



Practical Pointers Series
Hazardous Material Liability Under Federal Law for Conservation

Any fee owner of land may incur liability under CERCLA. Whether that is true for a conservation easement holder is unsettled, and so must be considered on every property, but tools exist to manage the liability risk. Practice 9C of *Land Trust Standards and Practices* addresses CERCLA risk.

1. **Prior knowledge of contamination can lead to liability.** Land trusts can potentially suffer severe financial hardship if hazardous substances are found on conserved property. If the owner or easement holder had knowledge of the contamination prior to receiving its interest, the risk is greater. The federal government can hold all parties in the chain of title to a contaminated site responsible. Liability is retroactive for all potentially responsible parties (“PRPs”), past and present, including owners and operators (those managing but not owning a site), and each may be individually liable for all costs of the entire cleanup without consideration of negligence, wrongdoing or illegality. Courts typically use equitable factors to allocate liability and sometimes apportion divisible harms. Legal costs are high.

2. **CERCLA liability costs can exceed the value of the contaminated property.** Response costs include investigative, cleanup and enforcement costs. The government may recover natural resource damages that often far exceed total response costs or property value. Certain substances are specifically excluded from the definition of “hazardous substance,” such as petroleum and certain fossil fuels. Have an experienced attorney review the easement or purchase agreement prior to execution and include a hazardous materials evaluation as part of your due diligence. Write and implement policies and procedures anticipating discovery or release of hazardous substances. During annual monitoring, pay special attention to areas of active management on the property.

3. **Visit the entire property before acquiring it or accepting an easement;** frequently visit thereafter. The “bona fide prospective purchaser” defense exempts a property owner from CERCLA liability if it knew the property was contaminated at purchase, acquired property rights after January 11, 2002 after conducting “all appropriate inquiries,” (a formal environmental investigation in compliance with 40 C.F.R. Part 312), satisfied “Continuing Obligations” after purchase, and is not affiliated with a PRP. “All appropriate inquiry” requires a Phase I environmental investigation, including, among other things, a physical (noninvasive) property inspection, an investigation of historic land use and documentation of steps taken during the investigation and findings, all conducted by *by a qualified and experienced environmental engineer*. EPA recognizes ASTM E1527-05 (<http://www.astm.org/Standards/E1527.htm>) and ASTM E2247-08 (a method tailored to inspections on forestland or large rural property) (<http://www.astm.org/Standards/E2247.htm>) as satisfying “all appropriate inquiries.” Land trusts should strongly consider an ASTM Phase I investigation for fee-interest acquisitions. Easement holders who do not qualify for the BFPP defense may, with advice of counsel, consider alternative diligence investigations that are thorough and appropriate for the transaction.

4. **Active management involvement increases liability risk for easement holders. Fee owners are exposed to CERCLA liability without regard to when hazardous substances were disposed or degree of involvement with the substances.** For easement holders, the risk

of liability can increase if the easement holder is actively involved in the contaminated property. Whether an easement holder is defined as an “owner” under CERCLA is unsettled; however, the party controlling activities on the conserved property relating to hazardous substances may be subject to “operator” liability. The Supreme Court held that, in order to impose liability on an operator, the person must “manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.” Classic land trust stewardship activities relating only to typical conservation restrictions should not trigger “operator” liability; decisions directing specific activities affecting hazardous substances may do so.

5. **Easement holders may qualify for the CERCLA “third party” defense (act or omission of a third party) or the “innocent purchaser” defense** (for PRPs who did not know of and had no reason to know of a release that occurred prior to the PRP taking ownership or operational control). However, a contractual relationship between the current owner or operator and those responsible for the release will frequently defeat this defense. The scope of “contractual relationship” will depend upon the jurisdiction deciding the case.

6. **If no contractual relationship exists:** To qualify for the “third party defense” a land trust must show that (1) the release was caused by the act or omission of a third party; (2) it exercised “due care” with respect to hazardous substances; and (3) it took precautions against the foreseeable acts of third parties. A land trust seeking to claim the “innocent purchaser” defense and a fee owner seeking to claim the BFPP defense must show that it: (1) did not dispose of hazardous substances after acquiring its interest in the property; (2) provided legally required notices; (3) took reasonable steps to stop or prevent releases and limit exposure to hazardous substances; (4) fully cooperated, assisted and gave access to those authorized to conduct the response action; (5) complied with any land use restrictions; and (6) did not impede the effectiveness or integrity of any institutional controls employed in the response action.

RESOURCES

For additional articles and other information on environmental due diligence, see:

- *The Law of Hazardous Waste: Management, Cleanup, Liability and Litigation*, Susan M. Cooke, ed., §14.01[4][c] (2009).
- *Acquiring Land and Conservation Easements*, Monica Henderson and MaryKay O'Donnell (The Land Trust Alliance, 2009), pp. 38-42.
- 2002 Small Business Liability Relief and Brownfields Revitalization Act (“SABRA”).
- Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. § 9601 *et seq.*
- *United States v. Bestfoods*, 524 U.S. 51, 66-67 (1998) on definition of an operator.
- Definition of those managing but not owning a site at 42 U.S.C. §9607(a)(1)-(4).
- *Managing Hazardous Substance Risks In Conservation Transactions*, Mark Pennington 2012, <http://tlc.lta.org/tlc/collections/90> in the Hazardous Materials collection.

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RALLY 2013

Managing Environmental Risk in Conservation Transactions

by

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Presentation Goals:

- Establish a realistic framework for understanding when and to what extent conservation transactions present risks of environmental liability for land trust
- Provide background and context regarding the nature and sources of environmental liability;
- Clarify the availability and limitations of statutory liability defenses;
- Put due diligence recommendations in a risk/reward perspective;
- Highlight recent developments;
- Describe tools and approaches for managing risk.

Key Takeaways:

1. Classic land trust stewardship functions for conservation easements should not give rise to CERCLA operator liability, nor should typical conservation easements without management rights.
2. Land trust participation in management of activities on contaminated easement land can pose CERCLA operator liability risks; but some kinds of management can be undertaken with minimal risk.
3. Fee owners can be subject to CERCLA liability, irrespective of involvement in management.
4. The value of an environmental site assessment satisfying EPA's All Appropriate Inquiry (AAI) rule (40 C.F.R. Part 312) is often overestimated in the context of conservation easements, for the reasons stated in 5, 6, and 7 below.
5. The CERCLA Bona Fide Prospective Purchaser (BFPP) Defense and Contiguous Land Owner Defense to CERCLA liability are available only for fee owners (and in certain lease situations). These defenses are not available for conservation easement holders. (But note that the CERCLA "Third Party Defense" and "Innocent Landowner Defense" are available for easement holders.)

6. None of the federal liability defenses protects against liability under other federal statutes, state statutes (except to the extent they incorporate federal defenses), or common law.
7. Performing AAI does not create an automatic liability protection. In the event of a lawsuit, the party asserting CERCLA defenses must meet the burden of showing that it has satisfied post-transaction duties of “due care” or “continuing obligations.” Under evolving case law, that burden is challenging and outcomes are uncertain. To qualify, landowners may need to make expenditures for investigation and cleanup.
8. Environmental reviews less extensive than AAI, if carefully implemented and consistent with land trust risk tolerance, may suffice for many typical conservation easements.
9. Land trust staff using tailored environmental checklists modeled on the ASTM Transaction Screen should be aware that this type of review will likely not meet the AAI Standard. (The ASTM Transaction Screen Process, ASTM Standard E 1528-06, is a more abbreviated environmental review than E 1527-05, intended primarily to screen out more obvious, higher risk sites).
10. Decisions to proceed with easements or fee acquisitions for lands known or suspected to be contaminated should involve environmental consultants and counsel with expertise and experience in the relevant state.
11. While case law is unsettled, contractual indemnification is a generally available risk management tool, and can be structured in a way that will not undercut federal liability protections.
12. Insurance is available for environmental risks, but at a cost that may be prohibitive for most land trusts.
13. Purchase and easement agreements should be fine-tuned to address how hazardous substance risks will be managed and by whom.

Key LTA Resources Addressing Environmental Liability Concerns

- LTA Standards and Practices, Standard 9 (Ensuring Sound Transactions), Practice 9C: Environmental Due Diligence for Hazardous Materials (2004)
- LTA Practical Pointers Series: Conservation Easements and Hazardous Material Liability Under Federal Law (September 2012)
- Acquiring Land and Conservation Easements, Monica Henderson and MaryKay O’Donnell (Land Trust Alliance, 2009) pp. 38-42
- The Conservation Easement Handbook, Elizabeth Byers and Karin Marchetti Ponte (Land Trust Alliance, 2005), pp. 371-373; 350;428-435; 446-450; 455-456
- Various model environmental inspection checklists and hazardous waste policies.

I. **Potential Sources of Environmental Liability**

- A. Federal statutes: Comprehensive Environmental Response Compensation and Liability Act (“CERCLA,” a.k.a. “Superfund”), Resource Conservation and Recovery Act, Toxic Substances Control Act, Safe Drinking Water Act Federal Insecticide Fungicide and Rodenticide Act (FIFRA), Clean Water Act, Clean Air Act, Emergency Planning and Community Right to Know Act, Endangered Species Act, among others.
- B. State statutes: State superfund analogues, oil pollution control laws, hazardous and solid waste management laws, groundwater protection laws, pesticide laws, clean water and clean air laws, emergency planning and community right to know, endangered species laws, among others.
- C. Common law (e.g., nuisance, trespass, negligence, ultra-hazardous activity).

II. **CERCLA Liability Basics**

A. General.

Enacted in the aftermath of Love Canal, the federal superfund program addresses the country’s most contaminated sites (sites on the “National Priorities List” or “NPL”). States have long used their own cleanup programs for sites of less than NPL magnitude. Some of those programs incorporate or mimic federal liability principles.

CERCLA’s far reaching liabilities have had the unintended result of discouraging parties from transacting or touching properties with suspected contamination. In response, federal and state legislation, regulations, and policy documents have evolved to address liability concerns of purchasers and lenders, facilitate transactions, and encourage the re-use of underutilized sites known or suspected to be contaminated (“brownfields”). Among the innovations are liability protections for parties who have conducted statutorily prescribed due diligence programs, and state brownfield programs providing flexible risk-based frameworks for addressing lesser-contaminated properties.

Evaluation of potential CERCLA liability requires review of both statutorily defined “potentially responsible parties” (PRPs) and available liability defenses.

B. Applicability

- 1. CERCLA addresses the “release” or “threatened release” of hazardous substances into the environment. EPA can take action to clean up hazardous substances using funds from the “Superfund”, and then seek reimbursement of response costs from “responsible parties.” Or, EPA can require responsible parties to clean up a site. Some states invoke CERCLA to leverage state cleanups or to seek recovery of cleanup costs under state superfund programs. CERCLA authorizes private parties to sue to recover response costs incurred consistent with federal standards.
- 2. CERCLA’s “hazardous substance” definition excludes petroleum (but petroleum

contaminated with hazardous substances is covered).

C. Liability principles

1. Responsible parties include: (1) the current owner and operator of a vessel or facility, (2) the past owner or operator of a vessel or facility at the time hazardous substances were disposed of; (3) persons who arrange for treatment or disposal of hazardous substances at a vessel or facility owned by others, and (4) persons who accept hazardous substances for transport to disposal, treatment or incineration facilities selected by such person. CERCLA § 107(a), 42 U.S.C. § 9607(a).
2. CERCLA liability is retroactive, strict (without regard to fault), and generally considered “joint and several” (each responsible party can be liable for the entire cost). *U.S. v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 991 (D.S.C. 1984). However, courts apply equitable factors to allocate liability, and liability can be apportioned if there is a reasonable basis for doing so. *Burlington Northern & Santa Fe Railroad Company v. U.S.*, 129 S. Ct. 1870 (2009).

D. Private Cost Recovery Actions

CERCLA authorizes private cost recovery actions for response costs incurred consistent with the National Contingency Plan. Much of the CERCLA case law has been created by private cost recovery actions, in which the purchaser or developer of a contaminated property sues a prior owner to recover of costs incurred in developing a site.

III. **Owner and Operator Liability Under CERCLA.**

CERCLA defines “owner or operator” with unhelpful circularity as any person “owning or operating” the land. CERCLA § 101(20)(A); 42 U.S.C. § 9601(20)(A). Most, but not all courts treat “owners” and “operators” as distinct categories. Since different courts apply different reasoning in evaluating liability under these categories in *particular factual settings*, it is important to examine the potential for liability under each category. Judicial decisions examining potential liability of easement holders (not holders of conservation easements) illustrate this point.

A. Cases Addressing Potential CERCLA Liability of **Other** Types of Easement Holders

To date there are no known cases finding the holder of a **conservation easement** responsible as an “owner” or “operator” for hazardous material response costs incurred on the property covered by the easement. Courts have addressed the liability of other types of easement holders, with differing results depending on specific facts. Generally speaking, courts are more likely to find liability when the party in question has or exercises significant control over hazardous substances on a property. In typical conservation easement situations, neither of these circumstances is present, since the easement holder’s rights are usually limited to investigating and enforcing conservation restrictions.

1. Easement holders found not liable

Grand Trunk Western Railroad Co. v. Acme Belt Recoating, Inc., 859 F. Supp. 1125 (W.D. Mich. 1994). Owner of an ingress/egress **easement** was not an “owner” because it did not hold the **fee** interest; easement holder was not an “operator” because it had no control over the landowner’s decisions regarding waste disposal or storage.

Long Beach Unified School District v. Dorothy B. Godwin California Living Trust, 32 F.3d 1364 (9th Cir. 1994) Simply holding an **easement** allowing a pipeline to run across school property did not make the school district an “owner”; easement holder not an “operator” where it had no management responsibility relating to hazardous substances and there was no evidence the pipeline was leaking.

See also City of Los Angeles v. San Pedro Boat Works, 635 F.3d 440 (9th Cir. 2011). Holder of **revocable permit** to use harbor berth not liable as an owner. “Owner” liability under CERCLA does not extend to holders of mere possessory interests in land, such as permittees, easement holders, or licensees, whose possessory interests have been conveyed to them by the owners of real property, which owners continued to retain power to control the permittee's use of the real property (noting that the Ninth Circuit provides an independent basis for imposing operator liability for authority to control the cause of contamination. *Id.* at 451-52).

2. Easement holders found liable

Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc., 596 F.3d 112 (2d Cir. 2010). Without distinguishing between **easement** and **fee** ownership, the court imposed “owner and operator” liability on an **easement** owner who owned a contaminated parcel, held an **easement** on a neighboring contaminated parcel for pipelines originating from the owned parcel, and physically occupied and operated the pipeline on the easement property. Control of and operations on the easement property contributed to the finding of owner liability, notwithstanding the ownership was **less than fee**.

B. Owner Liability (Non-easement cases)

Current **fee owners** can be held liable under CERCLA even if the owner does not actively participate in the management or operation of the site or contribute to the release. See, e.g., New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985); Litgo New Jersey Inc. v. Martin, 2011 WL 65933 (D.N.J. 2011).

In cases involving **less-than-fee** ownership situations other than easements, some courts hold that possession of fee title, or lack thereof, is not necessarily dispositive of “owner” liability. See e.g., U.S. v. Carolawn Co., 698 F. Supp. 616 (D.S.C. 1987). Some courts hold that tenants can be “owners,” even if not involved in waste disposal operations. U.S. v. Monsanto, 858 F.2d 160 (4th Cir. 1988). Tenants who maintain control over and responsibility for use of property and sublease the property can be owners. U.S. v. South Carolina Recycling and Disposal, Inc., 653 F. Supp. 984 (D.S.C. 1986).

But other courts decline to find tenants liable for contamination as “owners” unless they have substantially all rights of property ownership. See Commander Oil Corp. v. Barlo Equipment Corp., 215 F.3d 321 (2d Cir. 2000). For the Commander Oil Court, the critical question was whether the lessee’s status was that of a de facto owner, and not whether it exercised control over the facility.

EPA has several detailed guidance documents discussing circumstance under which tenants can be held liable or can qualify for liability protections.

C. Operator Liability (Non-easement cases)

Generally speaking, the risk of incurring “operator” liability is greater because courts construe this term more liberally. There is some discrepancy between different circuits as to whether authority to control is sufficient to give rise to operator liability, or whether actual exercise of control is required. Compare Kaiser Aluminum & Chemical Corp. v. Catellus Development Corp., 976 F.2d 1338 (9th Cir. 1992) (operator liability attaches to defendant who had authority to control the cause of contamination) with U.S. v. Township of Brighton, 153 F.3d 307, 314 (6th Cir. 1998) (operator liability requires affirmative acts.)

1. Bestfoods

The Supreme Court decision in U.S. v. Bestfoods, 524 U.S. 51 (1998), is frequently cited for guidance in evaluating operator liability. While the case addressed a parent corporation’s liability for the activities of its subsidiary, its logic has been applied in other fact patterns as well. See U.S. v. Township of Brighton, 153 F.3d 307 (6th Cir. 1998); Scarlett & Associates, Inc. v. Briarcliff Center Partners, LLC, 2009 WL 3151089 (N.D. Georgia 2009).

The Bestfoods court said:

To sharpen the definition [of operator] for purposes of CERCLA’s concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.

524 U.S. at 66.

It went on to say that in using the verb “operate,” Congress “obviously meant something more than mere mechanical activation of pumps and valves, and [the statute] must be read to contemplate ‘operation’ as including the exercise of direction over the facility’s activities.” 524 U.S. at 71. Nonetheless, on remand, the district court held that articulating environmental policies and procedures, and providing legal advice on environmental matters are not enough to confer directly liability under CERCLA. Bestfoods v. Aerojet-General Corp., 173 F. Supp. 2d 729, 749-51 (W.D. Mich. 2001).

Some commentators have cautioned that *Bestfoods'* focus on liability for decisions about *compliance with environmental regulations* puts land trusts at risk of operator liability. They counsel that land trust involvement and oversight be kept as narrow as possible. While this caution is appropriate, land trusts should not misconstrue it to mean that easements should not contain language governing management of hazardous substances, or that typical stewardship and enforcement activities related to a property's conservation purposes will put them at risk of liability. While there is some inconsistency in the case law, in most cases, it appears that liability will hinge not on the existence of easement terms requiring environmental compliance, but on specific direction of an activity related to contamination (as opposed to enforcement of an easement's general conservation restrictions).

2. Other cases

The following cases illustrate that decisions as to whether oversight and active management trigger CERCLA liability involve extremely fact specific analysis.

a. Parties Found to be Operators

- Excavator who exacerbated the extent of contamination by excavating contaminated soil and spreading it over uncontaminated areas of a property. *Kaiser Aluminum & Chemical Corp. v. Catellus Development Corp.*, 976 F.2d 1338 (9th Cir. 1992). (In addition to finding authority to control, the court found the excavator liable for disposal and transportation of hazardous substances).
- Developer who removed topsoil from former fruit orchard, not knowing it was heavily contaminated with metals and pesticides, stockpiled it, and spread it over new residential subdivision lots; members of a homeowners association who moved the soils to put them in swimming pools and driveways. *Bonnieview Homeowner's Association v. Woodmont Builders, LLC*, 655 F. Supp. 2d 473 (D.N.J. 2009) (also finding that movement of the soils constituted disposal).
- Sole shareholder of single purpose entity that owned a contaminated site, made decisions about remediation and delay of remediation was deemed liable as an operator without respect for whether contaminants were discharged during his ownership or operation. *Litgo New Jersey, Inc. v. Martin*, 2011 WL 65933 (D.N.J. 2011).
- U.S. acting as landlord for a mining lease, where U.S. was an active participant in designing and locating waste dumps, inspecting mining operations, ensuring compliance, and making specific "suggestions . . . that often got instant results." *Nu-West Mining, Inc v. U.S.*, 768 F. Supp. 2d 1082 (D. Idaho 2011).

- Company that performed construction work on a landfill and exercised actual physical control over wastes. City of North Miami v. Berger, 828 F. Supp. 401 (E.D. Va. 1993).
- City of Toledo v. Beazer Materials and Services Inc., 923 F. Supp. 1013, 1018 (N.D. Ohio 1996) (City, fee owner of a road widening right-of-way, found liable both as owner and as operator where it controlled a contaminated right-of-way and took responsibility to secure the contaminated property once hazardous waste was discovered).
- See also Scarlett & Associates v. Briarcliff Center Partners, 2009 WL 3151089 (N.D. Georgia 2009). Evidence that a property management company informed strip mall dry cleaner of EPA reporting requirements, and requested documentation that the dry cleaner was in compliance, combined with disputed evidence that the manager was responsible for performing all acts necessary to maintain compliance, was sufficient to deny a motion for summary judgment as to whether manager was an operator.

b. Parties Found Not to be Operators

- Port district with authority to regulate ship traffic in a harbor, but which did not direct ship movements, was not liable for costs incurred as a result of ship movements displacing PCB-contaminated sediment; company that hired independent contractors to come into port, but did not direct shipping activities or types of boats also not liable. City of Waukegan, Illinois v. National Gypsum Co., 560 F. Supp. 2d 636 (N.D. Ill. 2008).
- Regulatory agency that has power to mandate waste handling practices and inspect facility, but does not control day-to-day operations. U.S. v. New Castle County, 727 F. Supp. 854 (D. Del. 1989). See also U.S. v. Dart Industries, Inc., 847 F.2d 144 (4th Cir. 1988). But see Nu-West Mining, Inc. v. U.S., 768 F. Supp. 2d 1082 (D. Idaho 2011).
- Engineering firm that prepared site plans, secured permits, and provided guidelines on landfill operations. City of North Miami v. Berger, 828 F. Supp. 401 (E.D. Va. 1993).
- Party that merely inspected railcars that released hazardous substances, but did not control the cars or play a role in the release. Veolia Es Special Services, Inc. v. Hiltop Investments Inc., 2010 U.S. Dist. LEXIS 14421 (S.D.W. Va. Feb. 18, 2010).

D. Implications for land trust participation in active management of easements

Given the case law focus is on hazardous substance management, certain management activities that do not come into contact with or affect hazardous substances present on a property may pose minimal risk of liability.

On a scale of less risky to more risky:

Habitat Management Scenarios

- Land trust management of grassland habitat on a site with deeply buried subsurface contamination.
- Land trust involvement with wetlands mitigation on a contaminated property, but in a portion of the property confirmed to be uncontaminated.
- Wetlands mitigation involving direct contact with buried hazardous substances, contracted out to an independent contractor, with contract terms that set general performance standards, but do not dictate the means and methods of the work, and require the independent contractor to indemnify the land trust.
- Wetlands mitigation involving direct contact with buried hazardous substances by land trust staff.

Holder's Public Recreation Rights

- Allowing public access to areas where hazardous substances have been capped and potential exposure pathways have been cut off.
- Installing recreational improvements with no environmental diligence information.
- Installing recreational improvements with knowledge of environmental problems that have not been satisfactorily addressed.

Building Envelopes and Development

- Allowing for relocation of a building zone, subject to land trust approval and review of environmental due diligence information satisfactory to land trust.
- Defining building envelopes with no environmental due diligence information
- Defining building envelopes with knowledge of environmental problems within those envelopes.

IV. CERCLA Liability Defenses

- The CERCLA liability defenses evolved in a piecemeal fashion, are complicated, and are often confused and merged together, even by the courts. There are important differences between them.
- None of the CERCLA defenses protects against claims under other federal statutes, state law claims, or common law claims. None of the defenses is automatic. While you do not need to contact EPA to qualify for the defense, if you are sued, you must meet the burden of showing that you have satisfied post-acquisition duties of due care or “continuing obligations,” which are poorly defined and may require expenditures for investigation and cleanup.
- Each element of a CERCLA defense must be specifically pleaded by the party seeking to rely on that defense. See AMCAL Multi-Housing, Inc. v. Pacific Clay Products, 457 F. Supp. 2d 1016, 1029 (C.D. Cal. 2006).

A. The Original CERCLA Defenses

Act of God; act of war; act or omission of a third party. 42 U.S.C. § 9607(b).

1. The third-party defense. 42 U.S.C. § 9607(b)(3). Not specifically focused on parties to a real estate transaction, but has been construed as available to them. Granted relatively rarely.

Elements:

- The release was caused by the act or omission of a third party
 - Third party was not defendant’s employee or agent; defendant had no direct or indirect contractual relationship with the third party
 - Defendant exercised due care with respect to the hazardous substances
 - Defendant took precautions against the foreseeable acts of third parties.
2. Not restricted to owners. Applies to “a person otherwise liable.” Can be asserted by easement holders.
 3. Often asserted as a secondary defense when a defendant is unable to succeed with CERCLA’s transaction-related defenses (some of which are limited to owners and certain tenants, all of which require All Appropriate Inquiry). See Section IV.B, below.
 4. Defendant need not necessarily have performed due diligence to assert the defense, but the absence of due diligence may make it difficult to meet the due care requirement. (The same can be said for the other defenses discussed below.)
 5. Cases hold that allowing access to the site for another party to conduct response

actions and cooperating with remediation activities may satisfy due care requirements. *New York State Electric & Gas Corp. v. First Energy Corp.*, 808 F. Supp. 2d 417 (N.D.N.Y. 2011). *But see New York v. Adamowicz*, 2011 U.S. Dist. LEXIS 102988, (E.D.N.Y. Sept. 13, 2011) (owner who knew of environmental problems caused by bankrupt tenant, but waited 5 years before spending \$1 million to address them, failed to satisfy the due care requirement).

6. Some courts hold that the third party defense is not available to a purchaser who acquires land from a polluting landowner. *Village, Ltd. v. Unocal Corp.*, 270 F.3d 863 (9th Cir. 2001); *U.S. v. 150 Acres of Land*, 204 F.3d 698, 704 (6th Cir. 2000).
7. Other circuits hold that to defeat the defense, the contractual relationship must relate to hazardous substances or allow an owner to control the third party's activities. *New York v. Lashins Arcade Co.*, 91 F.3d 353 (2d Cir. 1996) (granting third party defense); *Westwood Pharmaceuticals, Inc. v. National Fuel Gas Distribution Corp.*, 964 F.2d 85, 89 (2d Cir. 1992) (granting third-party defense where seller demonstrated that contamination arose out of conditions left by its predecessor, material was in sealed containers undisturbed by seller, and buyer caused the release).

B. The Transaction-Related Defenses

Prior to the 2002 Brownfields Amendments, parties sought to define or minimize potential CERCLA liability by obtaining "comfort letters" from EPA or negotiating detailed "private purchaser agreements" with the Agency. These consumed significant agency resources and were perceived to be of limited utility. To facilitate business transactions, EPA in 2002 amended the innocent purchaser defense and created 2 new liability defenses (collectively, "the transaction-related defenses"). Following the 2002 Amendments, EPA undertook a rulemaking to create a self-implementing program for defining what level of inquiry is required to qualify for these defenses. The rulemaking culminated in promulgation of regulations at 40 C.F.R. Part 321. 70 Fed. Reg. 66070 (Nov. 1, 2005).

- **Innocent Landowner Defense**, CERCLA §§ 107(b)(3) and 101(35),
Created in 1986, and amended in 2002
Basis: No reason to know of contamination.
Available to: "a person otherwise liable"
- **Contiguous Landowner Defense**, CERCLA § 107(q),
Created in 2002
Basis: No reason to know of contamination, contamination migrated on-site from elsewhere.
Available to: "a person that owns real property"
- **Bona Fide Prospective Purchaser Defense**, CERCLA §§ 101(40) and 107(r)
Created in 2002.
Basis: Contamination known at time of purchase.
Available to: "person or tenant of a person" who acquires ownership of a facility"

Note: Neither the BFPP defense nor the contiguous property owner defense is available to easement holders, since neither section of the statute identifies holders of less than fee interests (other than tenants) as qualifying for the defense.

According to EPA, Congress knew that long-term leases are often used as a strategy for holding contaminated property, and wanted a mechanism to afford tenants liability protections under certain circumstances. Other less-than-fee interests are not addressed by the statute. Conservation easements were not on Congress' radar screen. Conversation with Susan Boushell, EPA Office of Site Remediation Enforcement.

1. Basic elements of the transaction-related defenses:
 - Performance of AAI (Environmental Site Assessment - ASTM E 1527-05 as proposed to be amended as ASTM E 1527-13 (see discussion, *infra*)).
 - Performance of Continuing Obligations
 - No affiliation with a PRP (not required by Innocent Landowner Defense, which has a slightly different "no contractual relationship" element)
2. All Appropriate Inquiries
 - a. Prior to the 2002 Brownfields Amendments, parties sought to define or minimize potential CERCLA liability by obtaining "comfort letters" or negotiating detailed "private purchaser agreements" with EPA. These consumed significant agency resources and were perceived to be of limited utility. EPA undertook the AAI rulemaking to create a self-implementing program for defining what level of inquiry is required to qualify for certain liability defenses. The rulemaking culminated in promulgation of regulations at 40 C.F.R. Part 321. 70 Fed. Reg. 66070 (Nov. 1, 2005).
 - b. The investigation required by AAI goes beyond the accepted Phase I practice then prevailing in the industry (ASTM E 1527) and the ASTM Transaction Screen (ASTM E 1528-06) (a more abbreviated environmental review than E 1527-05, intended primarily to screen out more obvious, higher risk sites).
 - c. AAI Statutory Criteria: CERCLA § 101(35)(b)(iii) [42 U.S.C. § 9601(35)(B)(iii)]
 - The results of an investigation by an environmental professional;
 - Interviews with past and present owners, operators, and occupants of the facility regarding the potential for contamination;
 - Reviews of historical sources (chain of title documents, aerial photographs, land use records, etc.) to determine previous uses and occupancies of the property since it was first developed;
 - Searches for recorded environmental cleanup liens filed under federal, state, or local law;

- Reviews of records (federal, state, and local government records; waste disposal records; hazardous waste handling, generation, treatment, disposal, and spill records; etc.) concerning contamination at or around the facility;
 - Visual inspections of the facility and adjoining properties;
 - Any specialized knowledge or experience;
 - Comparison of the purchase price to the value of the property, if the property were not contaminated;
 - Commonly known or reasonably ascertainable information about the property;
 - The degree of obviousness of the presence or likely presence of contamination at the property and the ability to detect the contamination by appropriate investigation.
- d. The AAI investigation must be supervised or overseen by an Environmental Professional that is required to sign all compliance reports.

Environmental Professional Qualifications (40 C.F.R. § 312.10)

1. Has sufficient specific education, training, and experience necessary to exercise professional judgment in matters regarding conditions indicative of releases or threatened releases of hazardous substances, **AND**
2. Has a professional engineer's license, professional geologist's license, or other state or tribal issued certification or license, and 3 years of relevant full-time experience, **OR**
3. Has a degree in science or engineering and five years of relevant full-time experience, **OR**
4. Has ten years of relevant full-time experience.

Relevant experience includes participation in investigations that include environmental analyses and remediation involving environmental conditions and the processes used to evaluate these conditions.

e. AAI Reporting Requirements

- Environmental Professional's Opinion
 - Findings of a release or potential release of any hazardous substances

- Any opinions detailing necessary additional investigations, if such an opinion exists (in rare circumstances when it is difficult to determine if a recognized environmental conditions exists)
- Identification of any data gaps that significantly affect the Environmental Professional’s ability to draw conclusions on environmental conditions
 - Unknown site usage during certain time periods
 - Inability to conduct a visual inspection
 - Inability to interview the key site manager or any regulatory officials
 - Data from previous site investigation is not available for review
- Qualifications and Signature of the Environmental Professional
 - Statement that the environmental professional meets the statutory definition of an Environmental Professional
 - Statement that AAI was performed in conformance with the standards set forth in the regulations

3. Continuing Obligations

a. Basic Elements

- No disposal after property ownership
- Provide legally required notices re: discovery of hazardous substances
- Take reasonable steps to:
 - Stop any continuing release
 - Prevent any future threatened release
 - Prevent or limit any human, environmental or natural resource exposure to any previously released hazardous substance.
- Comply with land use restrictions established or relied on in connection with a response action
- Do not impede the effectiveness or integrity of any institutional control

b. EPA Interpretations of Continuing Obligations

1. Key EPA Documents:

- EPA’s 2003 “Common Elements Guidance” (Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability.)
 - Congress did not intend to create, as a general matter, the same types of cleanup obligations for a BFPP that exist for a liable party under CERCLA.

- EPA's 2012 Memorandum, Revised Enforcement Guidance Regarding the Treatment of Tenants Under the CERCLA Bona Fide Prospective Purchaser Provision. EPA will not enforce against:
 - A tenant whose lease gives sufficient indication of ownership to be considered an owner (see *Commander Oil* case, Section III.B above) and who meets the elements of the BFPP defense.
 - A tenant of an owner who is currently or was previously a BFPP.
 - On a case by case basis, a tenant of an owner who is not a BFPP, but where the tenant itself meets all of the BFPP requirements.

c. Case law

The developing case law shows that new owners who ignore recommendations of Phase I reports do so at their own peril, and that courts may later second-guess new owners for failing to conduct Phase II investigations to assist in discharging due care obligations.

- *Ashley II of Charleston, LLC. V. PCS Nitrogen, Inc.* (D.S.C. 2010, amended 2011)
 - BFPP status denied. New owner failed to clean out, cap, fill, or remove sumps, leaving them exposed to weather, failed to test or remove a debris pile, failed to maintain site cover.
- *PCS Nitrogen, Inc. v. Ashley II of Charleston, LLC*, 714 F.3d 161 (4th Cir. 2013)
 - BFPP status denied on appeal. The Fourth Circuit determined that the due care inquiry should be "whether a party took all precautions with respect to the particular waste that a similarly situated reasonable and prudent person would have taken in light of all relevant facts and circumstances." Id. at 181.
- *3000 E. Imperial, LLC v. Robertshaw Controls Co.*, 2010 WL 5464296 (C.D. Cal. Dec. 28, 2010)
 - BFPP recognized. New owner sampled tanks, emptied their contents 6 months after purchase, and excavated contamination under state oversight after approximately 2 years.
- *Saline River Props. V. Johnson Controls, Inc.*, 823 F. Supp. 2d 670 (E.D. Mich. 2011)
 - BFPP status denied. Brownfield developer found liable for exacerbating pre-existing contamination caused by prior owner by removing a building slab and allowing additional rainwater into the ground and migration of hazardous substances.

- *Voggenthaler v. Maryland Square LLC*, --- F.3d ----, 2013 WL 3839330 (9th Cir. July 26, 2013)
 - BFPP status denied. Defendant’s affidavit only stated that Maryland Square retained an environmental consultant to review files and prepare a report. However, Maryland Square failed to state whether the consultant was a qualified environmental professional, what the report included, and what type of investigation was conducted.

d. Alternatives for avoiding uncertainty about Continuing Obligations

Given the uncertainties about what it takes to satisfy continuing obligations, new owners of contaminated properties can maximize predictability by enrolling in a brownfield cleanup program. These programs are not intended to provide no action assurances to parties contemplating transactions involving sites with suspected but unquantified contamination. They require site investigation, evaluation of remedial action alternatives, and design and implementation of a remedy. In exchange for the performance of the remedy, they offer a no further action letter, certificate of completion, and a liability limitation and/or release and covenant not to sue. For a description of these programs, see EPA’s April 2011 Publication entitled “State Brownfields and Voluntary Response Programs: An Update from the States,” available at:

http://www.epa.gov/swerosps/bf/state_tribal/pubs.htm

The CERCLA enforcement bar generally prohibits CERCLA enforcement against parties who are cleaning up lower risk contaminated properties in compliance with a state response program.

As can be expected, these undertakings can require significant financial resources. EPA’s brownfields program provides brownfield assessment grants to assist with site assessment and characterization as well as planning for cleanup and redevelopment. See www.epa.gov/brownfields. State brownfield cleanup programs offer an array of financial incentives. For these reasons, brownfields transactions typically require a sophisticated team of experts with experience in finance, tax, environmental science, real estate, and environmental law.

4. “No Affiliation Pre-Requisite”: What types of contractual relationships can vitiate available defenses?

A common technique for protecting against environmental liability is to use contractual techniques like releases and indemnification. Emerging case law has created some uncertainty as to whether and in what circumstances these techniques create an impermissible affiliation that defeats the liability defense.

- a. Ashley II case
 - Purchaser released seller from environmental liability
 - Purchaser tried to persuade EPA from enforcing against seller
 - Court found that purchaser was “affiliated” with seller; BFPP defense did not apply.
 - Better reading is that to be disqualifying, an affiliation must result from familial relationship, or from a contractual, corporate or financial relationship other than the property conveyance. (§ 101(40)(h) states that a relationship “created by the instruments by which title to the facility is conveyed or financed” are not impermissible relationships for purposes of the defense). This issue was not addressed in the Fourth Circuit’s decision in the Ashley II appeal, 714 F.3d 161 (4th Cir. 2013).
- b. EPA’s September 21, 2011 “No Affiliation Guidance” (Enforcement Discretion Guidance Regarding the Affiliation Language of CERCLA’s Bona Fide Prospective Purchaser and Continuous Property Owner Liability Protections).
 - EPA generally does not intend to treat indemnities in sale agreements as impermissible affiliations.
 - EPA’s chief intent is to prevent PRP from contracting away liability to a family member or related corporate entity; or prevent PRPs from taking advantage of the defense
 - Without criticizing the Ashley II case for misapplying the affiliation test, EPA says its inquiry is whether the contract party would otherwise be a PRP. If not, deeds or agreements necessary for property transfer are deemed to have a safe harbor.

5. Effect of Indemnification

§ 107(e)(1) of CERCLA states:

“No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.”

The majority of courts dealing with this provision, and, specifically, the District Court for the Northern District of Oklahoma have adopted the view that private parties are permitted to **apportion** liability amongst themselves by agreement, but they cannot create agreements to **transfer** liability from one private party to another. Cyprus Amax Mineral Co. v. CBS Operations Inc., No. 11-CV-252-GKF-

PJC, 2011 WL 4857924 (N.D. Okla. Oct. 12, 2012) (holding that the bar to the transfer of liability applies to contribution claims between third parties, not just in cases where the U.S. government is the claimant).

EPA recognizes the commercial realities of contractual indemnities:

“Indemnification and release agreements are private contracts in which one party (for example, a property owner) agrees to assume another party’s potential liability (for example, a lessee of that property). Indemnification and release agreements provide prospective buyers, lenders, insurers, and developers with a means of assigning responsibility for cleanup costs and encourage negotiations among private parties without government involvement. However, the existence of an indemnification and release agreement generally does not affect the way EPA or a particular state determines whether a party is a PRP and/or the decision whether to pursue an enforcement action against a party. Such an agreement, however, may affect the way a court determines whether a party qualifies for one of the CERCLA liability protections.”

EPA Offices of Enforcement and Compliance Assurance, Site Remediation Enforcement, Solid Waste and Emergency Response, Siting Renewable Energy on Contaminated Properties: Addressing Liability Concerns, EPA-330-F-11-001, March 2011 at 9.

Translation: Private parties cannot use contracts to eliminate environmental liability, but they can allocate the liability between themselves. EPA can choose its enforcement targets without regard for private contracts, and seek and obtain judgments against any potentially responsible party. Parties held liable by EPA can seek contribution from other liable parties.

6. Enforcement Context

Conservation easements are not an enforcement priority for EPA. EPA believes it is extremely unlikely it would seek to commence enforcement actions against conservation easement holders. Conversations with Susan Boushell, EPA Office of Site Remediation Enforcement, and Patricia Overmeyer, EPA Office of Brownfields and Land Revitalization. While sympathetic to needs of conservation community for reducing uncertainty in conservation transactions, EPA is not likely to publish guidance for conservation easement holders, since it views the risk of CERCLA liability for conservation easement holders as remote.

Note that EPA enforcement is only part of the risk. Parties to conservation transactions should keep the potential for private cost recovery actions on their radar screen. Much of the CERCLA case law has been created by private cost recovery actions, in which the purchaser or developer of a contaminated property sues a prior owner to recover of costs incurred in developing a site.

C. Concluding Observations on CERCLA Liability

1. Each conservation transaction must be evaluated on case-specific facts. Deciding how much diligence to do, and whether to proceed with a transaction presenting hazardous substance risks requires consideration of:
 - the type of transaction (easement or fee)
 - extent of disclosure by current owner (and willingness to indemnify)
 - history of property
 - adjacent property uses
 - regulatory status of property and adjacent properties
 - extent of information available
 - nature of the contamination (soil? groundwater? metals? volatiles?)
 - potential exposure pathways
 - planned use of property during easement/ownership
 - land trust policies and resources
 - potential for frustration of conservation purposes
 - potential adverse publicity
2. Because current fee owners face greater potential for CERCLA liability, and because the BFPP defense is available for them, there is a more compelling reason to conduct AAI in fee transactions than in typical easement transactions. (Owners also need to anticipate the diligence needs of subsequent purchasers.)
3. Even though some federal liability protections are not available to easement holders:
 - a. AAI level diligence can add an extra measure of comfort that environmental issues will be identified before a transaction is finalized.
 - b. Avoidance of the types of conduct that trigger CERCLA liability can minimize potential claims.
 - c. Adherence to continuing obligations principles post-closing may reduce the likelihood of potential claims and mitigate liability.

V. **Tools for Minimizing Environmental Liability**

A. Due Diligence

Conduct a level of due diligence appropriate to the type of transaction (easement, fee), type of property, and anticipated land trust activities on the property (e.g., active management). When preliminary diligence identifies hazardous substance concerns, seek advice of counsel on how to proceed.

B. Insulating the Land Trust

- Creation of the title holding entity
- Selection of the form of entity
 - ✘ Business corporation
 - ✘ Not for profit corporation
 - ✘ Limited liability company

C. Limited Liability Companies

1. Purpose and characteristics

LLCs are an extremely effective vehicle for limiting any liability that a land trust may face. LLC participants are generally free from personal liability for any obligations of the LLC, and LLCs are legal entities fully capable of owning property, making contracts, suing, and being sued. Land trusts can utilize these benefits to hold properties with serious environmental issues separately from the land trusts' other assets.

2. Tax Attributes.

Under IRS Notice 2012-52, Single-Member LLCs that are wholly owned and controlled by U.S. charities are exempt from federal tax obligations and treated as a branch of the charitable organization. Land trusts should explicitly state that the LLC is wholly owned and treated as a disregarded entity

3. Limitations

LLCs can be set up to limit potential environmental liability and owners will not be held personally liable absent choosing to assume the liability or being assigned liability in the LLC agreement. However, LLC owners may be held liable in instances of either "operator liability" or "veil-piercing liability."

a. Operator Liability (Direct Liability)

LLC participants may be found personally liable if they are found to be directly involved in any liability-creating conduct, such as:

- Acting as part of the LLC's management
- Actively participating the LLC's daily operations
- Actively participating in the LLC's environmental affairs

However, involvement limited to general corporate matters of the LLC will not cause liability to attach for environmental violations.

b. Veil-Piercing Liability

When the corporate veil can be pierced, typically pursuant to the standards of the LLC's state of incorporation, derivative liability attaches and the LLC form is disregarded, allowing the participants to be held personally liable.

Examples of reasons to pierce the veil include:

- Failure to maintain LLC formalities
- Inadequate capitalization
- Fraud, illegality, inequitable actions
- Intermingling of LLC and manager funds

D. Negotiation Tips

When possible, require landowner to take care of environmental problems before closing. Make sure that the work is done by contractors hired by owner, and that the land trust does not dictate the "means and methods" of the work.

Consider carving out of the easement discrete areas where hazardous substance impacts are present. (But examine the potential risks of leaving the conditions unmanaged, including potential frustration of conservation purposes on the property covered by the easement.)

E. Drafting Tips

1. Conservation Easement Drafting Guide at pages 372-373, 446-450.

- Ask the owner to make detailed environmental representations and warranties to avoid surprises.
- Take extra care to ensure that management and control of the property and hazardous substances on it remain with the owner. (Include caveat that nothing in the easement gives Holder right to control day-to-day operations or should be construed as to give holder liability under environmental laws).
- Make landowner solely responsible for remediating releases or threatened releases of hazardous substances.
- In typical easements, consider carefully whether to include an affirmative requirement to comply with environmental laws (except in limited contexts as discussed in C.2, below), since this might put a land trust in the uncomfortable position of having to enforce against environmental legal violations, some of which could be of relatively little importance.
- In more specialized transactions, in which there are known or suspected hazardous substance conditions and/or affirmative management rights held by

the land trust, more detailed environmental covenants may be appropriate.

- Avoid becoming directly involved in remediation of hazardous substances, and avoid “self-help” clauses in easement enforcement provisions that give the land trust the right to take direct action, without a court order, to address hazardous substance releases.
 - Require the landowner to provide a strong environmental indemnification clause. Consider first the likelihood of incurring environmental liability, and the possibility the owner will ask for a reciprocal indemnity.
 - As discussed previously, there is a strong basis to argue that indemnification agreements do not defeat the third-party or BFPP defenses, but the issue is unsettled and not without risk.
 - Note that indemnification should not be viewed as a substitute for adequate due diligence. There can be significant costs associated with enforcing indemnity provisions.
 - Resist requests from the landowner for a broad reciprocal environmental indemnity. If the landowner will not do a deal without some form of indemnity, limit the indemnity to narrow categories of claims arising out of the land trust’s specific activities (e.g. monitoring, exercise of affirmative management rights), see Andrew Dana, Ellen Fred, *Drafting Conservation Easements: FAQs*, Rally 2011, LTA Learning Center, and tied to a standard of care (e.g., negligence).
2. William Silberstein, *Law Update, Contamination and Environmental Assessments*, LTA Exchange, Spring 2000 at p. 23.

Tailor easement terms to remove impediments to any necessary remediation. As Bill Silberstein noted in his article, “cleanup procedures to remove hazardous material could actually violate the terms of some easements.” Examples of such easement terms include prohibitions against handling and storage of hazardous materials. Given the difficulty of amending easements, this can pose a potentially serious problem. This issue can be dealt with by drafting provisions that allow flexibility for safe handling of hazardous materials generated in connection permitted construction or remedial activities.

See Sample Provision 6.A, *Conservation Easement Drafting Guide* at p. 350:

It is forbidden to dispose of or store rubbish, garbage, building debris, unserviceable vehicles and equipment or parts thereof, hazardous or other waste, hazardous or toxic substances . . . on the Protected Property, except that . . . waste generated by permitted uses on the Protected Property may be stored temporarily in appropriate containment for removal at reasonable intervals, all in accordance with applicable state, local, and federal and regulations.

Easements containing provisions like this might need to be modified to clarify that environmental response actions taken in response to discovery of hazardous materials on the property are permitted uses.

4. Insurance

- Insurance can be a valuable tool for managing environmental risk, but it is expensive, and there are some limits to its utility. Even though environmental insurance is more cost-competitive in recent years, many land trusts find it can be prohibitively costly compared to their other coverage lines.
- Pollution liability insurance could be written both for conservation easements and fee acquisitions, as a substitute for, or a back stop to, a contractual indemnity, or to cover excess of indemnity. It could cover both the owner and easement holder.
- Typically, coverage for clean-up/remediation costs excludes known conditions. (But coverage for known conditions can be purchased for third party bodily injury and property damage and related legal expenses).
- The exclusion can be removed if a party remediates the site and obtains a no further action letter from regulatory authorities. (Few land trusts would take on this obligation.)
- The coverage would then cover reopener risks and other third party claims.
- For certain coverages (e.g., on-site cleanup), known conditions can be narrowly defined to refer to specific kind of problems (e.g., releases from specified underground tanks).
- In situations like urban parks or recreation areas, where a land trust may face a substantial unfunded loss, pollution liability insurance can be very useful.
- Alliant Insurance Services, which offers (through Chubb) an LTA-endorsed insurance program for land trusts called the Conserv-A-Nation program, also offers pollution liability insurance. Alliant observes that very few land trusts have purchased pollution liability coverage. Conversation with John Muha, Alliant Insurance.
 - Typical deals involve pristine sites. There is little history in the land trust community of land trusts facing claims for hazardous substances liability. The land trust community does not see the need for pollution liability coverage.
 - Premiums are not affordable for most land trusts.
 - Some carriers will very rarely write pollution liability coverage if there is not a full Phase I investigation.
 - If the investigation identifies a significant number of risks, the exclusions are likely to be broadly drafted.
 - Carriers are likely to be reluctant to engage in detailed negotiation of policy terms in conservation transactions because of the perception that they will not be able to charge a premium that justifies the time spent to negotiate coverage terms.

5. Other strategies to minimize hazardous substances liability

- Contract with others to perform any management activities on contaminated land. Negotiate contractual indemnifications.
 - May be difficult to push all risk to a third party contractor (except for liability arising out of the negligence of the contractor).
 - There may be trade-offs between relinquishing control and distancing the liability.
- Distance liability by holding interest in the property only as long as necessary to transfer it to another entity.

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All Appropriate Inquiries Final Rule

WHAT IS “ALL APPROPRIATE INQUIRIES”?

“All appropriate inquiries” is the process of evaluating a property’s environmental conditions and assessing potential liability for any contamination.

WHY IS EPA ESTABLISHING STANDARDS FOR CONDUCTING ALL APPROPRIATE INQUIRIES?

The 2002 Brownfields Amendments to CERCLA require EPA to promulgate regulations establishing standards and practices for conducting all appropriate inquiries.

STAKEHOLDER COLLABORATION

A Negotiated Rulemaking Committee consisting of 25 diverse stakeholders developed the proposed rule. Following publication of the proposed rule, EPA provided for a three month public comment period. EPA received over 400 comments from interested parties. Based upon a review and analysis of issues raised by commenters, EPA developed the final rule.

WHEN IS THE RULE EFFECTIVE?

The final rule is effective on November 1, 2006—one year after being published in the Federal Register. Until November 1, 2006, both the standards and practices included in the final regulation and the current interim standards established by Congress for all appropriate inquiries (ASTM E1527-00) will satisfy the statutory requirements for the conduct of all appropriate inquiries.

WHO IS AFFECTED?

The final All Appropriate Inquiries requirements are applicable to any party who may potentially claim protection from CERCLA liability as an innocent landowner, a bona fide prospective purchaser, or a contiguous property owner. Parties who receive grants under the EPA’s Brownfields Grant program to assess and characterize properties must comply with the All Appropriate Inquiries standards.

WHEN MUST ALL APPROPRIATE INQUIRIES BE CONDUCTED?

All appropriate inquiries must be conducted or updated within one year prior to the date of acquisition of a property. If all appropriate inquiries are conducted more than 180 days prior to the acquisition date, certain aspects of the inquiries must be updated.

WHAT SPECIFIC ACTIVITIES DOES THE RULE REQUIRE?

Many of the inquiry’s activities must be conducted by, or under the supervision or responsible charge of, an individual who qualifies as an environmental professional as defined in the final rule.

The inquiry of the environmental professional must include:

- interviews with past and present owners, operators and occupants;
- reviews of historical sources of information;
- reviews of federal, state, tribal and local government records;
- visual inspections of the facility and adjoining properties;
- commonly known or reasonably ascertainable information; and
- degree of obviousness of the presence or likely presence of contamination at the property and the ability to detect the contamination.

Additional inquiries that must be conducted by or for the prospective landowner or grantee include:

- searches for environmental cleanup liens;
- assessments of any specialized knowledge or experience of the prospective landowner (or grantee);
- an assessment of the relationship of the purchase price to the fair market value of the property, if the property was not contaminated; and
- commonly known or reasonably ascertainable information.

HOW DOES THE FINAL AAI RULE DIFFER FROM THE INTERIM STANDARD?

The final All Appropriate Inquiries rule does not differ significantly from the ASTM E1527-00 standard. The rule includes all the main activities that previously were performed as part of environmental due diligence such as site reconnaissance, records review, interviews, and documentation of recognized environmental conditions. The final rule, however, enhances the inquiries by extending the scope of a few of the environmental due diligence activities. In addition, the final rule requires that significant data gaps or uncertainties be documented.

Under the final All Appropriate Inquiries rule, interviewing the subject property's current owner or occupants is mandatory. The ASTM E1527-00 standard only required that the environmental professional make a reasonable attempt to conduct such interviews. In addition, the final rule includes provisions for interviewing past owners and occupants of the subject property, if necessary to meet the objectives and performance factors. Under the ASTM E1527-00 standard, the environmental professional had to inquire about past uses of the subject property when interviewing the current property owner.

The final rule also requires an interview with an owner of a neighboring property if the subject property is abandoned. The ASTM E1527-00 standard included such interviews at the environmental professional's discretion.

The final rule does not specify who is responsible for performing record searches, including searches for use limitations and environmental cleanup liens. The ASTM E1527-00 standard specified that these record searches are the responsibility of the user and required that the results be reported to the environmental professional.

Unlike the ASTM E1527-00 standard, the final rule requires the examination of tribal and local government records and more extensive documentation of data gaps.

The final rule includes specific documentation requirements if the subject property cannot be visually inspected. The ASTM E1527-00 standard did not include such requirements.

WHO QUALIFIES AS AN ENVIRONMENTAL PROFESSIONAL?

To ensure the quality of all appropriate inquiries, the final rule includes specific educational and experience requirements for an environmental professional.

The final rule defines an environmental professional as someone who possesses sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding conditions indicative of releases or threatened releases on, at, in, or to a property, sufficient to meet the objectives and performance factors of the rule, and has: (1) a state or tribal issued certification or license and three years of relevant full-time work experience; **or** (2) a Baccalaureate degree or higher in science or engineering and five years of relevant full-time work experience; **or** (3) ten years of relevant full-time work experience.

For more information on the environmental professional definition, please see EPA's Fact Sheet on the Definition of an Environmental Professional.

WILL THERE BE AN UPDATED ASTM PHASE I SITE ASSESSMENT STANDARD?

Yes. ASTM International updated its E1527-00 standard, "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process." EPA establishes that the revised ASTM E1527-05 standard is consistent with the requirements of the final rule for all appropriate inquiries and may be used to comply with the provisions of the rule.

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Also, please see the U.S. EPA's web site at www.epa.gov/brownfields for additional information.

IS THERE A REQUIRED FORMAT FOR REPORTING RESULTS OF ALL APPROPRIATE INQUIRIES?

The final rule requires no specific format, length, or structure of the written report. However, EPA offers the following suggestions regarding the potential content of a written report. The following suggestions generally are consistent with recommendations published in ASTM E1527-05, *Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process*. The ASTM E 1527-05 standard is consistent with the requirements of the final rule and may be used to comply with the provisions of the rule. The following are suggestions regarding format and content of an all appropriate inquiries written report. Please note that the suggestions below do not represent regulatory requirements. Prospective landowners and environmental professionals may design their own format for a written report, as long as the report contains the four documentation requirements listed above (and as noted below).

- **Introduction.** An introduction could include descriptions of: the purpose and objectives of the assessment; scope of services provided; methodology used to complete the inquiry; any significant assumptions made; limitations and exceptions; any modifications or deviations from the final rule requirements or from the ASTM E 1527-05 process; special terms and conditions; and information obtained from the landowner or user. The environmental professional and the person(s) who conducted the site reconnaissance and interviews may be identified.
- **Site Description.** This section may describe the property location; site and vicinity characteristics; structures, roads, site improvements, and utilities; current and historic use(s) of the property; site topography, geology, and surface/ground water resources; and current and historic use(s) of adjacent properties.
- **User-Provided Information.** The report may describe any information provided by the prospective landowner, or user, to the environmental professional. This information may include: title records; information of recorded environmental cleanup liens; recorded activity and use limitations (e.g., engineering controls, land use restrictions, institutional controls); specialized knowledge or experience held by the user related to the property or nearby properties; commonly known or reasonably ascertainable information; and relationship of the purchase price to the fair market value of the property, if it were not contaminated.
- **Records Review.** The written report may include a section that summarizes the information found during the records review. This section may describe records that were reviewed to complete the inquiry including: physical setting sources (e.g., topographic maps); historical use sources (e.g., aerial photographs, fire insurance maps, street directories, newspaper archives); federal, state, tribal, and local records or databases of government records; and other environmental record sources (e.g., prior investigation reports, tank/transformer inventories, spill records, permits, etc.).
- **Site Reconnaissance.** The written report may include a section dedicated to describing the methodology used to conduct the visual inspection of the subject and adjoining properties. The description may include: when and who performed the reconnaissance; physical imitations (e.g., snow-covered ground, limited access, safety concerns, etc.); general site setting; exterior observations; and interior observations. Additional information on evidence of staining, spills, odors, stressed vegetation, corrosion, pools of liquids, discolored water, ground surface alterations, and other conditions that might suggest a release or threatened release of hazardous substances also may be provided.
- **Interviews.** A summary of the interviews conducted could include a description of when and with whom the interviews were conducted (e.g., current property owner and occupants, site manager, attorneys, financial manager, local/state/federal government officials, past site owners and

occupants) and the method used to conduct the interviews (*e.g.*, in person, written, telephone). If property is abandoned, this section may describe which neighboring property owners were interviewed and if applicable, which past owners and occupants were interviewed.

- **Findings.** A findings section could describe the results of the assessment including the identified known or suspected recognized environmental conditions, historical recognized environmental conditions, and de minimis conditions. This section also may include findings related to, but not limited to: current and historic site usage; adjoining and nearby properties; hazardous substances and petroleum products; non-hazardous, solid, and hazardous waste management; water pollution; pits, ponds, and lagoons; drains and sumps; waste water; wells; septic systems; spills or releases; air emissions; storage tanks and drums; soil and groundwater contamination, polychlorinated biphenyls (PCB) contaminants, or other contaminants.
- **Opinion of the Environmental Professional.** In compliance with the all appropriate inquiries final rule at §312.21(c)(1), the written report **must include** the environmental professional’s opinion(s) as to whether the inquiry identified conditions indicative of releases or threatened releases of hazardous substances on, at, in, or to the subject property. The opinion likely will be based on conditions identified during the inquiries (and potentially noted in a findings section), and include a discussion of the logic, reasoning, and rationale used by the environmental professional in developing the opinion. The environmental professional also **must include in the final report an opinion regarding additional appropriate investigation to detect the presence of contamination at the property, if the environmental professional has such an opinion.**
- **Data Gaps.** **As required** in §312.21(c)(2) of the final rule, the report should document and discuss significant data gaps that affect the ability of the environmental professional to identify conditions indicative of releases or threatened releases.
- **Conclusions.** A conclusions section may be included that summarizes all identified conditions indicative of releases or threatened releases of hazardous substances (or recognized environmental conditions) connected with the property. The final rule does not require that any specific statements be made regarding these conditions, however, ASTM E 1527-05 requires that the report include one of the following written statements:
 - “We have performed a Phase I Environmental Site Assessment in conformance with the scope and limitations of ASTM Practice E 1527 of [insert address or legal description], the property. Any exceptions to, or deletions from, this practice are described in Section [] of this report. This assessment has revealed no evidence of recognized environmental conditions in connection with the property,” or
 - “We have performed a Phase I Environmental Site Assessment in conformance with the scope and limitations of ASTM Practice E 1527 of [insert address or legal description], the property. Any exceptions to, or deletions from, this practice are described in Section [] of this report. This assessment has revealed no evidence of recognized environmental conditions in connection with the property except for the following: (list).”
- **Additional Services.** If applicable, it may be useful to include a description of any additional services performed as part of the assessment that are beyond the scope of the final rule, and were contracted for between the user and the environmental professional. Additional services could include, but are not limited to: non-scope considerations (*e.g.*, lead-based paint, mold, radon, asbestos, regulatory compliance assessment, indoor air quality, etc.); broader scope of assessment; liability or risk evaluations; Phase II sampling and analysis; health and safety; evaluation of remediation techniques; etc.
- **References.** A reference section may be included that lists the published sources relied upon to complete the assessment.

- ***Signature(s) and Qualifications of the Environmental Professional(s).*** Include the statements and environmental professional(s) signature required by §312.21(d), as discussed above in “*What are the Documentation Requirements for All Appropriate Inquiries?*”
- ***Appendices.*** Appendices could include: regulatory records documentation; environmental database report; site map/plan; vicinity maps; site photographs; historical source documentation (building department records, local street records, chain of title documents, property tax records, zoning/land use records, aerial photos, fire insurance maps, USGS topographical maps); interview documentation; and qualifications of the environmental professional(s).

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***Brownfields Fact Sheet
AAI: Reporting Requirements and
Suggestions on Report Content***

***Solid Waste
and Emergency
Response (5105)***

***EPA 560-F-06-244
November 2006
www.epa.gov/brownfields***



Assessing Contractor Capabilities for Streamlined Site Investigations -- Additional Information Regarding All Appropriate Inquiries and Hiring an Environmental Professional

The Environmental Protection Agency prepared the document “*Assessing Contractor Capabilities for Streamlined Site Investigations*” (EPA 542-R-00-001, January 2000) to assist Brownfields grantees and other decision makers as they assess the capabilities of contractors and consultants to determine their qualifications to provide streamlined and innovative strategies for the assessment and cleanup of brownfields. A key decision faced by brownfields grantees and site managers who are implementing streamlined and innovative assessment and cleanup activities at brownfields sites is hiring the best environmental consultants and professionals to undertake these activities. Many vendors can provide these services. It is important for decision makers to understand the vendors’ capabilities to offer these services and their qualifications to apply required methods and technologies in an efficient, valid, and streamlined manner.

The 2002 Brownfields Amendments to the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) require EPA to promulgate regulations establishing standards and practices for conducting “all appropriate inquiries.” All appropriate inquiries is the process of evaluating a property’s environmental conditions and assessing potential liability under CERCLA for any contamination. EPA published the final All Appropriate Inquiries rule on November 1, 2005 (70 FR 66070). The final rule is effective on November 1, 2006.

The final All Appropriate Inquiries requirements are applicable to any party who may potentially claim protection from CERCLA liability as an innocent landowner, a bona fide prospective purchaser, or a contiguous property owner. Parties who receive grants under the EPA’s Brownfields Grant program to assess and characterize properties also must comply with the all appropriate inquiries standards when using grant funds to assess or characterize brownfields. To ensure the quality of all appropriate inquiries, or Phase I environmental site assessment, the final rule includes specific educational and experience requirements for an environmental professional. The final rule requires that the person who oversees the conduct of the all appropriate inquiries and who signs the written report must meet the definition of an environmental professional provided in §312.10 of the final rule.

Users of EPA’s “*Assessing Contractor Capabilities for Streamlined Site Investigations*” document therefore should be aware that, as a result of the All Appropriate Inquires rule, vendors performing all appropriate inquiries for property owners who want to qualify for protection from CERCLA liability or who are performing assessments of brownfields funded by EPA’s Brownfields Grant program must include personnel who meet the definition of an environmental professional.

WHO QUALIFIES AS AN ENVIRONMENTAL PROFESSIONAL FOR THE PURPOSE OF ALL APPROPRIATE INQUIRIES?

The final rule defines an environmental professional as someone who possesses sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding conditions indicative of releases or threatened releases of hazardous substances on, at, in, or to a property, sufficient to meet the objectives and performance factors of the rule.

In addition, an environmental professional must:

- Hold a current Professional Engineer’s (P.E.) or Professional Geologist’s (P.G.) license or registration from a state, tribe, or U.S. territory (or the Commonwealth of Puerto Rico) and have the equivalent of three (3) years of relevant full-time experience; **or**

- Be licensed or certified by the federal government, a state, tribe, or U.S. territory (or the Commonwealth of Puerto Rico) to perform environmental inquiries and have the equivalent of three (3) years of relevant full-time experience; **or**
- Have a Baccalaureate or higher degree from an accredited institution of higher education in a discipline of engineering or science and the equivalent of five (5) years of relevant full-time experience; **or**
- Have the equivalent of ten (10) years of relevant full-time experience.

Individuals who do not meet the above requirements may still participate in the conduct of all appropriate inquiries. However, they must work under the supervision or responsible charge of an individual who does meet the requirements for an environmental professional.

WHAT IS THE DEFINITION OF RELEVANT EXPERIENCE?

For the purposes of qualifying as an environmental professional under the final rule for all appropriate inquiries, “relevant experience” is defined as:

“Participation in the performance of environmental site assessments that may include environmental analyses, investigations, and remediation which involve the understanding of surface and subsurface environmental conditions and the processes used to evaluate these conditions and for which professional judgment was used to develop opinions regarding conditions indicative of releases of hazardous substances.”

WHAT TO LOOK FOR WHEN HIRING AN ENVIRONMENTAL PROFESSIONAL TO PERFORM ALL APPROPRIATE INQUIRIES?

As Brownfields decision makers and grantees evaluate the capabilities of environmental professionals whom they may hire to perform all appropriate inquiries, the following qualifications should be considered:

- Does the individual who will supervise the environmental assessment, or all appropriate inquiries, meet the minimum qualifications of an Environmental Professional, as defined above and in the final rule at §312.10?
- Does the vendor have experience in performing Phase I and Phase II environmental site assessment activities, including: interviewing owners, operators and occupants; reviewing historical sources of information and federal, state, tribal and local government records; performing visual inspections; conducting multi-media sampling and analysis; interpreting geologic, hydrologic, and chemical data; and preparing site assessment reports?
- Can the vendor demonstrate experience within the industry associated with the property being assessed (*e.g.*, aerospace and defense, chemicals, electronics, energy, manufacturing, metals/mining, petroleum, pharmaceuticals, real estate, telecommunications, transportation, etc.)?
- Is the vendor knowledgeable of federal, state, tribal, and local environmental laws and policies, particularly those related to the industry with which the property being assessed is associated?

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