



### A Brownfields Toolkit

#### Liability Protection

Before moving forward on a revitalization project, it may be necessary to overcome developers' liability concerns. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), otherwise known as Superfund, as amended by the Small Business Liability Relief and Brownfields Revitalization Act of 2002 (Brownfield Amendments or Brownfield Law), is a key tool in this regard. The exemptions and safeguards in CERCLA, along with other approaches offered by EPA, give developers many methods for addressing their liability issues.

The Brownfields Amendments created or amended CERCLA liability protection for three classes of landowners. "Bona Fide Prospective Purchasers" (BFPPs) are those persons who buy contaminated property after January 11, 2002 (with or without knowledge of the contamination) and satisfy eight other criteria. "Contiguous Property Owners" are persons that own property contiguous to or otherwise situated near a contaminating facility, but do not possess the contamination source itself and have satisfied specific conditions. The "Innocent Landowner" pre-existing defense was clarified by the Brownfield Amendments.

In all cases, the person seeking the liability protection must not be potentially liable or affiliated with any individual who is potentially liable. The person seeking exemption from liability must also take steps to "stop any continuing release; prevent any threatened future release; and prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substance."

Parties wishing to be designated Bona Fide Prospective Purchasers must complete the "all appropriate inquiry" requirement prior to purchasing a contaminated property. For property purchased before May 31, 1997, the inquiry should contemplate factors such as "commonly known information about the property," the property's value absent contamination, and the defendant's ability to detect contamination. For property purchased on or after May 31, 1997, "all appropriate inquiry" refers to a Phase I Site Assessment, using the procedures established by the American Society for Testing and Materials (ASTM) standards (note: EPA proposed a regulation defining AAI the final regulation is expected late 2005 or early 2006).

Following this inquiry, Bona Fide Prospective Purchasers may buy with knowledge of the site's contamination, while still enjoying liability protections. By contrast, Contiguous Property Owners and Innocent Landowners must buy their property "without knowing, or having reason to know" about contamination after completing "all appropriate inquiry" in order to be given protection from liability. In exchange for the liability protections, the property owner must not impede a response action and must take reasonable steps to stop continuing releases and prevent future releases of hazardous substances. The affected property could also be subject to a "windfall lien" if a response action increased a property's market value while leaving EPA with unrecovered costs.

All three liability protections impose certain continuing obligations on the part of the designee. Landowners must comply with all land use restrictions “established or relied on” as part of the response action, as well as respecting any institutional controls employed in connection with the project. Institutional controls may include governmental controls, such as zoning measures; proprietary controls; enforcement documents; and informational devices, such as deed notices.

At times, EPA may also execute Prospective Purchaser Agreements, providing liability protection to a purchaser of a contaminated property. EPA has stated that, in most cases, these settlements have been rendered unnecessary by the Brownfields Amendments. However, they may still be employed to facilitate a transaction that serves the public interest.

EPA Region 4 offers a service to prospective purchasers wishing to buy contaminated property. This service is called the Prospective Purchaser (“PPI”) Response Team Information Service and can be used for sites with federal cleanup involvement. The purpose of the PPI Response Team is to offer accurate, comprehensive, and timely information that enables a prospective purchaser to make a business decision on whether he or she wants to purchase a particular site. The goal is to resolve the issues Region 4 has identified as critical to the redevelopment of contaminated property. Those issues are:

- What is the current status of EPA’s cleanup, and what are EPA’s future anticipated actions, including property restrictions?
- Is the proposed redevelopment compatible with EPA’s cleanup and with existing and potential property restrictions?
- Does the prospective purchaser understand the applicable federal landowner liability protections?
- For Superfund sites, how will EPA settle or resolve any Superfund or Windfall liens?

A prospective purchaser may call Region 4’s Brownfield & Land Revitalization Legal Coordinator, or any staff person involved on the site to schedule a PPI Response Team meeting or conference call to discuss these issues. **Note:** Generally, brownfield properties do not undergo federal cleanup. Prospective purchasers of brownfield properties should contact the state environmental department in regard to the issues above.

EPA may choose to issue a comfort/status letter if developers, lenders, and similar parties require clarification as to a property’s environmental status. The letter may address: 1) potential EPA involvement at a site; 2) the applicability of particular statutes and policies; 3) cleanup status at a Superfund or RCRA site; 4) future cleanup steps at a site; 5) a discussion of the above-named issues; 6) reasonable steps to stop or prevent releases of hazardous substances; and/or 7) discussions of lien issues.

Sections 101(20) and 101(35) of CERCLA offer liability protection to state and local governments. In order for this defense to be exercised, contamination must have predated the entity’s acquisition of the property. Additionally, the government must not have contributed to or otherwise exacerbated the contamination.