Analysis&Perspective

Since the issuance of the Environmental Protection Agency's 1995 policy on prospective purchaser agreements (PPAs), PPAs have become an increasingly important tool in brownfield redevelopment and recycling of superfund sites.

PPAs can narrow the risks posed by these properties because the prospective purchaser can obtain a covenant not to sue and also receive contribution protection. The PPAs can also be used to enhance the marketability of the property by having the covenant not to sue extend to its lenders and any future successors or purchasers of the property.

This article will discuss the changes to the PPA model form announced Oct. 1 by Barry Breen, director of the Office of Site Remediation Enforcement, and review the key issues that should be addressed when negotiating PPAs.

Negotiating Prospective Purchaser Agreements Under EPA's Revised Policy

By Larry Schnapf*

In 1995, the Environmental Protection Agency published its "Guidance on Agreements With Prospective Purchasers of Contaminated Property" as part of its initiative to encourage the reuse of contaminated sites.[1] This policy which replaced the part of the 1989 Landowner Settlement Policy dealing with prospective purchasers[2] established new flexible criteria that EPA could use to evaluate the appropriateness of Prospective Purchaser Agreements (PPAs). Since the issuance of the 1995 policy, PPAs have become an increasingly important tool in brownfield redevelopment and recycling of superfund sites.

Indeed, from the issuance of the old 1989 policy to the publication of the 1995 policy, EPA had only entered into 20 PPAs. Since the adoption of the 1995 policy through October 1999, EPA has entered into 94 PPAs with 29 of those being issued since June 1998.

[1] 60 Fed. Reg. 34,792 (July 3, 1995).

[2] Guidance on Landowner Liability Under Section 107(a) of CERCLA, DeMinimis Settlements Under Section 122(g)(1)(b) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property, 54 Fed. Reg. 34235 (Aug. 18, 1989)

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The Liability Problem

The Comprehensive Environmental Response, Compensation and Liability Act[3] imposes strict and joint liability on four classes of potentially responsible parties (PRPs) for the cleanup and reimbursement of costs associated with releases of hazardous substances. The four classes of PRPs include past and current owners of facilities and vessels (i.e., tanks, equipment, etc.), past and current operators of facilities and vessels, generators of hazardous substances, and transporters of hazardous substances.

CERCLA contains an "innocent purchaser's defense,"[4] but it has not provided much comfort to prospective purchasers or their lenders. To successfully assert the defense, a subsequent owner must establish it did not know and had no reason to know that any hazardous substances were disposed of at the facility. To establish that it had no reason to know of the contamination, a defendant must demonstrate that it took "all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability." However, the statute does not define what constitutes an "appropriate inquiry but leaves that determination to the courts."

In determining whether there was an "appropriate inquiry," CERCLA requires that any specialized knowledge or experience of the innocent owner must be taken into account as well as the relationship of the purchase price to the contaminated property and whether the presence of contamination was obvious or could be detected by an appropriate site inspection.

[3] 42 U.S.C. 9601 et seq.

[4] 42 U.S.C. 9601(35)(A)

This defense will not be available to most prospective owners of brownfield sites since a brownfield's prior industrial use will probably be enough to suggest to a court that a prospective owner "should have known" of a site's potential contamination. Moreover, lenders usually require environmental site assessments (ESAs) before they will finance a transaction. If the ESA uncovers contamination, a prospective owner will be precluded from subsequently raising the defense. Even if an ESA fails to disclose contamination, the prospective purchaser will probably not be able to assert the innocent landowners for contamination that is discovered after the property is contaminated because courts place the burden of proof on the prospective landowners.

Since the vast majority of cases have held that prospective purchasers who have not discovered contamination failed to conduct an appropriate inquiry, the defense has been largely illusory.[5]

CERCLA also contains a third-party defense.[6] This has generally been unavailable to purchasers or occupiers of property or anyone in the chain of title because of the requirement that the person asserting the defense cannot be in contractual relationship with the third party (usually a prior landowner or tenant) who caused the release. CERCLA defines a "contractual relationship" to include "land contracts, deeds or other instruments transferring title or possession."[7] The majority of courts have broadly construed the meaning of this term so that it encompasses nearly every contractual arrangement between potential defendants. Under this interpretation, a landowner could only invoke the defense if the release was a result of acts of trespassers, or adjacent landowners, and then only if the landowner exercised due care.

Assuming that a prospective purchaser or tenant could overcome the "contractual relationship" hurdle, it would still have to establish that it satisfied the third prong of the test to exercise due care in dealing with the hazardous substances, and the fourth prong which requires taking precautions against the foreseeable actions of omissions of third parties. These elements can be particularly problematic for properties where institutional controls have been implemented. If an institutional control such as an impervious cap is constructed on a property to prevent exposure to contaminated soils, a subsequent purchaser or lessor will probably be required to ensure that the institutional controls are properly maintained to be able to assert the third party defense even where the seller or lessor contractually agrees to maintain the institutional controls. This is because the failure of a seller or lessor to properly maintain the institutional controls may be construed as a foreseeable omission. Moreover, if the subsequent property owner or lessee fails to monitor the condition of the controls or fails to maintain the controls in the event the seller or lessor fails to do so, this omission could constitute failing to exercise due care regarding the contaminants at the site. [8]

[5] See Schnapf, *Environmental Liability: Managing Environmental Risks in Corporate/Real Estate Transactions and Brownfield Redevelopment*, § 10.07 (Lexis Law Publishing 1999).

[6] 42 U.S.C. 9607(b)(3).

[7] 42 U.S.C. 9601(35)(A).

[8] See Schnapf, *Practical Considerations for Using Institutional Controls and Engineering Controls in Brownfield Redevelopment Projects*, 13 TXLR 856.

According to a study by the Government Accounting Office,[9] one of the primary obstacles to redeveloping brownfields sites has been the fear of prospective purchasers and their lenders that they will become responsible under CERCLA for remediating pre-existing contamination or become embroiled in CERCLA litigation filed by other responsible parties seeking recovery of cleanup costs. The process of identifying and remediating sites contaminated with hazardous substances can be a long and arduous process. Often times, the ultimate cleanup costs for a site may not become known until well after the remediation process has begun. Faced with this uncertainty, developers have been wary to purchase contaminated properties out of fear that they will become responsible for remediating past contamination.

Fear over liability, concern over reduced collateral values, and the effect that a cleanup will have on the ability of borrowers to repay their loans have also made lenders reluctant to provide financing to redevelop these sites. Moreover, many corporations that own inactive industrial sites associated with discontinued operations have warehoused these properties instead of placing them on the market. These companies have felt it is better to incur passive holding costs rather than taking the risk that contamination would be discovered during the pre-acquisition environment due diligence process which would draw attention to the sites and expose the owners to cleanup liability.

Criteria Under the 1995 PPA Policy

The 1995 policy expanded the circumstances in which EPA could consider entering into PPAs. Following is a review of the factors EPA will evaluate when determining if a PPA is appropriate for a particular site:

EPA Action. The 1989 policy limited PPAs to sites where enforcement action had been anticipated. The purpose was to make sure EPA did not become unnecessarily involved in private real estate transactions and to use its limited resources for negotiating agreements in situations where the public would likely receive a substantial benefit. Under the 1995 policy, EPA may now consider entering into PPAs for sites that are listed or proposed to be listed on the National Priorities List (NPL)[10] as well as sites where the EPA has taken or is planning on taking response actions.

According to a 1998 study performed by the EPA Office of Site Remediation Enforcement (OSRE), approximately 60 percent of all of the PPAs reviewed in the OSRE survey involved NPL sites. Thirty-seven percent of the sites covered by PPAs were in the site assessment or investigation stage while 63 percent either had the cleanup design completed, had cleanup activity initiated, or had cleanup actions completed when the PPA was finalized.

Sites that have been given a No Further Response Action Planned (NFRAP) desingation or have been removed from the CERCLIS will rarely be deemed to be appropriate for PPAs. [11] However, in extremely unusual

[9] Superfund Barriers to Brownfield Redevelopment (GAO/RCED-96-125 (June 1996)).

[10] The NPL is the list of the nation's most seriously contaminated sites. The NPL contains approximately 1200 sites and is published as an appendix to the National Contingency Plan, 40 C.F.R. 300.

[11] 60 Fed. Reg. at 34,794. The CERCLIS is a compilation of sites that are suspected of having releases. Many sites were

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circumstances, EPA may consider PPAs at such sites if it will be in the public interest and the PPA is essential to achieve a very significant public benefit.

If EPA receives a request to consider entering into a PPA at sites where no federal response actions have yet to be taken, the policy instructs the regional offices to consider whether there is a realistic possibility that the prospective purchaser may incur superfund liability.[12] The policy states that EPA will generally decline to enter into a PPA for sites currently undergoing cleanup under a state program since a federal response at the site would be extremely unlikely. If the regional office determines there is a realistic possibility of superfund liability, it must then determine if the potential superfund liability is a barrier to productive use, reuse, or redevelopment of the site and that a covenant not to sue is essential to remove this liability barrier. In making such a determination, the policy suggests that regional offices should consider the following factors:

- Whether there is information available from existing databases or from environmental site assessments furnished by the prospective purchaser indicating that there is a release or threatened release at the site and that there is a substantial likelihood of a federal response or enforcement action; and

- Whether there are other mechanisms such as an indemnity agreement or insurance that will sufficiently alleviate the threat of superfund liability without having to resort to a PPA.

Receipt of Substantial Benefit. PPAs may be used only where EPA will receive a substantial benefit either in the form of a direct benefit for cleanup, or an indirect public benefit in combination with a reduced direct benefit.

The most important factor leading to the dramatic increase in PPAs has been the change in the definition of the "substantial benefit" that EPA is required to receive as consideration for entering into a PPA. The 1989 policy mandated that the substantial benefit had to be either in the form of a commitment by the prospective purchaser to perform a response action or to reimburse EPA for its response costs. The 1995 policy still requires EPA to obtain adequate consideration for entering into PPAs. However, the policy allows EPA to consider a broader range of consideration than the old policy. Now, EPA may enter into PPAs when there will be substantial indirect benefits to a community so long as there is still some direct benefit to the agency. Examples of indirect benefits identified by the policy include measures that serve to substantially reduce the risk posed by a site, creation or retention of jobs, development of abandoned or blighted property, creation of conservation or recreation areas or enhancement of other community services such as transportation centers.[13]

When determining the adequacy of consideration, the policy requires the regional offices to evaluate a number of factors. They include the following:

- The estimated amount of past and future response costs expected to be incurred at the site;

- The existence of other PRPs who can perform the work or reimburse EPA;

- The likelihood that there will be a shortfall in recovery of response costs;

- Compare the purchase price against the market value of the property to determine if the purchaser is paying a reduced price;

- The likelihood of any increased value of the property attributable to the cleanup;

- Value of any liens that EPA has levied against the property;

- The size and nature of the prospective purchaser (e.g. large corporation, small business or non-profit);

- Determine if the prospective purchaser is likely to gain a "windfall" profit and whether it is appropriate to recoup unrecovered response costs from the profit.

The OSRE survey revealed the kind of reduced benefits EPA has been willing to accept in exchange for substantial indirect community benefits. At 76 percent of the PPA sites, EPA was reimbursed for its past costs but received payment of future costs at only 11 percent of the sites. Funding to support maintenance of institutional controls was the EPA direct benefit at 22 percent while 4 percent of the sites involved funds equal to the purchase price of the property.

As far as cleanups were concerned, response actions were performed at 36 percent of the sites while the prospective purchasers had to agree to provide access to the property at 66 percent of the sites. 18 percent of the PPAs required the purchaser to maintain institutional controls. Soil cleanups have occurred at 33 percent of these sites and groundwater remediation had taken place at 58 percent of the sites. Institutional controls were in place at 41 percent of the sites while 22 percent of the PPA sites had post-cleanup operation and maintenance activities.

Of the indirect benefits provided to communities, the OSRE survey indicated that 67 percent of the sites had some component of economic redevelopment, 61 percent resulted in job creation, 60 percent resulted in increased taxes and 19 percent had provisions for infrastructure improvement. 15 percent of the PPAs provided for the creation or restoration of green spaces. A number of PPAs have also been entered into by government agencies and non-profit organizations for purposes of creating or revitalizing public purpose facilities.

Effect on Existing Contamination. The policy requires EPA to review available information to determine if continued operations or new activities will contribute or aggravate existing contamination or interfere with an ongoing EPA remedy such as a soil vapor extraction system that includes an institutional control prohibiting soil excavation. If the prospective purchaser plans to undertake new operations, it must provide sufficient information to EPA so the agency can determine if the planned activities will worsen existing conditions or cause new contamination. If there are existing institutional controls on the property or the planned activities

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placed on the CERCLIS years ago when they were suspected of having contamination and remained on the list even when site investigations did not reveal significant contamination. However, the presence of a property on the CERCLIS has often scared away developers and lenders who were concerned that the site could be subject to a cleanup in the future. As a result, the EPA has "archived" or removed approximately 25,000 sites from the CERCLIS.

[12] 60 Fed. Reg. at 34,793.

[13] 60 Fed. Reg. at 34,794

could disturb a remedy or contaminants in a portion of the site, the PPA may include use restrictions.

The policy requires EPA to determine if there is sufficient information to evaluate the impact of the continued or new operations at the site. The policy indicated that a key factor for determining if there is sufficient site information is whether a remedial investigation or other site investigation has been performed. If a regional office determines there is insufficient information, it may not enter into a PPA. [14]

Likelihood of Health Risks. The policy requires that a PPA be used only at sites where continued operation or new development will not pose health risks to the community and those persons likely to be present at the site. The policy reaffirms EPA's commitment to environmental justice and indicates that regional offices should weigh the benefits of job creation in inner cities against the possibility of further degradation of industrial properties in mixed residential/industrial areas. Thus, EPA will evaluate the environmental implications of the proposed activity on the surrounding community and persons who are likely to be at the site.[15] Proper maintenance and enforcement of institutional controls can be an important factor in assuring that residents and workers are not exposed to unacceptable levels of contaminants.

Financial Viability. The policy requires the prospective purchaser to demonstrate it has the financial resources to perform its obligations under the PPA. In appropriate circumstances, EPA may structure required payments or work to be performed in a way that avoids or minimizes undue financial burdens on the prospective purchaser.

Negotiating the PPA

EPA published a model form PPA with the 1995 policy that was amended in October. Like any model form, the PPA model needs to be tailored to meet the needs of a particular transaction. Following are some of the key provisions that prospective purchasers should review carefully.

■ **Definition of Existing Contamination (Paragraph 2).** This standard definition has been limited to hazardous substances, pollutants or contamination existing at or below the site. EPA recently amended the PPA to allow for an alternative definition when the purchaser will be acquiring a parcel of land that is less than the entire site. Under this alternative definition, the word "property" is substituted for "site." In addition, the term "Existing Contamination" has been expanded to include hazardous substances, pollutants or contamination that has migrated from the property prior to the effective date of the agreement and any such contaminants that migrate onto, under or from the property after the effective date of the agreement.

The purpose behind this change is to clarify that the prospective purchaser may only be responsible for the contamination associated with the parcel that is being purchased. By expanding the definition of "Existing Contamination" to include contamination that migrates from the property, the purchaser (who is identified as the "Settling Respondent" in the model PPA) is also accepting responsibility for contaminants that have migrated beyond the parcel it purchased even though it did not cause or contribute to the problem. If the purchaser is agreeing to perform a site investigation as part of the PPA, it could be significantly expanding the scope of the investigation particularly if contaminated groundwater is moving off the parcel. Of course, the offsetting advantage is that the covenant not to sue would apply to all of those contaminants identified as "Existing Contamination."

Expanding the definition of "Existing Contamination" to include contamination that migrates from the property, requires the purchaser to accept responsibility for contaminants that have migrated beyond the parcel it purchased even though it did not cause or contribute to the problem.

Some agreements entered under state voluntary cleanup programs limit the definition of existing contamination to the contamination that is known to exist at the time. If a site has undergone an remedial investigation or further response actions, the Settling Respondent could consider having the PPA definition of Existing Contamination limited to the contamination identified in the Record of Decision or other reports generated for the site.

In addition, some states will relieve prospective purchasers from responsibility for remediating existing groundwater plumes that are migrating from a site provided the purchaser remove the source of the contamination, monitor the groundwater and/or agree to impose institutional controls on the property.

■ **Payment (Paragraph 11).** This section memorializes the consideration for the covenant not to sue, contribution protection, removal of any liens, and manner of payment. Some PPAs require the payment of one sum of money either upon the execution date of the agreement or a specified period of days following the effective date of the PPA. Others may allow for a schedule of payments particularly where the site is to be redeveloped, or may even provide for payment to EPA out of the proceeds of the sale of the property. It is also in this section where any recitation of public benefits would be set forth.

■ **Work To Be Performed (unnumbered paragraph).** In this section, the PPA will specify the particular response actions that the Settling Respondent has agreed to perform. The actions could range from investigation, remediation as well as maintenance of institutional controls or engineering controls (e.g., impermeable caps). Usually, the particular tasks and the schedule for implementing those tasks will be described in a scope of work (SOW). The SOW will be referenced in this section and will be attached as an exhibit to the PPA. It is also advisable that the Settling Respondent request that dispute resolution procedures be established in this section to address how disagreements over the adequacy of remedial activities or reports will be addressed.

[14] 60 Fed. Reg. at 34,795
[15] Id.

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■ **Right of Access/Successors (Paragraphs 13-15).** Paragraph 13 grants to EPA an irrevocably right of access to the site and any other property controlled by the "Settling Respondent") when such access is required for the implementation of response actions and for the purpose of performing and overseeing response actions taken under federal and state law. This right of access appears to be broader than the right of inspection that EPA has under various environmental statutes and allows EPA to enter the property when it may be first required to obtain a search warrant. The only restrictions are that EPA provide reasonable notice and that access occur at reasonable times. Counsel for prospective purchasers may try to have this paragraph modified to require EPA to use its best efforts to minimize interference with the businesses located at the site. In addition, if the site cleanup has been completed and only post-remediation groundwater monitoring is required to be performed or maintenance of institutional controls, the access should be limited to those specific purposes.

Paragraph 14 requires the owner of any property to prepare and submit to EPA a notice within 15 days of the effective date of the PPA or the purchase date of the property (whichever is later) that will be filed with local land records office. The notice is designed to inform successors in title that the property is part of the overall site and to provide information on the remedy. The notice must be filed with the appropriate local recorder's office within ten days of approval by EPA. The language of this section will be different if a remedial action has not yet been selected for the site. Like any other deed notice, the PPA should have language specifying the actions that must be taken in order to have the notice removed from the land records. The owner may even want to negotiate a form letter that could be filed with the local recorder's office to have the notice removed. The time period for filing the notices has varied in the PPAs and has been as long as 60 days.

The purchaser should try to modify the agreement to provide that it only needs to take reasonable measures to assure compliance and that any failure of the successors or assigns to comply that is beyond the purchaser's control will not deny the purchaser the benefits of the agreement.

Under paragraph 15, the Settling Respondent is required to provide a copy of the PPA to any successors, lessees or sublessees to provide access to EPA, and also agrees to ensure that such successors, lessees or sublessees provide access to EPA and cooperate with the implementation of the response action including maintenance of any institutional controls. Thus, the owner must ensure that any instruments conveying title or transferring right of possession to another party contain covenants where the successor, lessee or sublessor affirmatively agree to abide by the terms of the PPA. The Settling Respondent should try to have this paragraph changed to provide that it only needs to take reasonable measures to assure compliance and that any failure of the successors or assigns to comply with this paragraph that is beyond the control of the Settling Respondent should not deny it of the benefits of the agreement. The Settling Respondent could also try to extend this modification to lessees or sublessees but it may be difficult to obtain since the Settling Respondent would still have control of its tenants through its lease.

■ **Due Care/Cooperation (Paragraph 16).** This paragraph provides that the prospective owner acknowledges that the response actions required to be implemented may interfere with the use of the site, may require closure of a portion of the site or operations at the site, agrees to cooperate with EPA in the implementation of response actions and pledges not to interfere with any such response actions. This emphasizes the importance of having a pre-approved remedial plan before entering into the PPA. If institutional controls are going to be required as part of the remedial plan, the developer needs to know the nature of those restrictions so that it can modify its development plans, if necessary. The Settling Respondent may also want to add language clarifying that its duty of due care is limited to the Existing Contamination.

■ **Certification (Paragraph 17).** In this paragraph, the Settling Respondent certifies that to its best knowledge and belief, it has fully and accurately disclosed all known information and all information in the possession or control of its officers, directors, employees, contractors and agents which relates to the existing contamination or any other past or future releases. The Settling Respondent should try to have a definition of "best knowledge" added to the agreement and limit the certification to the Existing Contamination. It may also try to replace "known information" with "material information" and also try to exclude information that is already in the possession of the regional office.

■ **Covenant Not to Sue (Paragraph 18).** This is perhaps the most important provision of the PPA. In this paragraph, the United States covenants not to sue or take any civil or administrative action for any and all civil liability, for injunctive relief, or reimbursement of response costs pursuant to 107 and section 106, and possibly also state law where the state is a party to the agreement for the Existing Contamination. This is an improvement over the earlier PPAs which did not address injunctive relief under CERCLA section 106. The covenant should be expanded to include injunctive actions that the EPA may take under § 7003 of RCRA.[16] The Settling Respondent should try to have the covenant apply to off-site migration of Existing Contamination as well as any response costs that the EPA has agreed not to recoup and natural resource damages.

It is important to note that under this paragraph, the covenant not to sue does not become effective until the prospective purchaser tenders its consideration which may be either in the form of cash or completion of the remedial work as well as the recording of any institutional controls. This means that prospective purchasers who agree to perform a remediation will not receive protection until the work is completed. As a consequence, prospective purchasers should try to get pre-

[16] 42 U.S.C. 6973. EPA's authority is arguably much broader under section 7003 because this section covers not only releases of hazardous wastes but also solid wastes.

approval of remedial action to expedite the cleanup work.

■ **Reopeners (Paragraph 19).** Like most EPA settlements, the PPA contains a list of circumstances in which the covenant not to sue will not apply. These include claims based on the failure of the Settling Respondent to comply with its obligations under the PPA, liability for past or future releases cause or contributed by the Settling Respondent, its successors, lessees or sublessees; any liability resulting of exacerbation of Existing Contamination by Settling Respondent, its successors, lessees or sublessees; any liability resulting from releases after the effective date of the PPA which do not fall within the definition of Existing Contamination; criminal liability; liability for natural resources damages; and liability for violations of local, state or federal law or regulations. The Settling Respondent should try to build in a cure period for failure to comply with some of the more mechanical obligations (filing notices) under the PPA to prevent the entire agreement from becoming void. The Settling Respondent should also try to eliminate the reopener for past releases since the purpose of the covenant not to sue is to provide liability relief for Existing Contamination as well as natural resources damages.

■ **Parties Bound (Paragraph 25).** Paragraph 25 states that it shall be binding on Settling Respondent and its officers, directors and employees and that the Covenant Not to Sue and Contribution Protection shall apply to the same parties in their capacity as officers, directors and employees and not to the extent their alleged liability arose independently. The list of covered parties can be expanded to include shareholders of the purchaser, the lender of the purchaser as well as lessees at the site to be developed and future purchasers if they are known.

■ **Transfers of Covenants (Paragraphs 26-28).** Paragraph 26 provides that the right, benefits and obligations conferred under the PPA may not be assigned without the approval of the EPA and that EPA has the "sole discretion" to approve the assignment or transfer. Under paragraph 27, the assignor or transferor remains bound by the PPA and the assignee or transferee must consent in writing to be bound by the terms of the PPA. Furthermore, this paragraph provides that the covenant not to sue and the contribution protection will not be effective if EPA consents to the assignment.

To improve the marketability of the property, the PPA should be modified to provide that the EPA only has to be notified in advance of any proposed future conveyance of the property since the assignee or transferee will have to execute an instrument agreeing to abide by the terms of the PPA. This restriction should also be eliminated if the only obligation of the Settling Respondent was to make a payment which has already been made. If the PPA provides for staggered payments, the Settling Respondent should also be allowed to transfer the property without prior consent of EPA so long as it is not in default and the transferee would be financially capable of performing the obligations required by the PPA. EPA might insist in such situations that the transferee also not be otherwise liable under CERCLA for the Existing Contamination. In addition, if the property is going to be leased, the Settling Respondent should add a provision providing that it can lease the premises without having to first obtain approval of EPA. While EPA has agreed to this condition in the past, the PPA has usually provided that the tenant would not be able to take advantage of the protections offered by the PPA until it obtains approval of EPA and agrees to be bound by the PPA. Moreover, the Settling Respondent should seek to modify paragraph 27 so that it will be released from the obligations of the PPA once the transferee is approved but still retain the benefits of the PPA.

Termination (Paragraph 34). This paragraph provides that if any party to the agreement believes the access and notice to successor requirements of paragraphs 13-15 are no longer necessary to ensure compliance with the PPA, the party may request in writing to terminate those obligations though such obligations shall remain in effect until the party requesting the termination receives written notice agreeing to such termination. This paragraph should be more tightly drafted to provide objective criteria for determining when certain obligations are no longer necessary (e.g., groundwater monitoring shows levels of contaminants at certain levels, institutional controls, etc). Moreover, since the obligations are recorded in the land records, a mechanism should be established for removing those notices from the land records and obligating the parties to executing any instruments that are necessary to remove those notices from the land records.

■ **Contribution Protection (Paragraphs 35-37).** This is the other critical protection granted by PPAs. It grants liability relief to prospective purchasers from suits filed by other PRPs for recovery of cleanup costs. However, it does not insulate the Settling Respondent from lawsuits from adjoining property owners alleging property damage or personal injury due to exposure from hazardous substances migrating from the property. The model paragraph 35 limits the contribution protection to matters addressed by the PPA, but the scope of those matters is to be drafted by the regional office to take into account the specific property conditions and work agreed to be performed by the Settling Respondent. Counsel for Settling Respondent should try to have "matters addressed" to include any response actions taken by the EPA or any other person regarding the Existing Contamination, off-site migration of the Existing Contamination, any response costs that EPA has agreed to waive and natural resources damages.

Paragraph 36 obligates the Settling Respondent to provide notice to EPA within 60 days of any suit for contribution brought by the Settling Respondent. Paragraph 37 obligates the Settling Respondent to notify the EPA of any contribution claim brought against it within ten days of service of the complaint. Counsel should try to amend these two paragraphs to provide a period for curing such failure to provide the required notice to make sure that a simple failure to tender such notice does not vitiate the contribution protection provided to the Settling Respondent.

Removal of Liens (Paragraph 40). This paragraph provides that EPA is not required to remove any environmental liens filed against the property to secure reimbursement of response costs incurred by EPA until the prospective purchaser tenders its cash payment or completes the remedial work. Since this lien would have been recorded prior to the security interest of any lender financing the acquisition of the property, the existence of the lien could prove problematic to obtaining financing for the project. The Settling Respondent should try to arrange to have a portion of the sales pro-

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ceeds used to satisfy EPA's lien or request that EPA release its lien in exchange for a binding commitment to reimburse EPA at a specified later date. On some occasions, EPA has agreed to release its lien in exchange for a share of the proceeds from the sale of the property.

The OSRE survey indicated that the average time for negotiating PPAs is nine months. However, many transactions are fast-moving and require much quicker response time for PPAs to bring any value to a transactions. As a result, EPA recently published a model form letter and a checklist of information that the agency will usually require. The checklist is designed to help expedite the processing of PPA review. EPA has also established a PPA tracking system which will allow the agency to track individual requests, evaluate the timeliness of EPA responses and identify where delays are occurring in the PPA review and approval process.

Both EPA and the Department of Justice also have appointed PPA expediters to quickly resolve issues that might be impeding the negotiations of a particular PPA. In the past, there have been some coordination problems where EPA has engaged in lengthy negotiations with the prospective purchaser but failed to advise the DOJ of the existence of the proposed PPA until several days before the closing was scheduled to take place. On some occasions, the failure to coordinate with DOJ has resulted in postponement of the closing. Since the DOJ must be a signatory to the PPAs, it is advisable to make sure that the agency is brought into negotiations early in the process.

Following are the texts of Barry Breen's Oct. 1 memorandum, "Expediting Requests for Prospective Purchaser Agreements"; EPA's model letter used to acknowledge a PPA request; and the checklist of information EPA will generally require in evaluating a PPA request. The new revised Model Prospective Purchaser Agreement is available at http://es.epa.gov/oeca/osre/liabil.html or, for a fee, from BNA Plus at (800) 452-7773 (toll-free nationwide) or at (202) 452-4323 in Washington D.C.