MEMORANDUM

SUBJECT: Transmittal of the Revised Model Comfort Letter Clarifying NPL Listing, Uncontaminated Parcel Determinations, and CERCLA Liability Involving Transfers of Federally Owned Property

FROM: Elliott P. Laws
Assistant Administrator

TO: Director, Waste Management Division
Regions I, IV, V, VII

Director, Emergency and Remedial Response Division
Region II

Director, Hazardous Waste Management Division
Regions III, VI, VIII, IX

Director, Hazardous Waste Division
Region X

Regional Counsel, Office of Regional Counsel
Regions I – X

This memorandum transmits EPA's revised model comfort letter which addresses various issues concerning perceived National Priorities List (NPL) stigma and Superfund liability. The revised model comfort letter supersedes the August 9, 1995 model comfort letter, and is in response to comments received on that model. Specifically, in the NPL site context, the revision further clarifies that property that is not contaminated means property where no releases have occurred.

The revised model comfort letter is intended to be another tool that the Agency can use to address the often unwarranted stigma of NPL listing of closing military bases. As with the August 9, 1995 model, the revised model clarifies some common misunderstandings about NPL listing and CERCLA liability, and highlights certain provisions concerning the transfer of federally owned property. The revised model maintains the August 9, 1995 model clarification that EPA's CERCLA section 120(h)(3) determination that a remedy is operating properly and successfully, and concurrence on uncontaminated parcel identifications under CERCLA section 120(h)(4), do not affect NPL status, because such actions do not constitute Agency rulemaking.

As discussed in the revised model, property that has not been contaminated (i.e., no releases), unlike property where a response has been completed, can be characterized as never having been part of the NPL site.

The Regions are encouraged to utilize this model as part of the Agency's efforts to promote the reuse of closing military installations. In addition, the NPL listing and liability portions of the model can also be used for non-federal sites.

If you have any questions or comments regarding the attached model comfort letter, please have your staff contact Seth Thomas Low at (202) 260-8692 or Patricia Gowland at (703) 603-8721.

Attachments

cc: Sherri Goodman, DoD
Patricia Rivers, DoD
Steve Rogers, DOJ
Tim Fields, OSWER
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Superfund Branch Chiefs (Regions I - X)
Regional Counsel Branch Chiefs (Regions I - X)

[Revised January 1996]

Model Comfort Letter Clarifying NPL Listing, Uncontaminated Parcel Identifications, and CERCLA Liability Issues Involving Transfers of Federally Owned Property

[insert name and address]

Dear [insert name],

The U.S. Environmental Protection Agency (EPA) recognizes that some potential buyers and redevelopers may be concerned about purchasing and redeveloping property at a military installation part or all of which has been placed on EPA's National Priorities List (NPL) pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). EPA believes that the best way to respond to buyers' and redevelopers' concerns is to address some common misunderstandings about NPL listing and CERCLA liability, and highlight certain provisions about the transfer of federally owned property. Importantly, as is discussed below, whether property is part of an NPL site is unrelated to CERCLA liability.

National Priorities List

The purpose of the NPL is to identify releases of hazardous substances or pollutants and contaminants that are priorities for further evaluation. Hence, the NPL is a list of releases. When a site is added to the NPL, through a federal rulemaking process, it is necessary to define the release (or releases) encompassed within the listing. While sites, including Federal facilities, have sometimes been described in the rulemaking process with reference to a geographic area (e.g., Hanscom Air Force Base), sometimes referred to as "fenceline to fenceline", it is only the areas of contamination that are part of the NPL site. The boundaries of the installation are not necessarily the "boundaries" of the NPL site. Rather, the site consists of all contaminated areas within the area used to define the site, and any other location to or from which contamination from that area has come to be located.

It should be noted that where there is adequate information for EPA to determine that only certain portions of a military installation are contaminated by these releases, EPA could list only the contamination from those discrete areas of the installation. However, because of the extensive size of most military installations, the military services generally have not completed their assessment of all releases or potential releases to provide EPA with data sufficient to further define the NPL site. Such data are provided as the installations go through subsequent remedial investigations at later dates.

CERCLA Liability

Whether property is part of an NPL site is unrelated to CERCLA liability. Liability under CERCLA is determined under section 107, which makes no reference to NPL listing. Placing a site on the NPL does not create CERCLA liability where it would not otherwise exist. Rather, liability on the basis of property ownership arises if the property is part of a CERCLA "facility". CERCLA section 101(9) defines the term "facility" to include "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." Hence, the mere fact that a parcel lies within the area

used to describe an NPL site does not impose liability on the owner or subsequent purchaser; liability is based on a release or threatened release of a hazardous substance from a facility.

As for lenders, CERCLA provides that a lender who holds a security interest in contaminated property will not be considered an owner or operator for purposes of CERCLA liability provided the lender does not participate in the management of the facility. See CERCLA section 101(20)(A). Again, the NPL status of the mortgaged property does not impose liability on the lender; liability is based on the actions of the lender in the management of the facility.

Property Transfer, Covenants, and Uncontaminated Parcel Identifications

A Federal agency must comply with the provisions of CERCLA section 120(h)(3) before conveying any real property on which any hazardous substances have been stored for a year or more, known to have been released, or disposed of. Namely, each deed conveying such real property must contain the following:

1) Information regarding the hazardous substances;

2) A covenant that all remedial action necessary to protect human health and the environment with respect to any hazardous substances remaining on the property has been taken before the date of transfer. (A remedial action "has been taken" if the approved remedy has been constructed and has been demonstrated to EPA to be operating "properly and successfully." In other words, a transfer may occur even if the remediation levels specified for the remedy have not been achieved, as for example, in the case of groundwater remediation, the pump and treat system has been shown to be working "properly and successfully"); and,

3) A covenant that additional remedial action found to be necessary after the date of the transfer will be conducted by the United States.

A Federal agency planning to terminate operations on real property which the United States owns -- including military base closures -- must comply with the provisions of CERCLA section 120(h)(4). Specifically, section 120(h)(4)(A) directs a Federal agency to identify parcels of land at the discontinuing installation (e.g., the closing base) where no hazardous substances or petroleum products or their derivatives were stored for one year or more, or are known to have been released, or disposed of. For parcels that are part of a site on the NPL, EPA must concur in the parcel identification. For parcels that are not part of a site on the NPL, the appropriate State official must concur in the parcel identification. A Federal agency seeking to convey real property identified as uncontaminated under section 120(h)(4), must include in the deed conveying such property a covenant that any response action found to be necessary after the date of transfer will be conducted by the United States.

Therefore, a purchaser of real property that was part of a closing base receives from the Federal government a deed covenant that if any further remedial action is found to be necessary after the date of transfer that the United States will conduct such actions. Importantly, CERCLA section 120(h)(3) and (4) requirements apply regardless of whether the real property being conveyed is part of an NPL site.

Additionally, a Federal agency would continue to have obligations under CERCLA section 120(e) (Required Action by Department) and any existing applicable Federal Facility Agreement for conveyed real property that is part of an NPL site.

In conjunction with its obligation to concur on uncontaminated parcel identifications at NPL sites under CERCLA section 120(h)(4), EPA issued on April 19, 1994 a policy entitled, "Military Base Closures: Guidance on EPA Concurrence in the Identification of Uncontaminated Parcels under CERCLA Section 120(h)(4)" (copy enclosed). EPA notes in the policy that there may be instances in which it would be appropriate to concur with the military service that certain parcels can be identified as uncontaminated under CERCLA section 120(h)(4), although some limited quantity of hazardous substances or petroleum products have been stored, released or disposed of on the parcel. The policy reflects EPA's concern to protect human health and the environment and to achieve Congress' goal of expeditiously transferring uncontaminated real property to communities for economic redevelopment.

EPA's CERCLA section 120(h)(3) determination that a remedy is operating properly and successfully, and concurrence on uncontaminated parcel identifications under CERCLA section 120(h)(4), do not affect NPL status, because such actions do not constitute Agency rulemaking, but are, instead, Agency statements based on the facts known to exist at that time. Property that has not been contaminated (i.e., no releases), unlike property where a response has been completed, can be characterized as never having been part of the NPL site.

Leasing of Property

EPA supports the leasing of real property that is not available for immediate deed conveyance as a mechanism for providing expeditious appropriate civilian use of such property. EPA and the Department of Defense (DoD) have entered into a Memorandum of Understanding in which there is an agreement to use the September 9, 1993 "DoD Policy on the Environmental Review Process to Reach a Finding of Suitability to Lease (FOSL)" to ensure that the leasing of property at closing bases does not result in an unacceptable risk to human health or the environment. The procedures laid out in that guidance call for regulatory agency participation in DoD's FOSL conclusions. The procedures apply to all leasing of property at closing bases, regardless of whether the property is part of an NPL site.

Indemnification

Although not part of CERCLA, additional protection is afforded to transferees of base closure property by Section 330 of the National Defense Authorization Act for Fiscal Year 1993, as amended. Section 330 provides indemnification of such transferees for claims arising from the release or threatened release of any hazardous substance, pollutant or contaminant as a result of Department of Defense activities at any military installation (or portion thereof) that is closed pursuant to a base closure law.

EPA's Programs with Mortgage and Banking Associations

In response to expressed concerns, EPA is initiating programs with both Federal agencies and national mortgage and banking associations to address the often unwarranted alleged stigma of NPL listing. We

are emphasizing that the listing only includes those areas that are contaminated. We do not believe that NPL listing should hinder appropriate redevelopment of uncontaminated portions of military installations. In fact, a number of redevelopers have indicated that NPL listing is not a hindrance to such redevelopment, because, as discussed above, the Department of Defense, or other responsible Federal agency, remains responsible for any additional necessary remedial actions should contamination subsequently be found at these sites.

To reiterate, the fact that a parcel lies within the area used to describe an NPL site does not impose liability on the purchaser; liability is based on the presence of contamination.

In conclusion, we believe that the above explanations should help resolve most questions about NPL site listing issues and a purchaser's or redeveloper's potential liability involving the reuse of closing military bases. If you have any questions concerning these issues, please contact [insert name], who can be reached at [insert phone number].

Sincerely,

[insert name and title]

Enclosure

[NOTICE: This document does not represent final agency action, but is intended solely as guidance. It is not intended, nor can it be relied upon, to create any rights enforceable by any party in litigation with the United States. EPA officials may decide to follow the policies discussed in this document, or to act at variance with such policies, based on an analysis of specific site circumstances. The Agency also reserves the right to change this document at any time without public notice.]