

ENVIRONMENTAL PROTECTION AGENCY

[FRL-5251-7]

Announcement and Publication of Final Policy Toward Owners of Property Containing Contaminated Aquifers

SUMMARY: This policy states the agency's position that, subject to certain conditions, where hazardous substances have come to be located on or in a property solely as the result of subsurface migration in an aquifer from a source or sources outside the property, EPA will not take enforcement actions under CERCLA, 42 U.S.C. 106 and 107, against the owner of such property to require the performance of response actions or the payment of response costs.

FURTHER INFORMATION CONTACT: Ellen Kandell, Policy and Program Evaluation Division, Office of Site Remediation Enforcement, 401 M St. S.W., 2273-G, Washington, D.C. 20460. Phone: 703-603-8996, Fax: 703-603-9117

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Bruce M. Diamond,

Director, Office of Site Remediation Enforcement.

POLICY TOWARD OWNERS OF PROPERTY CONTAINING CONTAMINATED AQUIFERS**I. Statement of Policy**

Based on the Agency's interpretation of CERCLA, existing EPA guidance, and EPA's Superfund program expertise, it is the Agency's position that where hazardous substances have come to be located on or in a property solely as the result of subsurface migration in an aquifer from a source or sources outside the property, EPA will not take enforcement action against the owner of such property to require the performance of response actions or the payment of response costs.¹ Further, EPA may consider *de minimis* settlements under Section 122(g)(1)(B) of CERCLA where necessary to protect such landowners from contribution suits.

This Policy is subject to the following conditions:

(A) The landowner did not cause, contribute to, or exacerbate the release or threat of release of any hazardous substances, through an act or omission. The failure to take affirmative steps to mitigate or address groundwater contamination, such as conducting groundwater investigations or installing

groundwater remediation systems, will not, in the absence of exceptional circumstances, constitute an "omission" by the landowner within the meaning of this condition. This policy may not apply where the property contains a groundwater well, the existence or operation of which may affect the migration of contamination in the affected aquifer. These cases will require fact-specific analysis.

(B) The person that caused the release is not an agent or employee of the landowner, and was not in a direct or indirect contractual relationship with the landowner. In cases where the landowner acquired the property, directly or indirectly, from a person that caused the original release, application of this Policy will require an analysis of whether, at the time the property was acquired, the landowner knew or had reason to know of the disposal of hazardous substances that gave rise to the contamination in the aquifer.

(C) There is no alternative basis for the landowner's liability for the contaminated aquifer, such as liability as a generator or transporter under Section 107(a) (3) or (4) of CERCLA, or liability as an owner by reason of the existence of a source of contamination on the landowner's property other than the contamination that migrated in an aquifer from a source outside the property.

In appropriate circumstances, EPA may exercise its discretion under Section 122(g)(1)(B) to consider *de minimis* settlements with a landowner that satisfies the foregoing conditions. Such settlements may be particularly appropriate where such a landowner has been sued or threatened with contribution suits. EPA's Guidance on Landowner Liability and Section 122(g)(1)(B) *De Minimis* Settlements² should be consulted in connection with this circumstance.

In exchange for a covenant not to sue from the Agency and statutory contribution protection under Sections 113(f)(2) and 122(g)(5) of CERCLA, EPA may seek consideration from the landowner,³ such as the landowner's full cooperation (including but not

limited to providing access) in evaluating the need for and implementing institutional controls or any other response actions at the site.⁴

The Agency intends to use its Section 104(e) information gathering authority under CERCLA, 42 U.S.C. 9604(e), as appropriate, to verify the presence of the conditions under which the Policy would be applied, unless the source of contamination and lack of culpability of the property owner are otherwise clear.⁵ Accordingly, failure by a property owner to provide certified responses to EPA's information requests may, by itself, be grounds for EPA to decline to offer a Section 122(g)(1)(B) *de minimis* settlement.

II. Discussion**A. Background**

Nationwide there are numerous sites that are the subject of response actions under CERCLA due to contaminated groundwater. Approximately 85% of the sites on the National Priorities List have some degree of groundwater contamination. Natural subsurface processes, such as infiltration and groundwater flow, often carry contaminants relatively large distances from their sources. Thus, the plume of contaminated groundwater may be relatively long and/or extend over a large area. For this reason, it is sometimes difficult to determine the source or sources of such contamination.

Any person owning property to which contamination has migrated in an aquifer faces potential uncertainty with respect to liability as an "owner" under Section 107(a)(1) of CERCLA, 42 U.S.C. 9601(a)(1), even where such owner has had no participation in the handling of hazardous substances, and has taken no action to exacerbate the release.

Some owners of property containing contaminated aquifers have experienced difficulty selling these properties or obtaining financing for development because prospective purchasers and lenders sometimes view the potential for CERCLA liability as a significant risk. The Agency is concerned that such unintended effects are having an adverse impact on property owners and

² See Guidance on Landowner Liability Under Section 107(a)(1) of CERCLA, *De Minimis* Settlements under Section 122(g)(1)(B) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property, OSWER Directive No. 9835.9, June 6, 1989, 54 FR 34235 (August 18, 1989) (hereinafter "Guidance on Landowner Liability and Section 122(g)(1)(B) *De Minimis* Settlements").

³ A more complete discussion of the appropriate consideration that may be sought under Section 122(g)(1)(B) settlements is contained in Section IV.B.3.a. of Guidance on Landowner Liability and Section 122(g)(1)(B) *De Minimis* Settlements, *supra* note 2.

⁴ The Agency has developed guidance which explains the authorities and procedures by which EPA obtains access or information. See Entry and Continued Access under CERCLA, OSWER Directive #9829.2, June 5, 1987; Guidance on Use and Enforcement of CERCLA Information Requests and Administrative Subpoenas, OSWER Directive 9834.4-A, August 25, 1988.

⁵ See Guidance on Landowner Liability and Section 122(g)(1)(B) *De Minimis* Settlements, *supra* note 2, for an outline of the types of information which should be provided by the landowner to support a request for a *de minimis* settlement.

¹ By this Policy, EPA does not intend to compromise or affect any right it possesses to seek access pursuant to Section 104(e) of CERCLA.