Chapter 16
EXTREME MAKEOVERS: RISK-REDUCTION STRATEGIES FOR REDEVELOPING MINE-SCARRED AND OTHER INDUSTRIAL LANDS

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Synopsis

§ 16.01 Introduction

Parties need to implement strategies to reduce the environmental risk posed by selling and redeveloping mine-scarred and other industrial lands affected by contamination. This risk can be reduced but not totally eliminated. This article focuses on risk-reduction strategies that include securing the new bona fide prospective purchaser defense under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[1] obtaining enforceable agency assurances, investigating the type and extent of contamination, developing a vision and plan for reuse of the land, assessing risks posed by contamination in light of anticipated future land uses, tailoring the cleanup to targeted cleanup goals appropriate for the planned end uses, and developing engineering and institutional controls and activity and use

[1] Pub. L. No. 96-510, 94 Stat. 2767 (1980), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1986); Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996); and Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356, 2360, 2370, 2372, 2375 (2002).

limitations to prevent and limit exposure. Risks can be materially reduced when these strategies are implemented with the help and collaboration of local government officials and staff, federal and state environmental regulators, and engineering, environmental, and planning professionals.

The two decades that followed the passage of CERCLA in 1980 primarily involved locating contaminated properties that posed threats to human health and the environment, attempting to clean up those properties, and extensively litigating responsibility for the substantial costs of cleanup. Real estate industry trends support the notion that the next two decades will involve cleaning up contaminated properties, such as mine-scarred and other industrial lands, and redeveloping them into productive new uses. Brownfield redevelopment is being led by the collective efforts of private industry; local, state, and federal governments; and environmental, legal, engineering, marketing, and planning professionals.

The "cleanup and redevelop" shift in environmental policy is perhaps best demonstrated by Love Canal, the neighborhood of homes near Buffalo, New York, built over buried drums of chemicals that oozed into basements, leading to the whirlwind passage of CERCLA in 1980. After years of litigation over responsibility for the cleanup and court interpretations of the statute, in 2004 the EPA removed Love Canal from the National Priorities List and concluded that the community was approved for mixed use, including residential use, subject to some activity and use limitations.[2]

The original CERCLA legislation and the Brownfield amendments reflect two important competing policies. One policy avoids saddling taxpayers with the significant cost of cleaning up contaminated properties by holding owners and operators responsible for cleaning up their properties. Another policy supports returning idle, contaminated property to productive use and revitalizing urban and industrial areas by reducing liability risks, and thereby making the impaired property more attractive for purchase and redevelopment. Many mine-scarred and other industrial properties are situated in ideal locations near urban centers and resort areas but have sat idle, providing no jobs, tax revenue,

[2]Linda Roeder, "EPA Final Rule Removes Love Canal Site From National List, Announces Area Cleanup," *BNA Daily Env't Rep.*, Oct. 1, 2004, at A-4.

or public benefits and amenities for the local community.[3] These properties are now being sold and redeveloped despite their stigma, due in part to the application of the risk-reduction techniques explored in this article.

[1] Liability Risks

The CERCLA Brownfield amendments enacted in January 2002[4] provide important new liability risk relief to buyers of contaminated property. "Unfortunately, managing environmental liability risk associated with redeveloping contaminated properties under the Brownfield amendments is not a bed of roses and still resembles placing lipstick on a pig—all the snakes in the grass have not been removed."[5] This article identifies the risks that remain and explores and analyzes strategies for reducing those risks.

Several past Institutes have analyzed the breadth of potential environmental liability, not only under CERCLA, but also under the Resource Conservation and Recovery Act (RCRA) and other federal and similar state environmental statutes.[6] Other federal environmental statutes besides CERCLA pose environmental liability risk, including the RCRA,[7] Toxic Substances Control Act (TSCA),[8] and Federal Water Pollution Control Act (CWA),[9] among others. Further, state environmental statutes patterned after

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[3] *See generally* Brownfields Mine-Scarred Lands Initiative, *available at* http://www.epa.gov/brownfields/policy/msl_factsheet0904.pdf; Abandoned Mine Site Characterization and Cleanup Handbook (Aug. 2000) [hereinafter Handbook], *available at* http://www.epa.gov/superfund/resources/remedy/pdf/amscch.pdf; WGA Policy Resolution 04-10, Cleaning Up Abandoned Mines, *available at* http://www.westgov.org/wga/policy/04/aml-cleanup.pdf (June 22, 2004).

[4] Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356, 2360, 2370, 2372, 2375 (2002).

[5] Brad Cahoon, "Contaminated Property Transactions after 2002 Superfund Brownfield Amendments" 15 *Utah Bar J.* 13 (Nov. 2002).

[6] *See* Boyd A. Bryan, "Environmental Due Diligence in Mineral Property Transactions: Emerging Risks, Requirements, and Strategies," 51 *Rocky Mt. Min. L. Inst.* 24-1 (2005); John R. Jacus & Susan Keller Geer, "RCRA Compliance Orders in the Oil Patch: Sleeping Giant or Paper Tiger?," 45 *Rocky Mt. Min. L. Inst.* 9-1 (1999); Barbara J. Goldsmith & Michael R. Thorp, "Digging Up NRD: Issues in the Application of CERCLA's Natural Resource Damages (NRD) Provisions to Historic Mining Sites," 50 *Rocky Mt. Min. L. Inst.* 15-1 (2004).

[7] 42 U.S.C. §§ 6901-6992k (elec. 2006).

[8] 15 U.S.C. §§ 2601-2692 (elec. 2006).

[9] 33 U.S.C. §§ 1251-1387 (elec. 2006).

CERCLA, RCRA, and CWA also pose significant environmental liability risk. Moreover, toxic and other torts alleging personal and property injury are a concern with recycling contaminated lands.[10] Potential natural resources damage claims are also a concern for prospective buyers because such claims have reached significant amounts.[11] These claims arise under section 107 of CERCLA, section 1002 of the Oil Pollution Act,[12] and common law theories.[13]

[2] Risk-Reduction Strategies

This article addresses the following risk-reduction strategies: (1) securing and maintaining the bona fide prospective purchaser defense to CERCLA liability by satisfying the pre- and post-closing obligations of the defense, (2) obtaining "enforceable" agency written assurances, (3) stopping releases of and preventing exposure to previously released hazardous substances, (4) using effective activity and use limitations, and (5) if necessary, implementing an effective cleanup completion strategy. These risk-reduction strategies derive largely from the Brownfield amendments to CERCLA and relate to acquiring and redeveloping mine-scarred and other industrial lands that have become contaminated with released metals and chemicals.

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[10] *See*, *e.g.*, Bixby Ranch Co. v. Spectrol Electronics Corp., No. BC52566 (Sup. Ct. L.A. County 1993) (jury awarded property owner $826,500 for diminished property value due to stigma existing after completed cleanup); DeSario v. Industrial Excess Landfill, Inc., No. 89-570 (Ohio Ct. Common Pleas Stark County, Dec. 6, 1994) (jury awarded owners of non-contaminated property $6.7 million in property diminution because of stigma of living in proximity to hazardous waste site); Nonnon v. City of New York, No. 6099 (N.Y. App. Div., June 6, 2006) (New York residents offered sufficient causation evidence to go to trial on claims that exposure to trichloroethylene and other toxic chemicals at city-run landfill caused children to contract cancer).

[11] *See*, *e.g.*, Southwest Jordan Valley Ground Water Cleanup Project, State of Utah Natural Resource Damage Trustee, Findings and Conclusions (Aug. 31, 2004), *available at* http://www.deq.utah.gov (requiring one mining company to pay $9 million for natural resources damages and post $28 million letter of credit to assure groundwater treatment and replacement of groundwater supply for municipal water rights); Gerald B. Silverman, "Occidental Chemical to Pay $12 Million to New York for Lake Ontario Pollution," *BNA Daily Env't Rep.*, June 22, 2006, at A-1 (natural resources damages settlement involving, in part, Love Canal, New York).

[12] 33 U.S.C. § 2702 (elec. 2006).

[13] Carol A. Jones, Theodore Tomasi & Stephanie W. Fluke, "Public and Private Claims in Natural Resource Damage Assessments," 20 *Harv. Envtl. L. Rev.* 111, 116 (1996) (federal "statutes are generally consistent with common law, which recognizes a sovereign's right to act on behalf of the public in matters of 'sovereign' or 'quasi-sovereign' interest"); Alaska Sport Fishing Ass'n v. Exxon Corp., 34 F.3d 769, 773 (9th Cir. 1994).

The relief provided by the Brownfield amendments is exclusive to CERCLA and does not extend to other federal or state statutes or common law theories. Nevertheless, implementing the risk-reduction strategies discussed herein can go a long way toward limiting risk regardless of the source of the liability theory, statutory or otherwise.

Before January 11, 2002, if a buyer purchased property knowing that it was contaminated, that party could be held retroactively,[14] strictly, jointly, and severally[15] liable under CERCLA § 107(a) for the costs of cleaning up the property.[16] The Brownfield amendments significantly altered CERCLA § 107(a). For the first time, buyers may purchase property with knowledge of pollution conditions and not be held liable under CERCLA § 107(a) provided that they qualify, and maintain their protection, as bona fide prospective purchasers under CERCLA § 101(40). The clear intent was to limit liability in order to encourage acquisition and redevelopment of environmentally impaired properties.

Prior Institutes have addressed other risk-reduction strategies pertaining to contractual agreements, such as indemnities and releases, and pollution insurance.[17] Another emerging strategy is the guaranteed fixed price remediation contract in which a third party assumes liability and responsibility for the cleanup for a fee

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[14] *See, e.g.,* United States v. Dico, Inc., 266 F.3d 864, 879-80 (8th Cir. 2001) (retroactive application of CERCLA § 107 does not violate Due Process or Takings Clauses of U.S. Constitution).

[15] *See, e.g., In re* Bell Petroleum Servs., Inc., 3 F.3d, 889, 900-02 (5th Cir. 1993) (responsible party is jointly and severally liable unless it shows amount it caused is divisible).

[16] *See, e.g.,* O'Neil v. Picillo, 883 F.2d 176 (1st Cir. 1989).

[17] *See* Edward B. Grandy & Lisa Brown, "Risk Apportionment in Natural Resources Transactions through Indemnification Clauses and Releases," 49 *Rocky Mt. Min. L. Inst.* 4-1 (2003); David W. Tundermann, Hal J. Pos & J. Michael Bailey, "You Want to Build What? Where?: Using Environmental Insurance to Manage Cleanup and Development Risks," 47 *Rocky Mt. Min. L. Inst.* 20-1 (2001); William W. Pugh & Harold J. Flanagan, "Master Service Agreements and Risk Allocation: In Whose Good Hands Are You?," 48 *Rocky Mt. Min. L. Inst.* 14-1 (2002); Robert C. Bledsoe, "The Operating Agreement: Matters Not Covered or Inadequately Covered," 47 *Rocky Mt. Min. L. Inst.* 15-1 (2001); W.E. Rasmussen, "Insurance and Indemnification Provisions in Mining Contracts," 31 *Rocky Mt. Min. L. Inst.* 11-1 (1985). *See also* Penny L. Parker & John Slavich, "Contractual Efforts to Allocate the Risk of Environmental Liability: Is There a Way to Make Indemnities Worth More Than the Paper They Are Written On?," 44 *S.W.L.J.* 1349 (1991).

and indemnifies the buyer and seller.[18] A pollution insurance policy is often used in conjunction with these fixed price contracts as an added protection should the third party fail to perform, or there are unexpected cost overruns. These other risk management strategies are not a primary focus of this article.

§ 16.02 Bona Fide Prospective Purchaser (BFPP) Protection

One of the three defenses under CERCLA designed to protect buyers of mine-scarred and other industrial land that is affected by pollution is the bona fide prospective purchaser protection.[19] The other two defenses, innocent landowner[20] and contiguous property owner,[21] are not a primary focus of this article. CERCLA § 101(40) defines a BFPP as a person, or tenant of a person, who acquires an interest in a facility after the date of enactment of the Brownfield amendments, January 11, 2002, and establishes compliance with several pre- and post-purchase obligations by a preponderance of the evidence.

[1] Pre-Closing BFPP Obligations

In order to implement a strategy to avoid potential CERCLA liability associated with mine-scarred or industrial lands, before

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[18] Brad A. Maurer, "Guaranteed Fixed-Price Remediation Offers a New Approach to Cleanups," *BNA Daily Env't Rep.*, Nov. 28, 2005, at B-1.

[19] EPA, Mem. from Susan F. Bromm, Dir., Off. of Site Remediation Enforcement, to Regional Directors, Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Continuous Property Owner, or Innocent Landowner Limitations on CERCLA Liability Common Elements (Mar. 6, 2003) [hereinafter Common Elements Guidance], *available at* http://www.epa.gov.

[20] The innocent landowner has no knowledge of a property's polluted condition after conducting all appropriate inquires before buying the property, discovers the contamination after buying the property, and then acts with due care regarding the contamination.

[21] Before January 11, 2002, an owner or operator of property that became contaminated solely by migration of hazardous substances from a neighbor's contiguous property could be liable for cleanup costs under CERCLA § 107(a). *See, e.g.,* Reichhold Chemicals, Inc. v. Textron, Inc., 888 F. Supp. 1116, 1129 (N.D. Fla. 1995) ("mere migration of contaminants from adjacent land constitutes disposal for the purposes of CERCLA"). *But see* Carson Harbor Village, Ltd. v. Unocal Corp., 270 F.3d 863 (9th Cir. 2001).

The Brownfield amendments made it possible for contiguous property owners to avoid section 107(a) liability so long as they satisfied the elements of CERCLA § 107(r)(1). *See* EPA Mem. from Susan E. Bromm, Dir., Off. of Site Remediation Enforcement, Interim Enforcement Discretion Guidance Regarding Contiguous Property Owners (Jan. 13, 2004), *available at* http://www.epa.gov.

closing and obtaining an interest in the property, prospective buyers should ensure and create a record that they satisfied each of the following requirements:

- conducted "all appropriate inquiries" into the past use and ownership of the property;
- acquired the property after all disposal activities of hazardous substances occurred; and
- are not potentially liable, or affiliated with any other person that is potentially liable, for response costs at the property.[22]

Satisfying all appropriate inquiries is typically accomplished by having a qualified environmental professional conduct a Phase I Environmental Site Assessment (ESA) in compliance with EPA's final rule. Until November 1, 2006, all appropriate inquiries are satisfied by completing a Phase I ESA that complies with the 1997, 2000, or 2005 ASTM E 1527 Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process or EPA's final rule.[23]

The buyer should request that the professional include in the ESA a record that the prospective buyer satisfied the pre-closing elements of the BFPP defense to CERCLA liability. The ESA should confirm that the BFPP acquired the property after all disposal activities of hazardous substances, and that the buyer is not potentially liable or otherwise affiliated with a responsible party.

[2] Post-Closing BFPP Obligations

After acquiring an interest in the mine-scarred or industrial property, prospective purchasers should ensure that they satisfy each of the following post-closing obligations and create and maintain a record of compliance:

- exercise "appropriate care" by "taking reasonable steps" to stop any continuing release and prevent any threatened future release;
- prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance;[24]

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[22] 42 U.S.C. § 9601(40)(A), (B), (H) (elec. 2006).

[23] 40 C.F.R. pt. 312 (elec. 2006); 70 Fed. Reg. 66,070 (Nov. 1, 2005).

[24] 42 U.S.C. § 9601(40)(D)(iii) (elec. 2006).

- provide full cooperation, assistance, and access to persons who are authorized to conduct response actions or natural resource restoration;[25]
- comply with land use restrictions and do not impede the effectiveness or integrity of any institutional controls;
- comply with any CERCLA request for information or administrative subpoena; and
- provide all legally required notices of discovery or release of any hazardous substances at the property.[26]

Taking reasonable steps to stop a continuing release, preventing threatened future releases, and preventing and limiting exposure to previously released hazardous substances arguably present for BFPPs the greatest risk of having to expend funds that can seriously impact profit margins of a redevelopment project. These obligations could be interpreted so broadly as to erode completely CERCLA liability protection. Complying with land use restrictions and not impeding institutional controls also present challenges for redevelopers. Complying with information requests and reporting releases of hazardous substances are relatively simple in comparison to the other requirements.

Before closing, prospective buyers should request their environmental professionals to address, as best they can, the post-closing elements of the BFPP defense. EPA has observed that the "prepurchase 'appropriate inquiry' by the bona fide prospective purchaser will most likely inform the [BFPP] as to the nature and extent of contamination on the property and what might be considered reasonable steps regarding the contamination—how to stop continuing releases, prevent threatened future releases, and prevent or limit human, environmental, and natural resource exposures."[27] This observation may be overly optimistic because the Phase I ESA is limited in scope to reviewing records, interviewing people with knowledge about the property, and observations of the surface, not subsurface, of the property. Depending on the amount of data available about the extent and concentration of

[25] *Id.* § 9601(40)(E).

[26] *Id.* § 9601(40)(C).

[27] Common Elements Guidance, *supra* note 19, at 11.

contamination, the ESA may not be effective in determining, for example, how redevelopment of the property may pose exposure risks to human health, the environment, or natural resources, let alone what reasonable steps the buyer may need to take to maintain BFPP protection.

[3] "Appropriate Care" and "Taking Reasonable Steps"

The "due care" element of the innocent landowner protection under the third party defense to CERCLA § 107(a) liability differs from the "appropriate care" and "reasonable steps" language of the BFPP defense. For innocent landowners, CERCLA requires the exercise of "due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances."[28] In contrast, BFPPs are expected to exercise "appropriate care with respect to hazardous substances found at the facility by taking reasonable steps."[29] This standard offers little certainty as to exactly what environmental regulators, a court, or a jury will consider to be reasonable steps taken by a BFPP to stop a continuing release, prevent a threatened release, or limit or prevent exposure.

EPA acknowledges that the innocent landowner "due care" language differs from the new BFPP appropriate care and reasonable steps language; however, EPA has suggested that the "existing case law on due care provides a reference point for evaluating the reasonable steps requirement."[30] EPA also noted,

> The reasonable steps determination will be a site-specific, fact-based inquiry. That inquiry should take into account the different elements of the landowner liability protections and should reflect the balance that Congress sought between protecting certain landowners from CERCLA liability and assuring continued protection of human health and the environment.[31]

In applying the "due care" case law, EPA has attempted to provide guidance in answering some hypothetical questions regarding exercising appropriate care by taking reasonable steps.

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[28] 42 U.S.C. § 9607(b)(3)(a) (elec. 2006).

[29] *Id.* § 9601(40)(D).

[30] Common Elements Guidance, *supra* note 19, at 11.

[31] *Id.* at 11-12.

If a buyer purchased property that underwent a cleanup action unknown to government regulators, should the buyer notify EPA or the state of the cleanup action? EPA observed that a BFPP may have an obligation to report the discovery or release of a hazardous substance under CERCLA § 101(40)(C). Moreover, EPA argues that notifying regulators may be a reasonable step to prevent a threatened future release or exposure. Finally, EPA has cited *Bob's Beverage, Inc. v. Acme, Inc.*,[32] for the proposition that failure to timely notify EPA and state regulators of groundwater contamination was a factor in the court's holding that a party failed to exercise due care.[33] If the cleanup was properly conducted and is protective of human health and the environment and redevelopment will not result in exposure to health, the environment, or natural resources, then arguably regulators should not need to be notified of the cleanup, particularly if there is not evidence of a release or threatened release that poses a risk to health or the environment.

If a BFFP acquires a Superfund site where a portion of the remedy is an asphalt parking lot that serves as a cap over residual contamination, but other responsible parties are unable or unwilling to repair deteriorating portions of the parking lot, should the BFFP make the repairs as a reasonable step? EPA argues that this would be a reasonable step on the ground that reasonable steps include preventing or limiting exposure to previously released hazardous substances, and the current owner is in the best position to identify the need for and swiftly make the repairs.[34]

Fundamentally, BFPPs want to know whether they will be required to remove or remediate contaminated soils and/or reme-

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[32] 169 F. Supp. 2d 695, 716 (N.D. Ohio 1999).

[33] Common Elements Guidance, *supra* note 19, attach. B, at 1.

[34] *See id.* at 3; *see also* Franklin County Convention Facilities Auth. v. Am. Premier Underwriters, Inc., 240 F.3d 534, 548 (6th Cir. 2001) (failure to promptly erect barrier to prevent migration of contaminated groundwater was not due care); Lincoln Properties, Ltd. v. Higgins, 823 F. Supp. 1528, 1543-44 (E.D. Cal. 1992) (sealing sewer lines and wells and subsequently destroying wells to avoid releases was due care); Redwing Carriers, Inc. v. Saraland Apts., 94 F.3d 1489, 1508 (11th Cir. 1996) (time of development of maintenance plan to remove tar seeps was factor in establishing due care); United States v. DiBiase Salem Realty Trust, Civ. No. 91-11028-MA, 1993 WL 729662, at *7 (D. Mass. Nov. 19, 1993) (state regulator's knowledge of hazard did not remove owner's obligation to investigate and assess site conditions and risks).

diate, treat, or monitor contaminated groundwater in exercising appropriate care. EPA has stated:

> As a general matter, EPA does not believe Congress intended BFPPs . . . to have the same types of response obligations that CERCLA liable parties have (e.g., removal of contaminated soil, extraction and treatment of contaminated groundwater). The required reasonable steps relate only to responding to contamination for which the BFPP, CPO, or ILO is *not responsible*. Activities on the property after purchase resulting in *new contamination* can give rise to full CERCLA liability.[35]

EPA has addressed whether a protected owner must remediate a release discovered on the acquired property. EPA has stated that a BFPP "should take some affirmative steps to 'stop the continuing release,' but EPA would not, absent unusual circumstances, look to [the BFPP] for performance of complete remedial measures. However, notice to appropriate governmental officials and containment or other measures to mitigate the release would probably be considered appropriate."[36] Before BFPPs take away any comfort from these statements, they should understand that EPA has reminded the public that its guidance is "not a regulation and does not impose legal obligations."[37]

EPA also maintains that protected buyers must take reasonable steps to investigate the extent of the contamination. EPA reasons that absent such investigation, it would be "difficult to determine what reasonable steps will stop a continuing release, prevent a threatened future release, or prevent or limit exposure. While a full environmental investigation may not be required, doing nothing in the face of a known or suspected environmental hazard would likely be insufficient."[38]

EPA's answers to the foregoing hypothetical questions demonstrate that whether appropriate care will require taking reasonable steps to stop a continuing release, prevent a threatened future release, or prevent or limit exposure to health or the environment is a highly site-specific, fact-based analysis. For this reason, cautious buyers should seek direction from qualified legal and

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[35] EPA, "Common Elements" Guidance, Reference Sheet, at 3-4, *available at* http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-ref.pdf.

[36] Common Elements Guidance, *supra* note 19, attach. B, at 5.

[37] *Id.* at 14.

[38] *Id.* attach. B, at 5.

technical professionals to assess the extent of contamination and risks posed to health and the environment, particularly for redevelopment of the property, which could create exposure pathways.

[4] Windfall Lien

A party may establish that it is eligible for CERCLA § 107(a) liability protection as a BFPP under section 101(40); however, where EPA response action has increased the fair market value of the property, the property may become subject to a windfall lien equal to the increase in value or EPA response costs, whichever is less.[39] The lien is subject to prior recorded valid liens;[40] hence, buyers and lenders should conduct a public records search to confirm that no lien has been recorded against the property. In addition, buyers of contaminated property should ask for assurances that neither EPA nor state regulators have unrecovered response costs for which they could seek to assert a windfall lien against the property.[41] Buyers and lenders also should confirm whether state regulators have authority under state law to assert a windfall or other cost recovery lien.[42]

§ 16.03 Agency Assurances—Consent Decrees, PPAs, and Comfort Letters[43]

Given the uncertainty over what is considered appropriate care and reasonable steps and the site-specific, fact-based inquiry, buyers of polluted mine-scarred or industrial lands should consider obtaining from EPA and state regulators assurances to

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[39] 42 U.S.C. § 9607(r) (elec. 2006).

[40] *Id.* § 9607(l)(3) & (r)(4)(C).

[41] Buyers who do not qualify as BFPPs could be jointly and severally liable under § 107(a), and the property may become subject to a § 107(l) lien for all of EPA's response costs. Note that the § 107(r) windfall lien, in contrast, is limited to the increase in fair market value resulting from the cleanup.

[42] *See, e.g.,* Cal. Health & Safety Code § 25395.83 (elec. 2006) (has priority of judgment lien upon recording); Nev. Rev. Stat. Ann. § 459.930(4) (elec. 2006).

[43] Agency assurances in the form of prospective purchaser agreements and other agreements were addressed nearly a decade ago at a Special Institute. *See* Robert W. Lawrence & Laurie L. Korneffel, "Win/Win Solutions at CERCLA Sites Through Prospective Purchaser Agreements and Other Agreements with Federal and State Authorities," *RCRA and CERCLA* 10-1 (Rocky Mt. Min. L. Fdn. 1997) (analyzing CERCLA liability generally, prospective purchaser agreements, innocent landowner defense, de minimis settlements, comfort letters, contaminated aquifer policy, lender liability protections, state deferral guidance, and voluntary cleanups).

confirm their BFPP protection status, the status of cleanup activity at the affected property, and appropriate care and reasonable steps that may be needed to stop any continuing release, prevent a threatened future release, or prevent or limit exposure to health or the environment. In this context, the types or forms of agency assurances range from more formal judicial stipulations and consent decrees, administrative orders on consent, and prospective purchaser agreements (PPAs), on the one hand, to less formal comfort letters, on the other hand.

Preferably, assurances should be received before closing, so that estimated costs of maintaining buyer protection can be factored into the purchase price. In fact, investors and lenders often require such assurances as a closing condition. Unfortunately, there is not always sufficient time to obtain the agency assurances before closing, so buyers, investors, and lenders must make difficult and uncertain decisions whether to close without receiving agency assurances.

[1] Hierarchy of Agency Assurances

Buyers seeking agency assurances need to understand that there is a question under general principles of administrative law concerning the enforceability of comfort letters should the agency later change its mind. Even if buyers reasonably rely to their detriment on agency assurances, there is serious doubt whether the agency would be equitably estopped.

The U.S. Supreme Court has called into question the enforceability of statements contained in letters, but not made in rulemaking or adjudication proceedings:

> Here, however, we confront an interpretation contained in an *opinion letter*, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of *which lack the force of law*—do not warrant *Chevron*-style deference.[44]

An argument could be made that a comfort letter confirming a party's BFPP protection is distinguishable from an opinion letter that provides the agency's non-binding interpretation of a statute. Nevertheless, the point of the case calls into question the binding

[44] Christensen v. Harris County, 529 U.S. 576, 587 (2000) (emphasis added).

nature of any agency statement not made within a rulemaking or adjudication, which would include assurances made to a BFPP in an agency comfort letter.

In *AMREP Corp. v. FTC*,[45] the Tenth Circuit held that an agency's statement of assurance is enforceable by the courts against the agency *only if* the statement was made within either formal rulemaking or adjudication. In *AMREP* an administrative law judge (ALJ) found that the defendant engaged in unfair and deceptive sales practices in connection with sales of vacant lots. The Federal Trade Commission (FTC) affirmed the ALJ's finding. The defendant sought to set aside the FTC's decision because, according to the allegations, some of the commissioners applied the wrong legal standard in determining whether the actions at issue were deceptive.

The defendant argued that the FTC established a new deception standard when the Chairman wrote a letter to the Chairman of the House Committee on Energy and Commerce indicating that the FTC "would find acts or practices to be deceptive if they were likely to mislead consumers acting reasonably under the circumstances."[45.1] This "reasonable consumer" test was less rigorous than the FTC's previously adopted "tendency or capacity to mislead" test.

The Tenth Circuit held that the letter to the congressman did not represent a binding statement of the FTC's standards because it was a general policy statement and was not one of the two acceptable methods by which an agency can create binding precedents: rulemaking or adjudications. The court reasoned as follows:

> General policy statements . . . are the result of neither a formal rulemaking proceeding nor an adjudication. . . . Such policy statements have no more binding effect than press releases. It is only when a new standard set forth in a policy statement is adopted in a formal rule-making or adjudication that it becomes a binding norm which the agency must follow in future cases.[46]

Compounding the concern over enforceability of agency assurances is the principle that the government is immune from private claims

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[45] 768 F.2d 1171 (10th Cir. 1985).

[45.1] *Id.* at 1177.

[46] *Id.* at 1178.

of equitable estoppel. An equitable estoppel claim could arise if a BFPP were to reasonably rely to its detriment on assurances made in an agency comfort letter. The U.S. Supreme Court has all but foreclosed an equitable estoppel claim arising from this scenario. The Court has held that "equitable estoppel will not lie against the Government as against private litigants. . . . [However,] some type of 'affirmative misconduct' might give rise to estoppel against the Government."[47] The chances of an agency engaging in affirmative misconduct in issuing a comfort letter to a BFPP seem remote.

Comfort letters undergo neither public notice and comment for rulemaking nor adjudication. When it comes to enforceability, the foregoing principles of administrative law favor formal judicial consent decrees or PPAs and administrative orders, provided the same go through notice and comment in the *Federal Register*. However, EPA policy is to resist making assurances in adjudications or rulemakings. EPA instead prefers to issue comfort letters. Buyers need to understand that this presents potential issues over the enforceability of assurances made in comfort letters and should seek to convince EPA and state regulators to make assurances that are subject to public notice and comment, such as PPAs or administrative orders or judicial stipulations and consent decrees.

[2] CERCLA Guidance and Policy

Complicating concerns over the enforceability of comfort letters, based on EPA's view that the Brownfield amendments provide adequate protection for buyers, EPA presently enters PPAs sparingly but has been more willing to issue comfort letters.[48] An EPA

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[47] Off. of Personnel Mgmt. v. Richmond, 496 U.S. 414, 419, 421 (1990).

[48] Mem. from Susan E. Bromm, Dir., Off. of Site Remediation Enforcement, Interim Enforcement Discretion Policy Concerning "Windfall Lien" Under Section 107(r) of CERCLA (July 16, 2003) (July 2003 Guidance); Mem. from Barry Breen, Dir., Off. of Site Remediation Enforcement, Bona Fide Prospective Purchasers and the New Amendments to CERCLA (May 31, 2002) (May 2002 Guidance); Mem. from Barry Breen, Dir., Off. of Site Remediation, Support of Regional Efforts to Negotiate Prospective Purchaser Agreements (PPAs) at Superfund Sites and Clarification of PPA Guidance (Jan. 10, 2001); Mem. from Barry Breen, Dir., Off. of Site Remediation, Expediting Requests for Prospective Purchaser Agreements (Oct. 1, 1999); Mem. from Steven A. Herman, Ass't Admin., Off. of Enforcement and Compliance Assurance, Policy on the Issuance of Comfort/Status Letters (Nov. 8, 1996), *reprinted* at 62 Fed. Reg. 4624 (Jan. 30, 1997) (Jan. 1997 Guidance). Mem. from Steven A. Herman, Ass't Admin., Off. of Enforcement and Compliance Assurance, Guidance on Agreements with Prospective Purchasers of Contaminated Property (May 24, 1995). All documents are *available at* http://www.epa.gov.

headquarters directive in May 2002 established this policy when it stated that, "*in most cases, the Brownfield Amendments make PPAs from the federal government unnecessary*."[49] EPA has a long-standing policy of not becoming involved in private real estate transactions. Nevertheless, EPA has identified some limited instances when a PPA may be warranted:

- a PPA is needed to achieve significant environmental goals such as cleanup, reimbursement of EPA, response costs, or new use;
- pending CERCLA litigation makes it likely buyer may be sued by third party; and
- other unique, site-specific circumstances of significant public interest that would not occur without a PPA.

EPA has stated that it will issue a BFPP reasonable steps letter when it has had sufficient involvement with the property to provide a basis for recommending reasonable steps to prospective buyers. EPA has also acknowledged that for properties where a state has had direct involvement, the state, and not EPA, should issue the reasonable steps letter.

Prospective buyers and lenders often seek assurance from EPA and state regulators that the respective regulator will not seek to assert or perfect a windfall lien pursuant to section 107(r) of CERCLA.[50] For properties on which EPA will not be seeking to assert a windfall lien, EPA also has stated that it will issue a "Federal Superfund Interest Letter." However, it will limit the issuance of such letters to

> situations where the requesting party provides information that 1) a project found to be in the public interest (e.g., an economic redevelopment project) is hindered or the value of a property is affected by the potential for Superfund liability, and 2) there is no other mechanism available to adequately address the party's concerns other than a letter from EPA with a statement regarding the applicability of a specific Superfund policy, statutory provision or regulation.[51]

EPA reinforced this policy in recent guidance specifically addressing windfall liens:

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[49] May 2002 Guidance, *supra* note 48, at 1 (emphasis added).

[50] 42 U.S.C. § 9607(r) (elec. 2006).

[51] July 2003 Guidance, *supra* note 48, at 14 (quoting Jan. 1997 Guidance).

> [W]here there is a substantial likelihood that EPA will recover all of its cleanup costs from liable parties, the Agency will generally not perfect a windfall lien on the property. For example, *where EPA has entered a consent decree* or settlement agreement with PRPs that *provides for full recovery* of response costs and implementation of the remedy (e.g., an RD/RA consent decree), EPA will generally not perfect a windfall lien on the property.[52]

Rather than simply relying on these policy statements or a comfort letter, cautious buyers should seek to have EPA and state regulators make enforceable assurances, within an adjudication or in an instrument that undergoes public notice and comment, that the regulators will not assert a windfall lien.

[3] Mine-Scarred Land Policy

EPA's policy for mine-scarred lands favors entering PPAs to facilitate redevelopment. Regarding mine-scarred lands, EPA has stated, "The use of prospective purchaser agreements should be considered so that economic activity can continue."[53] Moreover, EPA made the following recommendations for mine-scarred lands:

> **Establish a Process for Responding to Realtors and Lenders.** Identify a contact person who will respond to inquiries from realtors and lenders about specific properties. Whenever possible, provide comfort letters to property owners whose property has been cleaned up or will not require remediation. Negotiate prospective purchaser agreements with buyers who are willing to undertake cleanup work. These activities take time but the return in community good will is worth it.[54]

It is unclear whether EPA would adhere to this directive for mine-scarred lands or whether it would disregard this policy and apply its policy disfavoring PPAs. Under the mine-scarred policy, a BFPP who declined to fund a cleanup may not be able to enter into a PPA. However, if a BFPP agreed to undertake cleanup of mine-scarred lands, then it may be eligible for a PPA if EPA decided to apply its mine-scarred policy rather than its general policy against entering PPAs.

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[52] *Id.* § III.A.1.b(5), at 7 (emphasis added).

[53] Handbook, *supra* note 3, at 5-4.

[54] *Id.* at 5-6.

[4] RCRA Guidance and Policy

EPA has published guidance addressing the use of PPAs and comfort letters for properties subject to or handled under RCRA. EPA's intent is to blunt "perceived barriers to the redevelopment of sites subject to RCRA corrective action."[55] EPA will apply the following factors in determining whether to enter into a PPA:

- Whether a comfort/status letter or other less resource intensive option will suffice, rather than a RCRA PPA;
- Whether the facility in question, or portion thereof, will be cleaned up/addressed as a result of the RCRA PPA;
- Whether EPA and its resources have been directly involved in the cleanup activities at the site;
- Whether there will be significant benefits to the community, environment, or government through remediation of the site and benefits from the redevelopment at the site (new jobs, increased tax base, etc.) that would not occur otherwise;
- Whether the owner/operator has extremely limited or no resources to address corrective action and the prospective purchaser intends to address the cleanup of the property; and
- EPA and DOJ staff availability.[55.1]

EPA typically declines to enter a PPA for a site in which it has no involvement. This is common in states with RCRA primacy. For state-administered RCRA sites, a buyer can attempt to enter into a PPA with the state. States often will apply EPA's written assurance guidance and policies.

[5] Statutory Solutions for Enforceable Agency Assurances

[a] Contiguous Property Owner Assurances

Interestingly, Congress specifically authorized EPA and states to issue written assurances to contiguous property owners, and at least one state has enacted legislation authorizing the state agency to issue enforceable written assurances to BFPPs, contiguous prop-

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[55] Mem. from Marianne Lamont Horinko, Ass't Admin., Off. of Solid Waste & Emergency Response, and John Peter Suarez, Ass't Admin., Off. of Enforcement & Compliance Assurance, Prospective Purchaser Agreements and Other Tools to Facilitate Cleanup and Reuse of RCRA Sites, at 1 (Apr. 8, 2003) (Apr. 2003 Guidance), *available at* http://www.epa.gov.

[55.1] *Id.* at 2-3.

erty owners, and innocent landowners. CERCLA § 107(q) provides as follows:

> The Administrator may (A) issue an assurance that no enforcement action under this chapter will be initiated against a person described in paragraph (1) [contiguous property owner]; and (B) grant a [contiguous property owner] protection against a cost recovery or contribution action under section 1913(f) of this title.[56]

Unfortunately, this language only applies to assurances provided to contiguous property owners, not BFPPs. The statute also raises a question whether the statutory authorization would render a comfort letter enforceable without rulemaking or adjudication. Arguably, Congress should consider another amendment to CERCLA to specifically authorize enforceable agency assurances in the form of comfort letters and should state clearly whether the letters need to undergo public notice and comment in the *Federal Register* to become enforceable against the agency.

[b] Utah Agency Assurances

In 2005, Utah enacted a statute specifically authorizing agency assurances under Utah's mini-CERCLA program:

> Based upon risk to human health or the environment from potential exposure to hazardous substances or materials, the executive director may issue *enforceable written assurances* to a bona fide prospective purchaser, contiguous property owner, or innocent landowner of real property that no enforcement action under this part may be initiated regarding that real property against the person to whom the assurances are issued.[57]

Utah is now in the process of promulgating rules that will govern the issuance of written assurances. The clause, "[b]ased upon risk to human health or the environment from potential exposure to hazardous substances or materials," has created a stir among the industry because of the possibility that the agency rulemaking will require costly risk assessment as a precondition to issuing written assurances. Moreover, having to conduct a risk assessment would almost certainly result in assurances being issued after transaction closings, which could prevent Brownfield transactions from closing. In effect, the Utah approach may encourage

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[56] 42 U.S.C. § 9607(q)(3) (elec. 2006).

[57] Utah Code Ann. § 19-6-326(1) (elec. 2006) (emphasis added).

sellers of contaminated property to take steps to complete a risk assessment in order to expedite the issuance of written assurances for prospective buyers.

[c] Arizona PPAs

Subject to conditions, Arizona authorizes its Department of Environmental Quality: to enter PPAs providing purchasers with releases and covenants not to sue; and to seek court orders granting approval of settlements and purchasers' immunity from contribution claims arising from existing contamination. A PPA cannot be entered unless (1) the agency has sufficient information to reasonably identify the extent of contamination at the affected property or the property is listed on the state's registry of contaminated sites; (2) the buyer is not currently liable for any existing contamination on the property; (3) the proposed redevelopment or reuse of the property will not contribute to or exacerbate existing known contamination, unreasonably interfere with cleanup actions, or cause contamination to present a substantial risk to public heath; and (4) the PPA will provide substantial public benefits such as funds for cleanup, participation by the buyer in cleanup, productive reuse of vacant or abandoned industrial or commercial property, and important public use of conservation or recreation areas.[58]

[d] California BFPP Agreements

California requires a BFPP to enter into an agreement with the environmental agency in order to qualify for liability immunity. The agreement must include performing a site assessment and a cleanup response plan if the agency requires it. The response action may include actions necessary to prevent an unreasonable risk in light of the intended use of the property.[59]

[e] Nevada Approach

Nevada has no formal or published policy on issuing written assurances; however, the Division of Environmental Protection will issue comfort letters to prospective purchasers and, in some limited cases, has entered into prospective purchaser agreements. The state has passed legislation incorporating the federal

[58] Ariz. Rev. Stat. Ann. § 49-285.01 (elec. 2006).

[59] Cal. Health & Safety Code § 25395.92 (elec. 2006). Innocent landowners and contiguous property owners also must enter into an agency agreement to be eligible for liability immunity.

Brownfield amendments, including the windfall lien;[60] however, there is no statute that specifically addresses agency comfort letters or prospective purchaser agreements.

§ 16.04 Modifying CERCLA Consent Decrees

Because mine-scarred and other industrial lands are often subject to CERCLA and can involve litigation, they present an opportunity for purchasers to obtain enforceable assurances from EPA and state agencies that are made within a judicial proceeding. The process typically involves a stipulation and joint motion to modify an existing consent decree (or to enter a consent decree if none exists).

In using this strategy, the buyer has the added advantage of likely preserving rights to pursue other responsible parties for contribution under CERCLA § 113(f). The U.S. Supreme Court held in *Cooper Industries, Inc. v. Aviall Services, Inc.*,[61] that a potentially responsible party (PRP) under CERCLA § 107(a) cannot sue other PRPs under CERCLA § 113(f) in the absence of a pending or completed civil action against the plaintiff PRP under CERCLA § 106 or § 107(a). Most buyers, however, as a practical matter, do not factor into their purchasing decisions the potential for seeking contribution from other PRPs because of the uncertain outcome of such actions and potentially excessive litigation costs. Moreover, BFPPs are not considered liable parties; hence, they should be able to bring a direct action for cost recovery under CERCLA § 107(a) should the need ever arise.[62]

In the case of the Midvale, Utah, Sharon Steel Superfund site, the prospective purchaser and current owner entered into a stipulation with EPA, the U.S. Department of Justice (DOJ), and the State of Utah. The parties had already resolved the liability of potentially responsible parties under a partial con-

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[60] Nev. Rev. Stat. Ann. § 459.930 (elec. 2006).

[61] 543 U.S. 157 (2004). See Lisa A. Kirschner *et al.*, "What's Up with Water, Air, and Post-*Aviall* Jurisprudence?," 6-1, § 6.04 of these *Proceedings* for a comprehensive discussion of the *Aviall* decision.

[62] *See, e.g.*, Nutrasweet Co. v. X-L Engineering Co., 227 F.3d 776, 784 (7th Cir. 2000) (innocent landowner may bring § 107(a) action against defendant if it establishes that defendant is covered person, there has been release or threatened release of hazardous substance from facility, and release caused landowner to incur costs consistent with National Contingency Plan).

sent decree entered by the U.S. District Court with jurisdiction over the property.[62.1] The stipulation and modified decree[62.2] contained several important covenants and assurances from EPA, DOJ, and the State of Utah in favor of the purchaser. Here are some examples:

- Covenant not to Sue[62.3]

> [T]he United States and the State further covenant not to assert any claims and hereby release and waive all claims or causes of action that they may have for all matters relating to the Sites against any bona fide prospective purchaser ("**BFPP**"), as set forth in Section 101(40) of CERCLA, 42 U.S.C. § 9601(40) who acquires an ownership or other interest in any real property located within the Sites.

- BFPP assurance[62.4]

> [T]he United States and the State further stipulate and agree that [Buyer] will qualify as a BFPP of the Sites under CERCLA § 101(40), 42 U.S.C. § 9601(40); provided, however, that neither [Buyer], nor any other person or entity will be considered a BFPP, if any of them: (a) is responsible for causing the release of any reportable quantity of hazardous substances at the Sites, or (b) fails to comply with Section XIV [Institutional Controls] (or any covenant or obligation created pursuant thereto) . . . , or (c) fails to comply with any request for information or administrative subpoena relating to the Sites.

- Windfall lien assurance[62.5]

> Accordingly, the Parties stipulate and agree that no windfall lien will be asserted against the Sites as to [Buyer] or [Owner] or their successors or assigns.

These provisions provide the purchaser and the purchaser's successors in interest with important assurances that should facilitate the redevelopment of the affected property. The assurances

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[62.1] Partial Consent Decree, United States v. Sharon Steel Corp., Civ. No. 89-C-136 (D. Utah Nov. 13, 1990).

[62.2] Order Confirming Stipulation and Granting Joint Motion for Modification and Termination of Partial Consent Decree, United States v. Sharon Steel Corp., Civ. No. 86-C-924J (D. Utah Nov. 18, 2004); Stipulation and Joint Motion for Modification and Termination of Partial Consent Decree, United States v. Sharon Steel Corp., Civ. 89-C-136 (D. Utah Aug. 30, 2004) (Stipulation).

[62.3] *Id.* at Covenant Not to Sue, Stipulation ¶ 17.

[62.4] *Id.* at BFPP Assurance, Stipulation ¶ 17.

[62.5] *Id.* at Windfall Lien Assurance, Stipulation ¶ 18.

were made within a judicial stipulation and modified decree removing questions concerning their enforceability against the government. Parties know what they must do in order to receive and maintain their liability protection. Finally, lenders and investors have the assurance that no windfall lien will be asserted by the government that could threaten security interests in the property or frustrate transaction closings.

§ 16.05 Stopping Releases and Preventing Exposure

The Brownfield amendments attempt to balance the need for protecting qualified buyers from CERCLA liability and ensuring the protection of health and the environment. While requiring BFPPs to take reasonable steps to stop releases and to limit or prevent exposure, EPA acknowledges that "Congress did *not* intend to create, as a general matter, the same types of response obligations that exist for a CERCLA liable party (e.g., removal of contaminated soil, extraction and treatment of contaminated groundwater)."[63] However, EPA argues that "Congress also did not intend to allow a landowner to ignore the potential dangers associated with hazardous substances on its property."[64] Redeveloping a property that has undergone a completed cleanup is different than redeveloping a property that needs to undergo cleanup. For example, a site that has been cleaned up may not need much investigation into the soil and groundwater conditions, unless the new use will pose a risk of exposure to residual contamination.

[1] Site Characterization

Determining the type and concentration level and depth and lateral extent of contamination and impacted media is critical to determine what reasonable steps must be taken in order to stop any continuing release and prevent or limit exposure to residual contamination. Effective site characterization is critical for successful risk assessment and site redevelopment planning—the three must be done hand in hand. Little, if any, site characterization may be needed when a cleanup is considered complete. There is sparse guidance from EPA on the extent of site characterization that BFPPs must do in order to maintain their liability protection. BFPPs must rely on their environmental and engineering profes-

[63] Common Elements Guidance, *supra* note 19, at 9-10.

[64] *Id.* at 10.

sionals to strike the right balance between the cost of site characterization and benefits derived from knowing as much as possible about the surface and subsurface environmental conditions and their impact on redevelopment planning and risk assessment.

[2] Risk Assessment

Once the contamination is better understood, the potential risk to human health and ecological resources needs to be assessed. Collaboration with environmental regulators, local government representatives, and the developer's professionals is needed to determine the scope and goals to be achieved by the study. The risk assessments are scientific, not legal, analyses that should be conducted by well-qualified PhD professionals.

The human health risk assessment generally identifies chemicals of concern, assesses potential exposure (future land use) and toxic effects from exposure, and characterizes the carcinogenic and non-carcinogenic risks.[65] The ultimate goal of the study is to identify site-specific contaminant levels that, if remediated to a certain concentration and/or exposure to the same is prevented, limited, or controlled, will be protective of human health and the environment. Accomplishing this objective should minimize the liability risk for the BFPP.

As a general rule, contaminated property cannot always be cleaned to background metal or chemical concentration levels because of the substantial costs and delays in reaching such levels. Rather, contaminated sites usually are cleaned to concentration levels that pose an acceptable risk of exposure to public health and the environment. For example, EPA and states generally use 1×10^{-6} for carcinogens (one person in one million may contract cancer after being exposed to the contaminant).

The residual contaminant concentration level may be higher for commercial or industrial uses than for residential uses.[66] EPA encourages the use of site-specific data so that risks can be evaluated on a case-by-case basis. Under a residential scenario, residents are assumed to be in frequent, repeated contact with contaminated

[65] Off. of Emergency & Remedial Response, EPA, Risk Assessment Guidance for Superfund, *Human Health Evaluation Manual* vol. 1 (Dec. 1989) (RAGS Part A), *available at* http://www.epa.gov/oswer/riskassessment/ragsa/index.htm.

[66] RAGS Part A, *supra* note 65, at 2-3.

media, i.e., daily exposure over a long time period. Under a commercial or industrial use scenario, workers are assumed to be exposed to contaminants for 8 hours a day for 250 days per year.[67]

[3] Site Redevelopment Plan

Because risk assessments attempt to analyze the potential types of populations that could be exposed, a redevelopment plan will aid and guide the risk assessment. The site redevelopment plan is a critical step for risk assessment and the establishment of appropriate cleanup levels and appropriate engineering and institutional controls if residential soil levels and/or drinking water standards are not met. For example, an area that is planned for industrial use will have a lower exposure risk and may not need to be cleaned up to residential levels. On the other hand, an excessively contaminated area that is planned for residential use likely will need to undergo more extensive remediation and may require engineering and institutional controls if the residual concentration does not meet residential standards, but only if such controls will be effective in preventing exposure.[68]

§ 16.06 Activity and Use Limitations (Institutional Controls)

In order to maintain liability protection, BFPPs must comply with any land use restrictions and not impede the effectiveness of any institutional controls. Often land use restrictions and/or institutional controls are imposed on property containing residual levels of contamination in order to prevent or limit exposure and protect health or the environment. Maintaining the effectiveness and enforcement of these measures is in the best interest of not only BFPPs but also sellers whose potential, future responsibility for residual contamination can be affected by the viability of use restrictions and institutional controls.[69] The viability and effective-

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[67] *See id.* at 3.

[68] Land Use in the CERCLA Remedy Selection Process (OSWER Directive 9355.7-04, May 25, 1995), *available at* http://www.epa.gov/superfund/resources/landuse.htm.

[69] Patricia J. Winmill & Hal J. Pos, "Use and Enforceability of Institutional Controls in Risk-Based Environmental Cleanups—They're Cheap and Good Looking, But Will They Last?," 49 *Rocky Mt. Min. L. Inst.* 23-1 (2003); Strategy to Ensure Institutional Control Implementation at Superfund Sites (Sept. 2004) *available at* http://www.epa.gov/superfund/action/ic/strategy.htm; Institutional Controls Bibliography: Institutional Control, Remedy Selection, and Post-Construction Completion Guidance and Policy

ness of activity and use limitations and institutional controls at Superfund sites has been questioned.[70]

Land use restrictions and institutional controls take many forms, including deed restrictions, restrictive covenants, easements, reservations, environmental notices, engineering controls, and other restrictions or obligations that are designed to protect human health or the environment.[71] They often forbid a property from being used for residential use, unless a lower contaminant concentration can be achieved. They also can forbid the use of groundwater, deep-rooted plants, basements, flood irrigation, or swimming pools. Engineering controls can include enhanced carbon filtered ventilation systems and/or vapor barriers in subfloors and foundations, particularly when volatile organic compounds, such as benzene or trichloroethylene, affect the subsurface of the property.

[1] Uniform Environmental Covenants Act (UECA)

Delaware, Idaho, Iowa, Kentucky, Maine, Maryland, Nebraska, Nevada, Ohio, South Dakota, Utah, West Virginia, and the District of Columbia have adopted UECA.[72] UECA was developed to address the long-term enforcement of institutional controls and to provide an opportunity for modification and termination should conditions change.

UECA was drafted to overcome potential defenses to the enforcement of institutional controls, coined "environmental covenants." An environmental covenant that is properly created runs with the land and is enforceable even if:

(a) it is not appurtenant to an interest in real property;

(OSWER Directive 9355.010, Dec. 2005) (compiles 40 guidance and policy documents pertaining to institutional selection, use, and enforcement) *available at* http://www.epa.gov/superfund/action/ic/guide/biblio.htm; Institutional Controls: A Guide to Implementing, Monitoring and Enforcing Institutional Controls at Superfund, Brownfields, Federal Facility, UST and RCRA Corrective Action Cleanups (Draft Feb. 19, 2003), *available at* http://www.epa.gov/superfund/action/ic/guide/icgdraft.pdf.

[70] Gov't Accountability Off., Hazardous Waste Sites, Improved Effectiveness of Controls at Sites Could Better Protect the Public (GAO-05-163, Jan. 2005) (Report to Congressional Requesters criticizing lack of enforcement of institutional controls), *available at* http://www.gao.gov.

[71] *See, e.g.*, Utah Code Ann. § 19-10-102(1) (elec. 2006).

[72] *See, e.g.*, Utah Code Ann. §§ 57-25-101 to -114 (elec. 2006). *See also* http://www.environmentalcovenants.org/ueca/DesktopDefault.aspx.

(b) it can be or has been assigned to a person other than the original holder;

(c) it is not of a character that has been recognized traditionally at common law;

(d) it imposes a negative burden;

(e) it imposes an affirmative obligation on a person having an interest in the real property or on the holder;

(f) the benefit or burden does not touch or concern real property;

(g) there is no privity of estate or contract;

(h) the holder dies, ceases to exist, resigns, or is replaced; or

(i) the owner of an interest subject to the environmental covenant and the holder are the same person.[73]

UECA appears to provide an effective approach to enforcement, modification, and termination. An environmental covenant may be amended or terminated by consent of the agency, the current owner of the property, each person that originally signed the covenant, and the holder of the covenant.[74] For any interest in real property subject to an environmental covenant, the interest is not affected by an amendment to the covenant unless the current owner consents to the amendment. Regarding enforcement of covenants,

(1) A civil action for injunctive or other equitable relief for violation of an environmental covenant may be maintained by:

(a) a party to the covenant;

(b) the agency;

(c) any person to whom the covenant expressly grants power to enforce;

(d) a person whose interest in the real property or whose collateral or liability may be affected by the alleged violation of the covenant; or

(e) a municipality or other unit of local government in which the real property subject to the covenant is located.[75]

[2] Role of Local Government

Local governments play a critical role in the development and enforcement of effective use restrictions and engineering controls. The zoning and land use entitlement process can be effective in

[73] Utah Code Ann. § 57-25-105(2)(a) - (i) (elec. 2006).

[74] *Id.* § 57-25-110.

[75] *Id.* § 57-25-111(1)(a) - (e).

tailoring appropriate restrictions and controls to the eventual redevelopment and reuse. An effective enforcement mechanism involves the creation of an owners association and the recording of restrictive covenants against the property that can be enforced by the owners association, and by the local government, if needed. In the case of Sharon Steel, the local government was given primary responsibility for creating, enforcing, modifying, and terminating institutional controls supporting the redevelopment. EPA and the State of Utah will play a limited role, unless there is a complete breakdown at the local government level. The local government's involvement is often effective in convincing EPA and state government to modify consent decrees or enter prospective purchaser agreements because the regulators are comfortable that the local community will have a primary role in enforcing land use restrictions and institutional controls.

[3] Potential Natural Resources Damages

When an institutional control prohibits the use of groundwater within a contaminated property, the beneficial use of that resource is lost in the interest of protecting human health and the environment. For that reason, there is a risk that the government may seek to recover natural resource damages for injury to or the loss of the use of the groundwater resources. Many times, pumping and treating groundwater is simply too costly to undertake; therefore, controls are placed over the property to prevent the use of or exposure to the contaminated water. Shallow aquifers in the metropolitan and industrial areas of arid western cities have been impacted by dry cleaning solvents, fuel, and other chemicals and heavy metals.

In the State of Utah the natural resource damage trustee reached two settlements arising from groundwater contamination. In one of the settlements, the responsible party agreed to pay approximately $12 million to fund cleanup and to settle the trustee's natural resource damage claim.[76] In the other settlement, the parties entered into a complex multi-million dollar agreement to clean up or replace sulfate-contaminated groundwater in the arid

[76] *See* State of Utah Natural Resource Damage Trustee Considers Public Comment, The Ensign-Bickford (Trojan Plant) Groundwater Cleanup, *available at* http://www.deq.utah.gov/Issues/EBCo/GroundWater/index.htm.

Salt Lake Valley affected by historic mining operations. The agreement affects thousands of acre-feet of groundwater rights used primarily for domestic water supplies.[77]

Cautious purchasers of mine-scarred and other industrial lands should ensure that they address the possibility that the federal or state government may seek to assess damages for injury to or the loss of use of groundwater and other natural resources. BFPPs need to prevent or limit exposure of natural resources to previously released hazardous substances in order to maintain their buyer protection. An ecological risk assessment may be needed to analyze possible exposure pathways that could adversely impact groundwater and other resources.

§ 16.07 Cleanup Completion Strategy

Ideally, a BFPP will not need or be required to conduct a cleanup of contaminated soil or groundwater; however, this question hinges on the level of exposure risk posed to human health, the environment, or natural resources by the type, extent, and concentration of contaminants. If a cleanup action is needed, then the BFPP needs to develop an effective strategy to remove the threat to public health and the environment in a cost-effective and efficient manner. The ultimate goal is to achieve a cleanup level that is based on good science and that federal and state regulators agree is complete and protective of health and the environment.

EPA has developed a number of tools to help achieve cost-effective and efficient cleanups that are protective. EPA uses a construction complete designation under CERCLA and corrective action complete designation under RCRA. EPA encourages large mine-scarred and industrial sites to be parceled, so that cleaner portions may be released from the National Priorities List (NPL) or from a RCRA post-closure permit, receive completion determinations, and proceed toward redevelopment.[78] Regarding mine-scarred sites listed on the NPL, EPA has recommended partial deletion:

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[77] State of Utah Natural Resource Damage Trustee, Southwest Jordan Valley Groundwater Cleanup Project, *available at* http://www.deq.utah.gov/Issues/nrd/index.htm.

[78] Direct Final Process for Deletions (updated Oct. 2002), *available at* http://www.epa.gov/superfund/programs/npl_hrs/direct.htm; Close Out Procedures for National Priorities List Sites (OSWER Directive 9320.2-09A-P, Jan. 2000), *available at* http://www.epa.gov/superfund/resources/closeout/index.htm.

> **Explore Partial Deletions from the National Priorities List (NPL).** EPA policy allows sites, or portions of sites that meet the standard provided in the NCP (i.e., no further response is appropriate), to be the subject of entire or partial deletion from the NPL (60 FR 55466). A portion of a site to be deleted may be a defined geographic unit of the site, perhaps as small as a residential unit, or may be a specific medium at the site such as ground water, depending on the nature or extent of the release(s). To reduce the site-wide Superfund "stigma," properties within the Superfund site that are known to be free of contamination should be publicly identified.[79]

This strategy can be effective in allowing a portion of a property to receive a regulatory completion determination, thus facilitating sales, leases, or other transactions in the redevelopment market.

EPA also has developed a "ready-for-reuse" program under CERCLA. Under this program, after a cleanup is complete, EPA issues a certificate confirming, strictly from a technical, and not a legal, standpoint, that the site is ready for reuse.[80] This same program has been applied to RCRA sites.[81]

Under RCRA, EPA allows completion determinations to be made with or without any controls. If corrective action has achieved a residential cleanup level, then the completion determination can be made without any institutional controls or activity and use limitations. If corrective action has not reached residential levels, then a completion determination can be issued, but will be subject to controls.[82]

If a state agency confirms that a cleanup is complete under the state environmental program, there is a risk that EPA may question and second-guess the state determination. Vapor intrusion, for example, has been a new concern for sites that have been previously closed but have residual levels of volatile organic compounds, such as benzene and solvents, which pose a risk to indoor air of

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[79] Handbook, *supra* note 3, at 5-6.

[80] Guidance for Preparing Superfund Ready for Reuse Determinations (OSWER Directive 9365.0-33, Feb. 18, 2004), *available at* http://www.epa.gov/superfund/programs/recycle/pdfs/rfrguidance.pdf.

[81] EPA Region 6, Guidelines for Preparing Ready for Reuse Determinations: RCRA, Federal Facilities, FUDS, UST, TSCA and VCP Programs (Apr. 12, 2004) *available at* http://www.epa.gov/earth1r6/ready4reuse/guide_rfrd.pdf.

[82] Final Guidance on Completion of Corrective Action Activities at RCRA Facilities, 68 Fed. Reg. 8757 (Feb. 25, 2003).

buildings constructed over these contaminants.[83] The Brownfield amendments placed limits on EPA's ability to reopen a cleanup completed under a state-administered program. As a general rule before the passage of the Brownfield amendments, a cleanup deemed complete under a state administered program released the party from liability under state law. Unless the state had a memorandum of agreement (MOU) with EPA, the state completion determination did not provide a release of liability arising under federal environmental laws. Without an MOU, EPA would not agree to exempt anyone from liability under federal environmental laws that had received a state-issued certificate of completion. Hence, those receiving a state certificate of completion assumed the risk that EPA could reopen the cleanup and require more cleanup work resulting in additional costs and potential further liability.

The Brownfield amendments limit the ability of EPA to act under CERCLA to reopen a site cleaned up under a state program. Unfortunately, the reopener restrictions apply only to cleanups conducted after February 15, 2001, and do not apply if EPA is acting under another law such as RCRA or TSCA.[84] The Brownfield amendments allow EPA to reopen a site cleaned up under a state program if EPA determines that a "release or threatened release may present an imminent and substantial endangerment to public health or welfare or the environment" and that additional actions "are likely to be necessary to address, prevent, limit, or mitigate a release or threatened release."[85] Depending on how EPA and courts interpret these provisions, the exceptions could swallow the rule against reopeners. For example, there are court deci-

[83] "EPA to Test for TCE Contamination In 150 Homes in Western New York," *BNA Daily Env't Rep.*, June 16, 2006, at A-6; OSWER Draft Guidance for Evaluating the Vapor Intrusion to Indoor Air Pathway from Groundwater and Soils (Subsurface Vapor Intrusion Guidance), *available at* http://www.epa.gov/epaoswer/hazwaste/ca/eis/vapor.htm; NJ DEP Vapor Intrusion Guidance (Oct. 2005), *available at* http://www.state.nj.us/dep/srp/guidance/vaporintrusion/vig.htm; Guidance for Evaluating Soil Vapor Intrusion in the State of New York, *available at* http://www.health.state.ny.us/nysdoh/gas/svi_guidance; Cal. Envtl. Protection Agency, Interim Final Guidance for the Evaluation and Mitigation of Subsurface Vapor Intrusion to Indoor Air (Dec. 15, 2004, rev. Feb. 7, 2005), *available at* http://www.dtsc.ca.gov/AssessingRisk/upload/HERD_POL_Eval_ Subsurface_Vapor_Intrusion_ interim_final.pdf.

[84] 42 U.S.C. § 9628(b) (elec. 2006).

[85] *Id.* § 9628(b)(1)(B)(iii).

sions construing the language "imminent and substantial endangerment" under RCRA to mean something less immediate and harmful than some might expect.[86]

Importantly, the reopener restrictions do not apply to state cleanup completion determinations, unless the state maintains a published record of sites that have been cleaned up under the state's program. The list must detail whether the use of the site will be restricted after cleanup and what institutional controls, if any, will be required for a completed site.[87] States need to develop and publish a compliant list of sites in order to make the reopener limitations apply to their completion determinations. They also should explore obtaining even better terms and conditions restricting EPA's ability to reopen closed sites through a memorandum of understanding.[88]

Finally, in *New York v. Solvent Chemical Co.*,[89] the plaintiff alleged that elevated levels of hazardous waste remained in groundwater after the State of New York had issued a letter stating that no further cleanup action was needed because the site no longer presented a threat to health or the environment. The court dismissed the plaintiff's RCRA § 7002 claim because the letter, as a matter of law, confirmed that the site no longer presented an imminent and substantial endangerment to health and the environment.

The *Solvent Chemical* case demonstrates the importance of obtaining a written assurance from environmental regulators that a cleanup action is complete and is protective of health and the environment. Parties may be able to use the agency's confirmation to stave off third-party claims challenging the sufficiency of the cleanup. Nevertheless, as discussed in this article, the letter may not be binding on the agency if agency policy changes because the statement was not made in rulemaking or adjudicatory proceedings.

§ 16.08 Conclusion

The risk-reduction strategies addressed in this article should help prospective buyers limit the environmental liability risk posed

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[86] *See, e.g.,* Cox v. City of Dallas, 256 F.3d 281 (5th Cir. 2001).

[87] 42 U.S.C. § 9628(b)(1)(C) (elec. 2006).

[88] *See* Memoranda of Agreement (MOAs) on State Voluntary Cleanup Programs (VCPs), *available at* http://www.epa.gov/swerosps/bf/html-doc/statemoa.htm.

[89] No. 83-CV-1401, 2006 WL 1582383 (W.D.N.Y. June 5, 2006).

by redeveloping mine-scarred and other industrial lands that have pollution conditions. Unfortunately, the risk cannot be entirely removed, but it can be significantly reduced. Protected buyers need to thoroughly investigate the contamination condition and determine what reasonable steps, if any, may be needed to stop a continuing release, prevent a threatened future release, and prevent or limit exposure to human health, the environment, or natural resources. Buyers should enlist qualified environmental professionals in making these important decisions to ensure that they obtain and maintain their buyer protection and reduce potential liability arising from federal and state environmental laws and regulations and third-party and natural resource damage claims.