Landowner Liability under Section 107(a) of CERCLA, *De Minimis* Settlements under Section 122(g)(1)(B) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property'' [1] (''the 1989 guidance''). This revised guidance reflects both Agency experience in implementing the 1989 guidance and changes to that guidance that EPA believes are needed.

During the past several years, EPA has entered into a number of prospective purchaser agreements to enable purchasers to buy contaminated property for cleanup, redevelopment or reuse. The 1989 guidance required EPA to receive substantial benefits in terms of work or reimbursement of response costs that otherwise would not have been available. While some agreements required performance of cleanup work on contaminated parcels prior to their redevelopment, others provided covenants not to sue for purchase of uncontaminated portions of larger Superfund sites. EPA's experience has demonstrated that prospective purchaser agreements might be both appropriate and beneficial in more circumstances than contemplated by the 1989 guidance. The Agency now believes that it may be appropriate to enter into agreements resulting in somewhat reduced benefits to the Agency through cleanup or response costs or in benefits that also may be available from other parties. These agreements in turn should provide substantial benefits to the community through the creation or retention of jobs, productive use of abandoned property, or revitalization of blighted areas.

While this new guidance restates much of the 1989 guidance, it revises two of the original criteria used to determine whether a prospective purchaser agreement is appropriate. The revised criteria allow the Agency greater flexibility to consider agreements with covenants not to sue to encourage reuse or development of contaminated property that would have substantial benefits to the community (*e.g.*, through job creation or productive use of abandoned property), but also would be safe, consistent with site remediation, and have direct benefits to the Agency. A ''model'' prospective purchaser agreement, which should be used as a starting point for negotiation of agreements, is attached.

II. Statement of Policy

Because of the clear liability which attaches to landowners who acquire property with knowledge of contamination, the Agency has received numerous requests for covenants not to sue from prospective purchasers of contaminated property.[2] It is the Agency's policy not to become involved in private real estate transactions. However, an agreement with a covenant not to sue a prospective purchaser might appropriately be considered if it will have substantial benefits for the government and if the prospective purchaser satisfies other criteria.[3]

The Agency recognizes that entering into an agreement containing a covenant not to sue with a prospective purchaser of contaminated property, given appropriate safeguards, may result in an environmental benefit through a payment for cleanup or a commitment to perform a response action. EPA's experience has shown that prospective purchaser agreements have also benefitted the community where the site is located by encouraging the reuse or redevelopment of property at which the fear of Superfund liability may have been a barrier. The Agency believes that it is necessary to provide greater flexibility in offering covenants not to sue. Through this guidance, the Agency adopts a policy which expands the circumstances under which prospective purchaser agreements may be considered.

III. Criteria for Entering Into Covenants Not To Sue With Prospective Purchasers of Contaminated Property

The following criteria should be met before the Agency considers entering into agreements with prospective purchasers. These criteria are intended to reflect EPA's commitment to removing the barriers imposed by potential CERCLA liability while ensuring protection of human health and the environment. The Agency may also reject any offer if it determines that entering into an agreement with a prospective purchaser is not sufficiently in the public interest to warrant expending the resources necessary to reach an agreement. Regions should consider the following criteria when evaluating prospective purchaser agreements.

1. An EPA Action at the Facility Has Been Taken, Is Ongoing, or Is Anticipated To Be Undertaken by the Agency

This criterion is meant to ensure that EPA does not become unnecessarily involved in purely private real estate transactions or expend its limited resources in negotiations which are unlikely to produce a sufficient benefit to the public. EPA, however, recognizes the potential gains in terms of clean up and public benefit that may be realized with broader application of prospective purchaser agreements. Therefore, this criterion has been expanded beyond the limitation in the 1989 guidance to sites where enforcement action is anticipated, to now include sites where federal involvement has occurred or is expected to occur.

Accordingly, when requested, the Agency may consider entering into prospective purchaser agreements at sites listed or proposed for listing on the National Priorities List (NPL), or sites where EPA has undertaken, is undertaking, or plans to conduct a response action. If the Agency receives a request for a prospective purchaser agreement at a site where EPA has not yet become involved, Regions should first evaluate the realistic possibility that a prospective purchaser may incur Superfund liability when determining the appropriateness of entering into a prospective purchaser agreement. This evaluation should clearly show that EPA's covenant not to sue is essential to remove Superfund liability barriers and allow the private party cleanup and productive use, reuse, or redevelopment of the site.

The Agency should consider the following factors when evaluating the appropriateness of entering into an agreement with a prospective purchaser at any site:

a. Whether information regarding releases or potential releases of hazardous substances at the site indicates that there is a substantial likelihood of federal response or enforcement action at the site that would justify EPA's involvement in entering into the prospective purchaser agreement. EPA should consider information that is available through EPA's data systems, such as the Comprehensive Environmental Response, Compensation, and Liability Information System (''CERCLIS''), a state agency, or through submissions from the prospective purchaser, such as the results of an environmental audit or site assessment.

b. Whether other available avenues (*e.g.*, private indemnification

[1] OSWER Directive No. 9835.9 and 54 FR 34235 (Aug. 18, 1989).

[2] Since settlements with typical prospective purchasers (*i.e.*, those who do not currently own the property, are not otherwise involved with the site, and are, therefore, not yet liable under Section 107) will not be reached under Section 122, the procedures and restrictions in that section, such as those relating to covenants not to sue, will not apply.

[3] This guidance is also applicable to persons seeking prospectively to operate or lease contaminated property. Agreements with prospective lessees/operators will be evaluated using the criteria set forth in this guidance, and will require the current owner's signature.