *See* 42 U.S.C. § 9620(h)(3)(C)(ii).

has completed all necessary remedial action, it must issue a warranty that satisfies that covenant requirement.[15] Because of those assurances, and the warranty just described, it is appropriate to include these transfers within the scope of this policy.

b) Uncontaminated Real Property

Section 120(h)(4) of CERCLA provides that where the United States has investigated and identified property on which no hazardous substances and no petroleum products or their derivatives were known to have been released or disposed of,[16] the deed transferring such property must contain a covenant warranting that the United States will conduct any response action or corrective action found to be necessary after the transfer.[17]

ii. *Statutory Indemnification for Closing Bases*

In Section 330 of the National Defense Authorization Act for Fiscal Year 1993, Public Law 102-484, Congress provided that the Secretary of Defense shall hold harmless, defend, and indemnify persons (including lessees) that acquire ownership or control of any facility at a military installation that is closed pursuant to a base closure law from any claim for personal injury or property damage that results from the release or threatened release of any hazardous substance, pollutant or contaminant, or petroleum or petroleum derivative as a result of DoD activities. It is important to note, however, that the indemnification does not apply to persons and entities that contributed to any release or threatened release.[18]

d. *Use of BFPP Agreements, PPAs, and Comfort Letters at Federal Facilities*

EPA recognizes that encouraging the purchase, cleanup, and redevelopment of contaminated property can help protect human health and the environment. To help foster these goals, EPA issued additional guidance and tools including the Agency's 2006 Model Administrative Order on Consent (AOC) for Removal Action by a BFPP[19] and the August 2015 Revised Policy on the Issuance of Superfund Comfort/Status Letters.[20] EPA reiterated the environmental benefits of reuse and redevelopment of contaminated property in the April 17, 2018 Policy, which states that EPA may enter into site-specific agreements or issue comfort letters to address liability concerns of BFPPs, prospective purchasers, or other third parties to foster cleanup and reuse of contaminated sites.[21] At NPL federal facilities, EPA likewise recognizes how redeveloping

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[15] *See* 42 U.S.C. § 9620(h)(3)(C)(iii).
[16] *See* 42 U.S.C. § 9620(h)(4)(A).
[17] *See* 42 U.S.C. § 9620(h)(4)(D)(i).
[18] *See* Public Law 102-484, as amended by Public Law 103-160.
[19] See *Issuance of CERCLA Model Agreement and Order on Consent for Removal Action by a Bona Fide Prospective Purchaser* (Nov. 27, 2006), *available at* https://www.epa.gov/sites/production/files/documents/bfpp-ra-mem_0.pdf.
[20] *See Transmittal of Revised Policy on the Issuance of Superfund Comfort/Status Letters* (Aug. 25, 2015), https://www.epa.gov/sites/production/files/2015-08/documents/comfortstatus-rev-mem-2015.pdf.
[21] *See Agreements with Third Parties to Support Cleanup at Reuse, available at* https://www.epa.gov/sites/production/files/2018-04/documents/sftf25-memo-ppa-bfpp-final-2018_2.pdf.

contaminated property can help promote cleanup, and thus, EPA may issue comfort letters or, together with the Justice Department, enter into specific agreements.

As previously discussed, statutory protections for transferees of federal facilities already exist through required deed covenants and in some cases, indemnification. Consequently, prospective purchasers of federal facilities usually have less risk of being pursued for CERCLA liability because of the above-referenced statutory protections than prospective purchasers of private property. Nevertheless, EPA recognizes that the use of such PPAs and comfort letters may be beneficial to foster cleanup and reuse. EPA is developing federal facility-specific models for some of these tools, such as a model comfort letter with language consistent with Section 120(h) of CERCLA, to facilitate their use for federal property transfers.[22]

Use of the Policy

Nothing in this policy alters or alleviates environmental responsibilities under CERCLA 120.[23] This policy does not constitute rulemaking by the Agency, does not create any legal obligations, and is not intended and cannot be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. Furthermore, the Agency may take action at variance with this policy.

For further information concerning this policy, please contact Sally Dalzell in the Federal Facilities Enforcement Office at (202) 564-2583.

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[22] EPA will post the federal facility comfort letter on EPA's Superfund enforcement website upon its completion. The URL for the comfort letters category is https://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund/index.cfm?action=3&sub_id=1222.

[23] Some owners of residential property have asked EPA for individual assurances that EPA will not take an enforcement action against them for performance of the response action or payment of response costs. EPA has not been able to provide individual owners of residential property with assurances of no enforcement action outside of the framework of a legal settlement, and this policy does not alter EPA's policy of not providing no action assurances.