



Standard Guide for Identifying and Complying With Continuing Obligations¹

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1. Scope

1.1 *Purpose*—The purpose of this guide is to provide information and guidance² related to the process of identifying and fulfilling *continuing obligations*³ at *commercial real estate*, and forestland and rural property, with respect to *hazardous substances* within the scope of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (42 U.S.C. § 9601 *et seq.*) as well as *petroleum products* (collectively hereafter *chemicals of concern*). As such, this guide's primary purpose is to provide information and guidance about procedures that, if completed, would help *users* to satisfy *continuing obligations* applicable to the *innocent landowner*, the *contiguous property owner* (CPO), and the *bona fide prospective purchaser* (BFPP) protections from CERCLA liability (hereinafter, collectively referred to as the “*Landowner Liability Protections*,” or “*LLPs*”) (see Legal Appendix X1.1 to X1.3 for an outline of CERCLA's liability and defense provisions).

1.1.1 *Continuing Obligations*—Subsequent to *property acquisition*, the Small Business Liability Relief and Brownfields Revitalization Act of 2002 (the “*Brownfields Amendments*”), which amended CERCLA, requires persons (a broad term meant to cover individuals, companies, government agencies, and other entities) seeking to maintain *LLPs* to establish, by a preponderance of the evidence, fulfillment of certain *continuing obligations*. The *continuing obligations* set forth in the *Brownfields Amendments* include: (1) complying with any *land use restrictions* established or relied upon in connection with a *response action* at a *property*; (2) not impeding the effectiveness or integrity of any *institutional controls* employed at a *property* in connection with a *response action*; (3) taking *reasonable steps* with respect to releases of *hazardous substances*, including stopping *continuing releases*, preventing threatened future *releases*, and preventing or limiting human, environmental or *natural resource exposure* to prior *releases* of

hazardous substances; (4) providing full cooperation, assistance and access to persons who are authorized to conduct *response actions* or *natural resource restoration* at a *property*; (5) complying with information requests and administrative subpoenas; and (6) providing legally required notices with respect to releases of any hazardous substances at a *property*.⁴

1.1.2 *Certain Continuing Obligations Not Detailed in this Guide*—The procedures recommended in this guide focus on *continuing obligations* pertaining to *land use restrictions*, *institutional controls*, and taking *reasonable steps*. As noted immediately above, CERCLA lists other *continuing obligations* such as those related to legally required notices, allowing access, and cooperating with government regulators. These “other” *continuing obligations* are not further discussed in this guide. The lack of detailed treatment of these other *continuing obligations*, however, does not intend to suggest that they are less important or less relevant to maintaining *LLPs*. The *user* seeking additional information will find background on these other *continuing obligations* in Legal Appendix X1.8 to this guide.

1.1.3 *Guide Does Not Provide Legal Advice*—As noted above, this guide primarily intends to provide information and guidance to *users* who wish to perform *continuing obligations* for the purpose of maintaining *CERCLA LLPs*. To serve this purpose, this guide focuses on technical, scientific, and procedural issues involved with identifying and performing appropriate *continuing obligations* under site-specific circumstances. In order to explain the context for the various *continuing obligations* recommended in this guide, however, the guide necessarily makes reference to the statutory provisions of CERCLA. These CERCLA discussions are meant for informational purposes only and are not intended and should not be construed as legal opinions or conclusions of law; nor should any statement in this guide be relied upon as legal advice concerning CERCLA or any legal matter. The *CERCLA LLPs* involve complicated legal matters with potentially severe consequences. This guide is not intended to and does not replace legal advice, and should not be relied on for any legal question. No implication is intended that a person must use this

¹ This guide is under the jurisdiction of ASTM Committee E50 on Environmental Assessment, Risk Management and Corrective Action and is the direct responsibility of Subcommittee E50.02 on Real Estate Assessment and Management.

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² This guide's CERCLA discussions are for information purposes only and are not intended and should not be construed as legal opinions or conclusions of law. This guide should not be relied upon to answer legal questions.

³ Definitions provided in Section 3. All defined terms appear in italics.

⁴ In setting forth these requirements, the *Brownfields Amendments* use the terms “vessel” and “facility” to describe the subject *property*. See, for example, CERCLA § 101(40), 42 U.S.C. § 9601(40). Since the aim of this guide is to assist the *user* in identifying and satisfying *continuing obligations* at *commercial real estate*, we use the term “*property*”, which is the relevant subset of “*facility*” throughout this guide.

guide in order to establish or maintain *LLPs*. Conversely, no implication is intended to assure a person using this guide of success against CERCLA liability when using this guide. The *user* is encouraged to seek legal advice when seeking to establish and maintain CERCLA liability defenses. In a number of sections throughout the guide, the guide notes instances where legal issues are particularly relevant and often reinforces the guide's overall recommendation to seek the advice of legal counsel concerning CERCLA *LLPs*. Where particular sections do not suggest the need for legal advice, no implication is intended that legal advice is not recommended or warranted.

1.1.4 Inclusion of Petroleum Products—*Petroleum products* are included within the scope of this guide because they are often of concern at *commercial real estate*. Although *petroleum products* enjoy a limited exclusion from CERCLA liability, current custom and usage generally includes an evaluation of whether *petroleum products* may be present on *commercial real estate* during pre-acquisition *environmental site assessments*. Thus, this guide likewise includes *petroleum products* within its scope. The actions discussed in this guide could be useful or prudent if applied at *commercial real estate* affected by a release of *petroleum products*.

1.1.5 Applicability to Non-CERCLA Properties—While this guide is primarily intended to address CERCLA *LLPs*, it need not be limited exclusively for that purpose. The procedures described in this guide may prove prudent at properties where *Activity and Use Limitations (AULs)* or environmental contamination exists, even though CERCLA *LLPs* may not be of concern. *AULs* are employed at many properties remediated under state or non-CERCLA federal programs where CERCLA liability may not be of concern but, nonetheless, the *AUL* and *reasonable step* procedures recommended by this guide may provide useful procedures for assuring *AUL* compliance. For example, Michigan state law sets “due care” requirements for purchasers of contaminated properties, mandating that they perform various post-purchase duties including, among others, complying with and not impeding the effectiveness and integrity of *AULs*, and preventing exacerbation and mitigating unacceptable exposure of hazardous substances.⁵ Also, for example, Wisconsin sets legal rules and administrative guidance covering certain continuing obligations for *AULs*.⁶

1.1.6 Activity and Use Limitations, Institutional Controls, Engineering Controls, and Land Use Restrictions—The term *Activity and Use Limitation (AUL)* is taken from Guide E2091 to include both legal controls (that is, *institutional controls*) and physical controls (that is, *engineering controls*) within its scope. Agencies, organizations, and jurisdictions, however, may define or utilize these terms differently. For example, the term “land use controls” is used by the Department of Defense and the term *land use restrictions* is used but not defined in the *Brownfields Amendments*. CERCLA, as amended by the *Brownfields Amendments*, expressly prescribes *continuing obligations* only for *institutional controls (ICs)* and *land use*

restrictions (LURs), each of which represents a subset of the term *AUL*. In addition to *land use restrictions* and *institutional controls*, additional types of *AULs*, particularly *engineering controls*, may exist at a *property*. While broadly a type of *AUL*, *engineering controls* could also be required by or be associated with *ICs* or *LURs*. Where this guide directly addresses the *continuing obligations* for *AULs* set forth in CERCLA, it uses the statutory terms *land use restrictions* and *institutional controls* to maintain consistency with CERCLA. Where this guide refers generally to *AULs*, this guide employs the term *AUL*. Although certain *continuing obligations* expressly refer to *land use restrictions* and *institutional controls*, the broader set of *continuing obligations* (such as taking *reasonable steps* to address releases of chemicals of concern) require a consideration of all *AULs*, including *engineering controls*.

1.1.7 Properties Covered—In addition to *property* with *AULs*, the procedures suggested by this guide are primarily intended to cover *property* where chemicals of concern are known to have been (1) released on the *property* prior to acquisition by the current *property owner* (2) are present at the *property* after acquisition by the current *property owner*, due to the migration from neighboring *property*, or (3) are discovered after *property* transfer where the *Phase I* (or other methods of performing *AAI*), though properly performed, provided no reason to know of the presence of chemicals of concern. This guide focuses on these release situations because such situations tend to give rise to circumstances in which one or more of the CERCLA *LLPs* could apply. See Legal Appendix X1.3 for additional discussion of CERCLA *LLPs*.

1.1.8 Recognized Environmental Conditions—For the purposes of this guide, the term *recognized environmental condition* is defined in the same manner as the term is defined in Practices E1527 and E2247, which provide guidance for the *Phase I environmental site assessment* process (hereafter *Phase I*). *REC* means the presence or likely presence of any chemical of concern on a *property* under conditions that indicate an existing release, a past release, or a material threat of a release of any chemicals of concern into structures on the *property* or into the ground, groundwater, or surface water on the *property*. *RECs* do not include de minimis conditions that do not generally present a threat to human health or the environment and which would not generally be the subject of an enforcement action if brought to the attention of the appropriate governmental agencies.

1.1.9 Presumption of All Appropriate Inquiries and Desire to Qualify for LLPs—This guide is primarily intended for *users* who seek to qualify for any *LLPs*. Therefore, this guide presumes that its *users* have performed or will perform a currently valid *Phase I* or otherwise satisfy “all appropriate inquiries” prior to acquisition of the *property*.

1.1.10 Timing—Subject to the other scope considerations described in this section, the procedures in this guide are intended to be applicable when a *user* knows or has reason to know, after the *user's* purchase of the *property*, that chemicals of concern either (1) have been released at the *property* or (2) may be released in the future. Therefore, for *users* who purchase *property* where *RECs* have been identified, this guide is meant to apply upon *property* purchase. *Users* who have

⁵ See MCL § 324.20101 *et seq.*

⁶ Continuing Obligations for Environmental Protection, *Responsibilities of Wisconsin Property Owners*, PUB_RR_819 (Jun. 2009) (avail. at <http://dnr.wi.gov/org/aw/rr/archives/pubs/RR819.pdf>).

gained knowledge or reason to know of *property releases of chemicals of concern* prior to the publication of this guide (for example, where a *user* purchased contaminated *property* years before this guide was published) may still use this guide. Such *users* may need to reconsider and update the findings and conclusions in any existing *Phase I* (or alternative *all appropriate inquiries* efforts) in order to fully utilize this guide. See 5.2.2 (addressing presumption of currently valid *Phase I/AAI*).

1.1.11 *Determination of No Continuing Obligations Related to Activity and Use Limitations and Reasonable Steps*—Section 5 of this guide recommends a procedure for considering whether *continuing obligations* covered by this guide are required or applicable to the *property*. Refer to 1.1.2 for a summary of *continuing obligations* that are not addressed in detail by this guide. As addressed in more detail in Section 5, a determination that no *continuing obligations* are required can be made where neither *RECs*, *institutional controls*, nor *land use restrictions* exist, and *user's* otherwise have no knowledge to indicate the presence of *chemicals of concern* at the *property*. Even where a *Phase I* (or *all appropriate inquiries*) found *RECs*, further evaluation (see Section 6) can justify a conclusion that no *chemicals of concern* were released and, in turn, this conclusion can justify a determination of no *continuing obligations*. See 5.4, however, discussing the case where future circumstances could arise that would cause *users* to reevaluate determinations that no *continuing obligations* are required.

1.1.12 *CERCLA Requirements Other Than Continuing Obligations*—This guide does not provide guidance on requirements other than *continuing obligations* that may be necessary to retain eligibility for *LLPs* or other CERCLA defenses. See Legal Appendix X1.3 for discussion of CERCLA *LLPs* and other CERCLA defenses.

1.1.13 *Other Federal, State, and Local Environmental Laws*—*Users* are cautioned that federal, state, and local laws may impose environmental assessment, *remedial action*, or other obligations related to *hazardous substances* or *petroleum products* that are beyond the scope of this guide.

1.1.14 *Documentation*—CERCLA requires that a *user* seeking to retain eligibility for an *LLP* must demonstrate compliance with *continuing obligations* by a preponderance of evidence. There is no apparent requirement for written documentation to demonstrate compliance with *continuing obligations*, but written documentation could be useful and, perhaps even essential, in cases where a *user* desires to demonstrate the performance of *continuing obligations*. The guide provides guidance in Section 9 on the preparation of *continuing obligation plans* and suggests procedures for documenting *continuing obligation* efforts. *Users* are encouraged to consult with legal counsel on steps to be taken to document compliance with *continuing obligations*.

1.2 *Objectives*—This guide establishes the following objectives: (1) provide information and guidance related to procedures to identify and comply with *continuing obligations* on *commercial real estate* or on forest or rural land; and (2) formulate and clarify suggested industry methods and procedures for identifying and satisfying *continuing obligations* that are practical, efficient and reasonable.

1.3 *Organization of this Guide*—This guide has nine sections and eight appendices. Fig. 1 provides a representation of this guide as a flowchart, and represents decision points for the *user* as the guidance is applied:

Section 1 is the Scope.

Section 2 lists Referenced Documents.

Section 3, Terminology, contains definitions of terms used in this guide, definitions of terms unique to this guide and acronyms.

Section 4 discusses the Significance and Use of this guide.

Section 5 discusses Step 1, a screening process relying on the *Phase I* to help determine whether *continuing obligations* apply to the *property*.

Section 6 discusses Step 2, a process for evaluating the environmental conditions and *AULs* that may affect the *property* in advance of planning for *continuing obligations*.

Section 7 discusses Step 3, providing guidance for a process to select *continuing obligations* to be performed under site-specific circumstances.

Section 8 discusses Step 4, providing guidance for a process to select and schedule monitoring requirements for *continuing obligations*.

Section 9 offers guidance on documentation for (1) statements of no *continuing obligations* on a *property*, (2) a *continuing obligations plan*, and (3) reporting the periodic monitoring of *continuing obligation*.

The Appendices provide additional information:

Appendix X1 (the Legal Appendix) describes liability and defenses to liability under CERCLA, as amended by the *Brownfields Amendments*, while also providing important discussion on *continuing obligations*.

Appendix X2 provides a recommended table of contents and report format for a statement of no *continuing obligations*.

Appendix X3 provides a representative form for a statement of no *continuing obligations*.

Appendix X4 provides a recommended table of contents and report format for a *continuing obligations plan*.

Appendix X5 provides a recommended table of contents and report format for a *continuing obligations monitoring and evaluation report*.

Appendix X6 provides a representative form for *continuing obligations* field investigation, for a simple site.

Appendix X7 provides a representative form for *continuing obligations* field investigation, for a more complex site.

Appendix X8 develops five scenarios to assist in the application of this guide.

1.4 *This standard does not purport to address all of the safety concerns, if any, associated with its use. It is the responsibility of the user of this standard to establish appropriate safety and health practices and determine the applicability of regulatory limitations prior to use.*

1.5 *This guide offers guidance on performing one or more specific tasks and should be supplemented by education, experience and professional judgment. Not all aspects of this guide may be applicable in all circumstances. This guide does not necessarily represent the standard of care by which the adequacy of a given professional service must be judged, nor should this document be applied without consideration of a*

property's unique aspects. The word "standard" in the title means only that the document has been approved through the ASTM consensus process.

2. Referenced Documents

2.1 ASTM Standards:⁷

- E1527 Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process
- E1689 Guide for Developing Conceptual Site Models for Contaminated Sites
- E1903 Guide for Environmental Site Assessments: Phase II Environmental Site Assessment Process
- E2081 Guide for Risk-Based Corrective Action
- E2091 Guide for Use of Activity and Use Limitations, Including Institutional and Engineering Controls
- E2205 Guide for Risk-Based Corrective Action for Protection of Ecological Resources
- E2247 Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process for Forestland or Rural Property
- E2435 Guide for Application of Engineering Controls to Facilitate Use or Redevelopment of Chemical-Affected Properties

2.2 Federal Statutes and Regulations:

Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") (42 USC 9601 *et seq*) as amended

Small Business Liability Relief and Brownfield Revitalization Act (the "Brownfield Amendment of 2002")

"All Appropriate Inquiries" Final Rule, 40 CFR Part 312

2.3 USEPA Documents:

Draft Interim Final Guide, Institutional Controls:⁸ A Guide to Planning, Implementing, Maintaining and Enforcing Institutional Controls at Contaminated Sites, November 2010

Enforcement Discretion Guidance Regarding the Applicability of the Bona Fide Prospective Purchaser Definition in CERCLA § 101(40) to Tenants, January 2009

Interim Enforcement Discretion Guidance Regarding Contiguous Property Owners (Contiguous Property Guidance), January 2004

Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property, or Innocent Landowner Limitations on CERCLA Liability (Common Elements Interim Guidance), March 2003

Institutional Controls: A Site Manager's Guide to Identifying, Evaluating and Selecting Institutional Controls at Superfund and RCRA Corrective Action Cleanups, September 2000

Final Policy Towards Owners of Property Containing Contaminated Aquifers—Memorandum (Contaminated Aquifer Policy), May 1992

2.4 Other Relevant Documents:

Association of State and Territorial Solid Waste Management Officials (ASTSWMO), State Approaches to Monitoring and Oversight of Land Use Controls, October 2009

Interstate Technology Regulatory Council, An Overview of Land Use Control Management Systems, December 2008

Uniform Environmental Covenants Act (available at <http://www.environmentalcovenants.org>)

Uniform Fire Code, National Fire Protection Association

International Fire Code, International Code Council

Standard Definition of Petroleum Statistics, American Petroleum Institute, Fourth Edition, 1998

3. Terminology

3.1 This section provides definitions and a list of acronyms for many of the words used in this guide. The terms are an integral part of this guide and are critical to an understanding of the methodologies described herein.

3.2 Definitions:

3.2.1 *activity and use limitations (AULs)*—legal or physical restrictions or limitations on the use of, or access to, a site or facility to eliminate or minimize potential *exposures* to *hazardous substances* or *petroleum products* or to prevent activities that could interfere with the effectiveness of a *response action*, to ensure maintenance of a condition of "acceptable risk" or "no significant risk" to human health and the environment. These legal or physical restrictions are intended to prevent adverse impacts to individuals or populations that may be exposed to *hazardous substances* or *petroleum products*.

NOTE 1—CERCLA expressly lists *continuing obligations* for *institutional controls* and *land use restrictions*, each of which represents a subset of the term *AULs*. Additional types of *AULs*, such as *engineering controls*, may exist at a *property*.

3.2.2 *all appropriate inquiries or AAI*—that inquiry conducted prior to the date of acquisition of the subject *property* constituting "all appropriate inquiries into the previous ownership and uses of the *property* consistent with good commercial or customary practice" as defined in CERCLA, 42 U.S.C. §9601(35)(B), and in EPA's regulations, 40 C.F.R. Part 312, that will qualify a party to a *commercial real estate* transaction for one of the threshold requirements that an *owner* of *commercial real estate* must satisfy in order to be eligible for any of the *landowner liability protections* to CERCLA liability (42 U.S.C. §9601(35)(A) & (B), §9607(b)(3), §9607(q); and §9607(r)), assuming compliance with other elements of the defense.

3.2.3 *appropriate care*—CERCLA defines *BFPPs* as persons who, among other things, exercise *appropriate care* with respect to *hazardous substances* by taking *reasonable steps* to stop any continuing *release*, prevent any threatened future *release*, and prevent or limit human, environmental, or *natural resource exposure* to any previously *released hazardous substances*. 42 U.S.C. §9601(40)(D). *Appropriate care* is one of several *continuing obligations*.

⁷ For referenced ASTM standards, visit the ASTM website, www.astm.org, or contact ASTM Customer Service at service@astm.org. For *Annual Book of ASTM Standards* volume information, refer to the standard's Document Summary page on the ASTM website.

⁸ EPA solicited public comments and, in turn, received public comments to this Interim Final Guide on January 4, 2011. As of the date of this guide, EPA remains in the process of processing comments. See EPA Institutional Control Guidance webpage (<http://www.epa.gov/superfund/policy/ic/guide/index.htm>).

Step 1

Reviewing of Phase I Findings for Whether Continuing Obligations Apply

- Review of Phase I or AAI for RECs
- Review of Phase I or AAI for Land Use Restrictions and Institutional Controls

(See Section 5)

Step 2

Review and Evaluate Environmental Conditions and AULs at the Property

(See Section 6)

Evaluate again based on Step 2, whether REC, ICs or LURs exist at the Property?

(Section 6)

NO

YES

Do Continuing Obligations Apply?

(Section 5)

NO

No Continuing Obligations*

Perform Continuing Obligations

Step 3

Perform Initial Continuing Obligations

- Prepare Continuing Obligations Plan
- Execute any Initial Continuing Obligations

(See Section 7)

Step 4

Perform Ongoing Continuing Obligations

(See Section 8)

Documentation Guidance

Statement of No Continuing Obligations

Continuing Obligations Plan

Evaluation and Monitoring Documentation

(See Section 9)

Note: There is no statutory obligation to document a determination that no continuing obligations are required or document the performance of continuing obligations.

NOTE—Continuing obligations may be triggered based in the future as discussed in 5.4.1. Other obligations may exist as discussed in 5.4.2.

FIG. 1 Flowchart of Guide to Continuing Obligations

3.2.4 *bona fide prospective purchaser (BFPP)*—a person who meets the criteria set forth in CERCLA §101(40) (42 U.S.C. §9601(40)) qualifies as a *bona fide prospective purchaser*. Generally, a *BFPP* can be a person who purchases *property* knowing that it is already contaminated. Among other requirements, *BFPPs* must make *all appropriate inquiries* and perform *continuing obligations*. Persons meeting the definition of *BFPP* may, in accordance with the provisions set forth in CERCLA §107(r) (42 U.S.C. §9607(r)), qualify for CERCLA’s *BFPP landowner liability protection*, which provides a potential defense for such persons from the meaning of “owner” or “operator” as defined by CERCLA. A person must make all appropriate inquiries into the previous ownership and uses of the *property* prior to acquiring the *property* and all disposal of *hazardous substances* at the *property* must have occurred prior to acquisition. The *property* must have been acquired after January 11, 2002. See Legal Appendix X1.3.2 for the other necessary requirements that are beyond the scope of this guide.

3.2.5 *Brownfields Amendments*—amendments to CERCLA contained in the Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118 (2002), 42 U.S.C. §§9601 *et seq.*

3.2.6 *chemicals of concern*—means *hazardous substances* or *petroleum products*.

3.2.7 *commercial real estate*—any real *property* except a *dwelling* or *property* with no more than four *dwelling* units exclusively for residential use (note, however, that a *dwelling* or *property* with no more than four *dwelling* units exclusively for residential use is included in this term when it has a commercial function, as in the building of such dwellings for profit). This term includes but is not limited to undeveloped real *property* and real *property* used in industrial, retail, office, agricultural, other commercial, medical or educational purposes; *property* used for residential purposes that has more than four residential dwelling units; and *property* with no more than four dwelling units for residential use when it has a commercial function, as in the building of such dwellings for profit.

3.2.8 *contiguous property owner (CPO)*—a person who meets the criteria set forth in CERCLA § 107(q)(1)(A) (42 U.S.C. § 9607(q)(1)(A)) qualifies as a *contiguous property owner*. *Contiguous property owners* are persons who own *commercial real estate* that is contiguous to and that is or may be contaminated by *hazardous substances* from other *property* that is not owned by that person. To qualify as *CPOs*, among other requirements, persons must have conducted *all appropriate inquiries* and perform *continuing obligations*. Persons meeting the definition of *contiguous property owner* may, in accordance with the provisions set forth in CERCLA §107(q) (42 U.S.C. §9607(q)), qualify for the CERCLA *contiguous property owner LLP*, which provides a potential defense for such persons from the meaning of “owner” or “operator” as defined by CERCLA and, therefore, could relieve such persons from CERCLA liability that would be triggered based on their status as an “owner” or “operator”. Knowledge of contamination resulting from all appropriate inquiries would preclude this liability protection. See Legal Appendix X1.3.3 for the other necessary requirements that are beyond the scope of this guide.

3.2.9 *continuing obligations*—subsequent to *property* acquisition, the Small Business Liability Relief and Brownfields Revitalization Act of 2002 (the “*Brownfields Amendments*”), which amended CERCLA, requires persons (a broad term meant to cover individuals, companies, government agencies, and other entities) seeking to maintain *LLPs* to establish, by a preponderance of the evidence, fulfillment of certain *continuing obligations*. The *continuing obligations* set forth in the *Brownfields Amendments* include: (1) complying with any *land use restrictions* established or relied upon in connection with a *response action* at a *property*; (2) not impeding the effectiveness or integrity of any *institutional control* employed at a *property* in connection with a *response action*; (3) taking *reasonable steps* with respect to *releases* of *hazardous substances*, including stopping *continuing releases*, preventing threatened future *releases*, and preventing or limiting human, environmental or *natural resource exposure* to prior *releases* of *hazardous substances*; (4) providing full cooperation, assistance and access to persons who are authorized to conduct *response actions* or *natural resource* restoration at a *property*; (5) complying with information requests and administrative subpoenas; and (6) providing legally required notices with respect to releases of any hazardous substances at a *property*. This guide addresses the first three of these *continuing obligations*.

3.2.10 *continuing obligation plan*—a plan prepared by the *user* to identify *continuing obligations* and procedures to be taken post-acquisition of the *property* to satisfy any *continuing obligations*.

3.2.11 *continuing obligations evaluation report*—a document prepared periodically by the *user* to document the satisfaction of any *continuing obligations*.

3.2.12 *continuing release* or *continuing releases*—any ongoing *release* from a man-made container or repository.

3.2.13 *dwelling*—structure or portion thereof used for residential habitation.

3.2.14 *engineering controls (ECs)*—physical modifications to a site or facility used to render an *exposure pathway* or *potential exposure pathway* incomplete (for example, slurry walls, capping, hydraulic controls for ground water, or point of use water treatment). An *engineering control* is a type of *AUL*.

3.2.15 *environmental professional*—a person meeting the education, training, and experience requirements as set forth in 40 C.F.R. §312.10(b) and as described in Appendix X2 of Practice E1527. The person may be an independent contractor or an employee of the *user*.

3.2.16 *environmental site assessment (ESA)*—the process by which a person or entity seeks to determine if a particular parcel of real *property* (including improvements) is subject to *recognized environmental conditions*. An *environmental site assessment* may include more inquiry than that constituting a *Phase I* or more inquiry necessary to perform *all appropriate inquiries* or, if the *user* is not concerned about qualifying for *LLPs*, less inquiry than required for a *Phase I* or for performing *all appropriate inquiries*. An *environmental site assessment* is both different from and typically less rigorous than an environmental audit.

3.2.17 *exposure*—contact of an organism (human or ecological receptor) with a *chemical(s) of concern* at the exchange boundaries (for example, skin, lungs, and liver) when the *chemical(s) of concern* is available for absorption or adsorption. For purposes of this guide, *exposure* to *chemicals of concern* only includes *exposures* to levels that exceed those levels determined to be acceptable by applicable government agency or scientific standards.

NOTE 2—Acceptable *exposure* levels are dependent upon the target species and may vary based upon other stressors in the habitat.

3.2.18 *exposure pathway*—the course a *chemical of concern* takes from the source area(s) to a receptor or relevant ecological receptor and habitat. An *exposure pathway* describes the mechanism by which an individual or population is exposed to a chemical of concern originating from a site. Each *exposure pathway* includes a source or release from a source of a chemical of concern, a point of *exposure*, an *exposure* route, and the potential receptors or relevant ecological receptors and habitats. If the *exposure* point is not at the source, a transport or *exposure* medium or both (for example, air or water) are also included.

3.2.19 *hazardous substance*—a substance defined as a *hazardous substance* pursuant to CERCLA, 42 U.S.C. §9601(14), as interpreted by USEPA regulations and the courts: “(A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Resource Conservation and Recovery Act of 1976 (RCRA), as amended, (42 U.S.C. §6921) (but not including any waste the regulation of which under RCRA (42 U.S.C. §§6901 *et seq.*) has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act (42 U.S.C. §7412), and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator (of EPA) has taken action pursuant to section 2606 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a *hazardous substance* under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).”

3.2.20 *IC/EC registries*—databases of *institutional controls* or *engineering controls* that may be maintained by a federal, state or local environmental agency or a private entity for purposes of tracking sites that may contain residual contamination and *AULs*. The names for these databases may vary from program to program and state to state, and include terms such as the Declaration of Environmental Use Restriction database, “deed restrictions” lists, environmental covenants lists, and Brownfields site lists. They also include environmental covenant registries established under the **Uniform Environmental Covenants Act**.

3.2.21 *innocent landowner (ILO)*—an *innocent landowner* qualifies for *LLPs*. A person may qualify as one of three types of *innocent landowners*: (i) a person who “did not know and

had no reason to know” that *hazardous substances* existed on the *property* at the time the purchaser acquired the *property*; (ii) a government entity which acquired the *property* by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation; and (iii) a person who “acquired the facility by inheritance or bequest.” To qualify for the first category of *innocent landowner*, such person must have, among other things, made *all appropriate inquiries* on or before the date of purchase, must exercise due care with respect to *hazardous substances* and take precautions against foreseeable acts or consequences pursuant to 42 U.S.C. §9607(b)(3), and must perform *continuing obligations*. Furthermore, the *all appropriate inquiries* must not have resulted in knowledge of *hazardous substances*. If it does, then such person would typically “know” or “have reason to know” of *hazardous substances* and would not qualify as an *innocent landowner*. See Legal Appendix X1.3.4 for the other necessary requirements that are beyond the scope of this guide.

3.2.22 *institutional controls (ICs)*—a legal or administrative restriction on the use of, or access to, a site or facility (for example, “deed restrictions,” restrictive covenants, easements, or zoning) to (1) reduce or eliminate potential *exposure* to *chemicals of concern* in the soil or ground water on the *property*, or (2) to prevent activities that could interfere with the effectiveness of a *response action* in order to ensure maintenance of a condition of no significant risk to public health or the environment. An *institutional control* is a type of *AUL*.

3.2.23 *landowner liability protections (LLP)*—*landowner liability protections* under CERCLA, which include the *bona fide prospective purchaser*, *contiguous property owner*, and *innocent landowner LLPs*. See 42 U.S.C. §§9601(35)(A)-(B), 9601(40), 9607(b), 9607(q), 9607(r).

3.2.24 *land use restrictions (LURs)*—a term added to CERCLA §§101(35)(A)-(B), 101(40), 107(q)(1)(A)(v)(I), 42 U.S.C. §§9601(35)(A), 9601(40), 9607(q)(1)(A)(v)(I), by the *Brownfields Amendments* that prescribes as a condition of eligibility for a *landowner liability protection* that the *property* owner “is in compliance with any land use restrictions established or relied on in connection with the response action at the facility.” The statute contains no definition of “*land use restrictions*,” suggesting that Congress may have intended to give these terms their ordinary meaning and leaving it to future judicial interpretation to define the scope of “*land use restrictions*.”⁹ For additional background on this term, see Legal Appendix X1.7.

3.2.25 *material threat*—a physically observable or *obvious* condition, fact or circumstance that could reasonably be expected to lead to a *release*.

3.2.26 *natural resource*—includes land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States,

⁹ In its Common Elements Interim Guidance, USEPA discussed its interpretation of the statutory term “*land use restrictions*” to clarify *continuing obligations* requirements of *LLPs*. *USEPA Common Elements Guidance* at 6-8.

any state, local government, foreign government, any Indian tribe, or under some circumstance, by any member of an Indian Tribe. See CERCLA §101(16), 42 U.S.C. §9601(16).

3.2.27 *obvious*—that which is plain or evident; a condition or fact that could not be ignored or overlooked by a reasonable observer while visually or physically observing the property.

3.2.28 *operator*—a person satisfying the definition of *operator* as defined in section 101(20)(A) of CERCLA, 42 U.S.C. §9601(20)(A), as interpreted by the courts, which generally includes *operators* which possess control over *property* use. Under certain circumstances, a tenant may qualify as an *operator*.

3.2.29 *owner*—a person satisfying the definition of *owner* as defined in section 101(20)(A) of CERCLA, 42 U.S.C. §9601(20)(A), as interpreted by the courts, which generally includes the fee simple *owner* of record for the *property*.

3.2.30 *petroleum products*—those substances included within the meaning of the petroleum exclusion to CERCLA, 42 U.S.C. §9601(14), as interpreted by the courts and EPA, that is: petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under Subparagraphs (A) through (F) of 42 U.S.C. §9601(14), natural gas, natural gas liquids, liquefied natural gas, and synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas). (The word “fraction” refers to certain distillates of crude oil, including gasoline, kerosene, diesel oil, jet fuels, and fuel oil, pursuant to *Standard Definitions of Petroleum Statistics*.)

3.2.31 *Phase I Environmental Site Assessment* or *Phase I*—the process described in Practice E1527 (covering *commercial real estate*) and Practice E2247 (covering forestland or rural property).

3.2.32 *potentially responsible party (PRP)*—any individual or entity including *owners*, *operators*, transporters, or generators who may be liable under CERCLA §107(a), 42 U.S.C. §9607(a).

3.2.33 *practically reviewable*—information that is practically reviewable means that the information is provided by the source in a manner and in a form that, upon examination, yields information relevant to the *property* without the need for extraordinary analysis of irrelevant data. The form of the information shall be such that the *user* can review the records for a limited geographic area. Records that cannot be feasibly retrieved by reference to the location of the *property* or a geographic area in which the *property* is located are not generally *practically reviewable*. Most databases of public records are *practically reviewable* if they can be obtained from the source agency by the county, city, zip code, or other geographic area of the facilities listed in the record system. Records that are sorted, filed, organized, or maintained by the source agency only chronologically are not generally *practically reviewable*. Listings in publicly available records which do not have adequate address information to be located geographically are not generally considered *practically reviewable*. For large databases with numerous facility records (such as RCRA hazardous waste generators and registered underground storage tanks), the records are not *practically reviewable* unless they can be obtained from the source agency in the

smaller geographic area of zip codes. Even when information is provided by zip code for some large databases, it is common for an unmanageable number of sites to be identified within a given zip code. In these cases, it is not necessary to review the impact of all of the sites that are likely to be listed in any given zip code because that information would not be *practically reviewable*. In other words, when so much data is generated that it cannot be feasibly reviewed for its impact on the *property*, it is not *practically reviewable*.

3.2.34 *primary containment*—the tank, drum, vessel, tote, other container, or bermed containment, surface impoundments, and lagoons, that is in immediate contact with a *chemical of concern*.

NOTE 3—The loss of structural integrity of the primary containment may result in a release of the *chemical of concern* into the environment.

3.2.35 *property*—real *property* that is *commercial real estate*, and which is described by a legal description or is otherwise adequately described or identified. Real *property* includes buildings and other fixtures and improvements located on the *property* and affixed to the land.

3.2.36 *proprietary control*—controls based on the rights associated with private ownership, particularly ownership of a limited interest in real property as specified in a legal instrument, such as an easement or a restrictive covenant.

3.2.37 *publicly available*—information that is *publicly available* means that the source of the information allows access to the information by anyone upon request.

3.2.38 *reasonable steps*—the *landowner liability protections* require persons seeking such protections to demonstrate, among other things, that they have taken *reasonable steps* to stop or prevent existing or threatened releases of hazardous substances, and prevent or limit any human, environmental or natural resource exposure to any previously released hazardous substances.

3.2.39 *reasonably ascertainable*—for purposes of this guide, information that is (1) *publicly available*, (2) obtainable from its source within reasonable time and cost constraints, and (3) *practically reviewable*.

3.2.40 *recognized environmental conditions (RECs)*—are defined by Practice E1527 as the presence or likely presence of any hazardous substances or petroleum products on a *property* under conditions that indicate an existing release, a past release, or a material threat of a release of any hazardous substances or petroleum products into structures on the *property* or into the ground, ground water, or surface water of the *property*. The term includes hazardous substances or petroleum products even under conditions in compliance with laws. The term is not intended to include de minimis conditions that generally do not present a threat to human health or the environment and that generally would not be the subject of an enforcement action if brought to the attention of appropriate governmental agencies. Conditions determined to be de minimis are not *recognized environmental conditions*.

3.2.41 *recorded land title records*—records of historical fee ownership, which may include leases, land contracts, and AULs on or of the *property* recorded in the place where land title records are, by law or custom, recorded for the local jurisdiction in which the *property* is located. (Often such

records are kept by a municipal or county recorder or clerk.) Such records may be obtained from title companies or directly from the local government agency. Information about the title to the *property* that is recorded in a U.S. district court or any place other than where land title records are, by law or custom, recorded for the local jurisdiction in which the *property* is located, are not considered recorded land title records.

3.2.42 *release*—as defined by §101(22) of CERCLA, 42 U.S.C. §9601(22), “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant). This term has received varying interpretation by federal courts in different parts of the country. In some federal court jurisdictions, *release* attributed to a *property owner* only encompasses releases caused by human intervention. In some jurisdictions, *releases* attributed to a *property owner* could include the passive migration of *hazardous substances* through soil or ground water.

3.2.43 *remedial action*—activities conducted to reduce or eliminate current or future *exposures* to receptors or relevant ecological receptors and habitats. These activities include monitoring, implementing *activity and use limitations*, and designing and operating clean-up equipment. *Remedial action* includes activities that are conducted to reduce sources of *exposure* to meet corrective action goals, or to sever *exposure pathways* to meet corrective action goals.

3.2.44 *relevant ecological receptors and habitats*—the ecological resources that are valued at the site. Identification of *relevant ecological receptors and habitats* is dependent upon site-specific factors and is a technical policy decision important to the planning and scoping phase of ecological evaluation. Examples may include species or communities afforded special protection by law or regulation; recreationally, commercially, or culturally important resources; regionally or nationally rare communities; communities with high aesthetic quality; and habitats, species, or communities that are important in maintaining the integrity and biodiversity of the environment. These may be functionally equivalent to assessment end points. See Guide E2205.

3.2.45 *response action*—means actions to respond or a response, as those terms are defined in CERCLA §101(25), 42 U.S.C. §9601(25), to *releases of hazardous substances*. Generally, *response action* operates as an umbrella term to cover any type of *hazardous substance* cleanup at a *property*, including “removal actions” and “remedial actions” as those terms are defined in CERCLA §101(23)-(24), 9601(23)-(24).

3.2.46 *risk-based corrective action*—a consistent decision making process for the assessment and response to *releases of chemicals of concern* based upon protection of human health and the environment. Assessment and responses to such *releases* may consider the use of *activity and use limitations*.

3.2.47 *site conceptual model or SCM*—the integrated representation of the physical and environmental context, the complete and potentially complete exposure pathways and the potential fate and transport of *chemical(s) of concern* at a site. The *site conceptual model* should include both the current

understanding of the *property* and the understanding of the potential future conditions and uses for the site. It provides a method to conduct the exposure pathway evaluation, inventory the exposure pathways evaluated, and determine the status of the exposure pathways as incomplete, potentially complete or complete.

3.2.48 *state cleanup programs*—programs administered by state government agencies with legal authority to compel, oversee, or approve *remedial actions* or *response actions*. State cleanup programs include *voluntary cleanup programs*.

3.2.49 *voluntary cleanup program*—*voluntary cleanup programs* include programs administered by state government to oversee, review, and/or approve *response actions* upon the request of eligible persons (eligibility is defined differently among states). As such, *voluntary cleanup programs* provide an alternative to the conventional CERCLA or state Superfund-like enforcement approach to cleaning up contaminated sites. Many states, and in some cases local agencies, have developed *voluntary cleanup programs* to speed the cleanup of non-National Priorities List sites, which, generally, pose a lower risk than those sites listed on the National Priorities List (NPL). These *voluntary cleanup programs* are designed to achieve results that are acceptable to the State in terms of costs and protection of human health and the environment.

3.2.50 *user*—the person using Guide E2790 to obtain guidance about *continuing obligations* or on how to perform *continuing obligations* at *commercial real estate*. Accordingly, this guide anticipates that the primary *users* will include, without limitation, (1) persons who recently purchased *property* (or tenants of such persons) after performing a *Phase I* that identified *RECs*, or (2) persons who recently gained knowledge or reason to know of *releases of chemicals of concern* at their *property* where such *releases* occurred prior to their ownership or by the migration from neighboring *property*, or (3) potential purchasers that seek information about potential *continuing obligations*. Other *users* may include, without limitation, property managers, lenders, or environmental regulators.

4. Significance and Use

4.1 *Uses*—This guide is intended for use on a voluntary basis primarily by parties who desire to satisfy *continuing obligations* at *commercial real estate* or at forestland or rural properties. As such, this guide provides information and suggested procedures that could be useful to persons who wish to assert a defense to *CERCLA liability* and to establish *one of the LLPs*. This guide may apply where *response actions* have already occurred, where *response actions* remain ongoing, or where *response actions* may be necessary in the future. As noted in 1.1.6, however, the use of this guide need not be necessarily limited to *CERCLA LLPs*.

4.2 Clarifications on Use:

4.2.1 *Use is Property-Specific*—*Continuing obligations*, and the process to identify and implement *continuing obligations*, is necessarily *property-specific*. Therefore, this guide includes information to consider when performing a *property-specific*, fact-based evaluation to determine appropriate *continuing obligations*.

4.2.2 *Partially Addresses Eligibility for CERCLA LLPs*—*Users* wishing to establish *CERCLA LLPs* should be aware

that the *continuing obligations* covered by this guide comprise only part of CERCLA's statutory eligibility requirements for *LLPs*. For example, *users* seeking to qualify for *LLPs* must perform *AAI* before *property* acquisition. *Users* seeking the *BFPP* or *CPO LLP* must also demonstrate that they are not liable or potentially liable or affiliated with any person who is liable or potentially liable for *releases of hazardous substances* under CERCLA. 42 U.S.C. §9607(q)(1)(A)(ii); 42 U.S.C. §9601(40)(H). Further, *users* seeking the *BFPP LLP* must establish that disposal of *hazardous substances* occurred on the *property* prior to its acquisition. 42 U.S.C. §9601(40)(A). *Users* seeking the *CPO LLP* must establish that they did not cause, contribute or consent to the *release of hazardous substances*. 42 U.S.C. §9607(a)(A)(i). Finally, *users* seeking to qualify for the *ILO LLP* must establish that a third party was the sole cause of the *release of hazardous substances* and that they held no employment, agency, or contractual relationship with the third party, among other requirements. In addition, *users* asserting the *ILO* defense must also establish that they had no knowledge (or reason to know) of any such *releases*. 42 U.S.C. §§9601(35)(A)(i), 9607(b). The foregoing list is not meant to be exhaustive.

4.2.3 Certain Continuing Obligations Not Detailed in this Guide—As noted in 1.1.3, this guide focuses only on certain *continuing obligations*, namely those pertaining to *land use restrictions*, *institutional controls*, and taking *reasonable steps* with respect to *releases of chemicals of concern*.

4.2.4 Use Will Depend on Context—The context for *continuing obligations* may differ between *BFPPs*, *ILOs* and *CPOs*.

4.2.4.1 BFPPs acquire *property* after performing *AAI*, and, therefore may have knowledge of the presence or likely presence of *chemicals of concern* at the *property*, as well as the potential need for additional appropriate investigation, if any. This knowledge would guide the *BFPP* as to what measures it may employ in order to satisfy *continuing obligations*.

NOTE 4—The presence of *chemicals of concern* on the subject *property* may be the result of historical, area-wide land uses (for example, heavy metals in the soil due to the *property* being down-wind of smelters or foundries or area-wide ground water contamination) and such area-wide concerns could affect *continuing obligations*.

4.2.4.2 To establish eligibility for *LLPs* as *ILOs* or *CPOs*, CERCLA requires, among other things, that, after performing *AAI*, there was neither knowledge nor a reason to know that any *hazardous substances* were disposed on, in, or at the *property* (*ILO*) or that the *property* was or could be contaminated by a *release* (*CPO*). 42 U.S.C. §9607(q)(1)(A)(viii)(II) (setting *CPO* standard); 42 U.S.C. §9601(35)(A)(i) (setting *ILO* standard). Even though *ILOs* and *CPOs* would have no knowledge of *hazardous substances* when they acquired *property*, compliance with *continuing obligations* would be triggered if the persons seeking the *ILO* or *CPO* protection thereafter learned of *hazardous substances* on the *property* due to *releases of hazardous substances*.

4.3 Who May Conduct—This guide does not suggest minimum qualifications for persons implementing or evaluating the need for *continuing obligations*. *Continuing obligations* may, in some cases, require professional judgment. *Property owners*

should closely evaluate whether, under site-specific circumstances, the evaluation of *continuing obligations* suggested by this guide would benefit from the experience and judgment of an *environmental professional* with appropriate education and training relevant to the conditions at the *property*. Similarly (see 1.1.3) *continuing obligations* issues are likely to warrant legal advice.

4.4 Consultation with Government Agencies—A *user* may also wish to consult (or may be required by state or local laws to consult) appropriate governmental agencies when implementing *continuing obligations*.

4.5 Residential Properties—This guide does not cover properties with four or less *dwelling* units. Rather, this guide covers *commercial real estate*. *Dwelling* purchasers and *owners* should be cautioned, however, that depending on the circumstances, *dwelling*s could qualify as facilities under CERCLA § 101(9) and, therefore, CERCLA liability could exist if *hazardous substances* were *released at dwelling*s. Thus, purchasers of *dwelling*s that conducted *all appropriate inquiries* prior to acquiring the *property* may wish to seek liability protection associated with *releases of hazardous substances* in some circumstances, and if they do, the recommendations in this guide could be useful.

4.6 Principles:

4.6.1 Striking A Balance Between Remediation Liability and Redevelopment Incentives—As more fully discussed in Legal Appendix X1.3.1, Congress sought to strike a balance between the broad liability and remedial goals imposed by CERCLA on responsible parties and the goal of promoting redevelopment of Brownfields sites by removing the disincentives to redevelopment that result from the strict CERCLA liability scheme. Under this balance, those performing *continuing obligations* for the purpose of meeting a CERCLA *LLP* would not ordinarily need to undertake the same *response actions* as parties responsible for the *release*.

4.6.2 Proportionality to Nature of Release and Exposure Potential—The nature and extent of the *continuing obligations* should be proportional to the nature, extent, and complexity of the *release* as well as the potential for *exposure* under the site-specific *property* conditions and land uses. Environmentally impaired properties range from extremely large and severely contaminated sites (for example, Superfund sites) to small lightly contaminated sites (for example, small service station leaks). The procedures suggested in this guide, and particularly those in Sections 7 through 9, should be tailored to the site conditions. Thus, the magnitude and frequency of *continuing obligation* efforts will be more or less involved depending on the site specifics. Based on the procedures recommended in the guide, the *continuing obligations* plan (see Section 9) designs tailored procedures to perform site-specific *continuing obligations*.

4.7 Applicability of Other Environmental Laws—*Users* are reminded that all persons, including those seeking eligibility for the *LLPs*, have an affirmative obligation to comply with local, state, federal (and tribal if appropriate) rules and statutes governing the management and disposal of hazardous materials and hazardous waste (many of which encompass *chemicals of concern*), the details of which are beyond the scope of this

guide. In addition, some locally enforced national codes (for example, the *Uniform Fire Code* or *International Fire Code*) provide standards for the management of hazardous materials and include rules governing the prevention and mitigation of unauthorized releases of chemicals of concern.

5. Step 1: Reviewing a Phase I Findings for Whether Continuing Obligations Apply

5.1 Scope—This section suggests a screening process relying on the *Phase I* (or other methods that satisfy *all appropriate inquiries*) for determining whether *continuing obligations* apply and, in turn, should be performed at the *property*.

5.2 Determination of Whether Continuing Obligations Are Required—For many *property* transactions, a screening evaluation will allow *users* to conclude that there is no current need to perform *continuing obligations* covered by this guide (refer to 1.1.1 and 1.1.2 for a summary of *continuing obligations* not covered by this guide and by a determination of no *continuing obligations* made pursuant to this guide) if all of the following findings are made: (1) no *RECs* have been identified at the *property* or a *REC* has been identified but no further action is reasonably required based on further evaluation (see 5.2.5); (2) no *institutional controls* were employed in connection with a *response action* at the *property*; and (3) no *land use restrictions* were established or relied upon by a *response action* at the *property*. In the case where *users* make these conclusions, Appendix X3 provides a form for documenting a determination of no *continuing obligations*. See 5.4.1, however, discussing the case where future circumstances could arise that would cause *users* to reevaluate determinations that no *continuing obligations* are required.

5.2.1 Review Phase I Findings and Opinions for RECs—A determination of no *continuing obligations* may, in some cases, be based on the findings, opinions, evaluation of data gaps, and conclusions of a *Phase I* or other method of *all appropriate inquiries*. As explained in more detail within Practice E1527: (1) *Phase I* findings identify known or suspected *RECs*, *Historical RECs* (*HRECs*), and de minimis conditions; (2) *Phase I* data gaps may, if significant, affect the ability of an *environmental professional* to identify *RECs*; (3) *Phase I* opinions recognize that suspected *RECs* and *HRECs* may or may not actually qualify as *RECs* and provide an *EP's* rationale for concluding whether identified conditions do or do not qualify as *RECs* and *Phase I* opinions may also address the need, if any, for additional investigation; (4) *Phase I* conclusions summarize any *RECs* identified at the *property*; (5) as part of the process of identifying *RECs*, the *Phase I* is required to review *institutional control* and *engineering control* registries (*IC/EC registries*) for the presence of *AULs*; and (6) the *Phase I* user has the responsibility to arrange for a review of *reasonably ascertainable recorded land title records*. The *user* should carefully review the *Phase I* (or *AAI* report prepared pursuant to 40 C.F.R. §312.21).

5.2.2 Presumption of Current Valid Phase I—This guide presumes that any prior *Phase I* (or other method for performing *all appropriate inquiries*) relied on by the *user* of this guide would have been prepared in accordance with the *Phase I* and *AAI* procedures and, therefore, within all applicable time limits and *user* reliance rules set by the *Phase I* and *AAI* procedures.

5.2.3 Do RECs Exist?—For the purpose of Step 1, the identification of *RECs* means that *chemicals of concern* are present or are likely present under conditions indicating a *release*, past *release* or *material threat of release* at the *property*. If *RECs* do not exist after considering the significance of any data gaps (and there are no *land use restrictions* or *institutional controls* employed, established or relied on in connection with a *response action*), a determination of no *continuing obligations* may be made. If *RECs* exist at the *property*, further evaluation (see 5.2.6 and Step 2) may conclude that conditions identified as *RECs* are actually not releases of *chemicals of concern* or do not warrant additional attention or action.

5.2.4 Actual Knowledge of the Presence of Chemicals of Concern at the Property—If the *user* has knowledge of the presence of *chemicals of concern* at the *property*, even if not identified by the *Phase I* (or other method of performing *all appropriate inquiries*) as *RECs*, *users* should consider whether such conditions should be treated as a *REC*.

5.2.5 Do LURs or ICs Exist?—If there are no *LURs* or *ICs* that were employed, established, or relied upon in connection with a *response action* at the *property* (and there are no *RECs*), a determination of no *continuing obligations* may be made.

5.2.6 When the Phase I Identifies RECs, Step 2 May Still Conclude That Continuing Obligations Do Not Trigger—If the *Phase I* (or other method of satisfying *AAI*) concludes that *RECs* exist at the *property*, the *user* may perform additional evaluations to further assess whether *continuing releases* or threatened releases of *chemicals of concern* exist at the *property*, and whether released *chemicals of concern* trigger the need to prevent or limit unacceptable *exposure* and, therefore warrant additional attention or action. This guide does not specify the type of additional assessment that might be performed, but *users* are referred to Step 2 of this guide for procedures to further evaluate any releases of *chemicals of concern*. If upon additional review, *users* conclude that *RECs* do not qualify as *continuing releases*, threatened releases, or releases of *chemicals of concern* that would cause unacceptable *exposure* (and there are no *land use restrictions* or *institutional controls* employed, established or relied on in connection with a *response action*), the procedures suggested by this guide do not apply. See 6.8 of this guide (covering “Step 2” reconsideration of *RECs*).

5.3 Continuing Obligations When Chemicals of Concern Exist Off-Site at Neighboring Property—When *chemicals of concern* are known to have been released on an adjoining *property*, the *user* may or may not have *continuing obligations*. Where *chemicals of concern* have migrated, or have the potential to migrate, onto the *user's* *property*, the *user* may need to implement certain *continuing obligations* at the *property*, for example, to prevent or minimize potential *exposure* to those *chemicals of concern*, or to stop or prevent any migration from occurring. For example, if the *user* is located in an urban area and has a sump pump in its basement that may draw *chemicals of concern* from an adjoining *property* onto the *user's* *property*, the *user* may need to take preemptive measures (for example, installation of a vapor barrier or venting of those

chemicals) to ensure that they do not cause adverse *exposures* on the *user's property*.

NOTE 5—Persons seeking to qualify for *LLPs* as a *contiguous property owner* must meet certain criteria, including that “the person did not cause, contribute, or consent to the release...” 42 U.S.C. § 9607(q)(1)(A)(i).” Persons seeking to qualify as *BFPPs* must establish that all disposal of *hazardous substances* at the *property* occurred prior to acquisition. 42 U.S.C. § 9601(40)(A). Persons seeking to qualify as *ILOs* must establish that the “release of a hazardous substance[s] ... was caused solely by ... (3) an act or omission of a third party.” 42 U.S.C. § 9607(b). *Users* at *properties* where *chemicals of concern* have been *released* at neighboring *properties* are encouraged to consult with experienced legal counsel before engaging in activities that could cause off-site *chemicals of concern* to migrate.

5.4 Duration and Scope of Determinations that No Continuing Obligations Are Required:

5.4.1 *Subsequent Knowledge or Reason to Know of a Release Gained After Acquiring a Property*—Where the *user* acquires a *property* with no knowledge or reason to know that *chemicals of concern* have been *released* on the *property* (for example, the *Phase I* concludes that no *RECs* exist) and (1) later gains knowledge or a reason to know that *chemicals of concern* were *released* at the *property* prior to the *user's* acquisition (that is, the *release* was not caused by the *user*) or (2) later gains knowledge or reason to know that off-site contamination has or threatens to migrate to the *property* (for example, if new off-site *releases* or other changed conditions occur), the procedures suggested by this guide are meant to apply from and after the time the *user* gains knowledge or reason to know of the *release* or *material threat* of *release*. Thus, a *user's* determination that no *continuing obligations* are required should be reassessed if the *user* later gains knowledge or reason to know of *releases* of *chemicals of concern* at the *property*.

5.4.2 “Other” *Continuing Obligations*—When a *user* makes a no *continuing obligation* determination under the procedures of this guide, no implication is intended regarding the future applicability of the *continuing obligations* listed in 1.1.1 such as providing full cooperation, assistance and access to persons who are authorized to conduct *response actions* or *natural resource* restoration at a *property*, complying with information requests and administrative subpoenas, and providing legally required notices. It may be necessary to demonstrate any or all of these *continuing obligations* in order to qualify for *LLPs* should future circumstances arise in which the *user* subsequently seeks to establish eligibility for *LLPs*.

6. Step 2: Review and Evaluate Environmental Conditions and AULs at the Property

6.1 *Scope*—This section presumes that the *user*, after proceeding through Step 1 (see Section 5), concludes that *continuing obligations* should be performed. Building from the identification of *RECs* and *AULs* in Step 1, this section moves forward to build an understanding of the nature, scope, and extent of (1) any *land use restrictions* established or relied on in connection with a *response action* at the *property*, (2) any *institutional controls* employed at the *property* in connection with a *response action*, (3) other types of *AULs* such as *engineering controls* at the *property*, and (4) the nature of any

previous *releases* and any *exposure* to previously *released hazardous substances* or *petroleum products* at the *property*. The evaluation procedures described in this section serve to inform subsequent steps of this guide (see Steps 3-4) covering initial and ongoing *continuing obligations*.

6.2 *Reasonable Due Diligence*—Information available or obtainable for any given *property* will vary widely, ranging from *properties* with only *Phase I* documentation to *properties* with volumes of environmental cleanup and *AUL* documents. When reviewing environmental conditions and *AULs* at the *property* during Step 2, *users* need not ordinarily identify and obtain every possible information source about the *property*. Rather, *users* should review *reasonably ascertainable* (1) baseline sources of information (see 6.3), (2) specialized sources of *AUL* information (see 6.4), and (3) specialized sources of information related to *releases* and *exposure* (see 6.5). The level of due diligence that is reasonable will depend upon the nature of the *RECs* identified at the *property* (that is, a suburban property with a *release* from a heating oil tank is not likely to merit the same level of due diligence as former industrial properties with multiple known releases). At some properties, particularly where multiple or potentially serious *RECs* have been identified, reasonable due diligence may require environmental field investigations (see 6.5.2).

6.3 *Baseline Sources of Information*—When performing Step 2, the *user* should review the following *reasonably ascertainable* baseline sources of information.

6.3.1 *Phase I Assessments*—While the screening in Step 1 (Section 5) would conclude that a *REC* triggered the need for *continuing obligations*, during Step 2 the *user* should more closely review the *Phase I* findings, opinions (including opinions addressing the need for additional appropriate investigation, if any) and materials that may be appended to the *Phase I* to further assess the nature and extent of *RECs*, the nature and scope of any *AULs* at the *property*, or the need for additional appropriate investigations, if any. See 6.5.2 of this guide addressing additional investigations.

NOTE 6—*Users* are cautioned that some older *Phase Is* (particularly those completed before November 1, 2005) may be a far less reliable source of information about *AULs* than recorded land title records, *IC/EC registries* and additional sources of *AUL* information.

6.3.2 *Property Transaction Disclosures*—Many *users* of this guide, and particularly *users* who seek to qualify for the *BFPP LLP*, may have recently acquired *property*. *Users* should review documents relating to the purchase of the *property*, such as purchase and sale contracts, title reports, and other documentation of legally-required disclosures. Such information may directly discuss *RECs* or *AULs* or may identify additional documents relevant to *RECs* or *AULs*.

6.3.3 *Government Records on Site Assessment and Cleanup*—Although government records are reviewed as part of the *Phase I*, a *user* may perform additional reviews of specific government records to evaluate the nature and scope of *released chemicals of concern* and *exposure* pathways and receptors, and to identify and/or evaluate further the nature and scope of *AULs*. Such a review would be especially relevant when additional site assessment and cleanup, beyond the *Phase I*, was performed at the *property*. Thus, additional reviews of

government records would tend to be more appropriate at more seriously contaminated *properties*. Examples of potentially relevant government records include the Administrative Record for the *property*, approval letters, remedy decision documents, cleanup orders, certificates of completion, no further action letters, permits, and closure letters.

6.3.4 Personal Knowledge—In addition to information gathered from the baseline sources listed above, a *user* may have reason to know of *releases* or threatened *releases of chemicals of concern* on a *property* and/or *AULs* at a *property* that may not be evident in the baseline sources of information listed in this section. A *user* with such knowledge should incorporate that knowledge into its Step 2 evaluation.

6.4 Specialized Sources of AUL Information:

6.4.1 IC/EC Registries—*Users* should review federal, state, tribal, local and/or private *IC/EC registries* to determine whether *AULs* have been recorded on the *property* or were otherwise relied on in connection with a *response action* at the *property*. These types of databases are continually improving yet still they may be fairly inconsistent and incomplete in their coverage. Several states have developed databases or similar mechanisms to make *IC/EC registries* or similar *AUL* databases available on the Internet. To the extent that more than one *IC/EC Registry* is available, then the *user* should consult all *IC/EC registries* that are relevant to the *property*. Some state registries include nearly all *AULs* issued in the state, but some only include *AULs* issued by a particular state department or issued after a certain date. Thus, the failure of an *IC/EC registry* to list an *AUL* is not conclusive evidence that an *AUL* does not exist.

6.4.2 Recorded Land Title Records—An important source of information about *AULs* is recorded land title records. While *AULs* within recorded land title records should be identified during the *Phase I* (see **Note 7**) (or alternative method for performing *AAI*), it may be important to conduct additional title reviews to collect copies of recorded *AULs* (for evaluation of the actual *AUL* requirements) or to more closely inspect other recorded interests at the *property* (such as utility easements) that could affect actions needed to assure the compliance, integrity, or effectiveness of an *AUL*. A search of title records for *AULs* and other interests that affect the *property* is *not* the same as a chain of title report. In most local jurisdictions an official repository of land title records exists. Often local counties, but in some cases cities or other units of local government, hold the official land title records. State laws, commonly known as recording acts, govern the process of, among other things, recording, indexing, and storing official land title records. A properly requested title report should provide information, at a minimum, about restrictions of record on title, such as restrictive covenants (as opposed to deed “notices” or advisories, which may or may not be flagged in a title report).

NOTE 7—The *Phase I* standard identifies searches for restrictions of record on title as a *user* responsibility, although the *user* can contract to have an *EP* assume this responsibility.

6.4.3 Local Land Use Ordinances—Where baseline sources or specialized sources suggest that government ordinances were relied on by a *response action*, *users* should review the

local ordinances that were relied upon. This review will allow the *user* to know the precise rules, limits, or conditions set forth in the ordinance, which will likely be necessary information during subsequent reviews (see Steps 3 and 4) of the compliance, integrity, or effectiveness of *AULs*. Many local jurisdictions make their ordinances available online, and many free web services compile municipal ordinances. Otherwise, local ordinances are typically available directly from municipal offices (for example, city clerk’s office).

6.5 Specialized Sources of Information Concerning Releases and Exposure:

6.5.1 Documents on Current and Anticipated Future Use of the Property—The *user* of this guide would typically own the *property* or be considering an imminent purchase and, therefore, presumably would be in a good position to know and have access to information concerning the current and anticipated use of the *property*. Such information could include, among other things, development plans and construction drawings which, in turn, will often identify important features of the *property* potentially affecting *exposure*, such as: (1) the type of use as commercial, industrial or residential; (2) planned activities such as grading and excavation; (3) the existing or planned installation of utility lines (which sometimes act as *exposure* pathways) and recorded easements for such utilities; (4) ground level and second level uses (which could affect *exposure* assessments—for example, if ground level uses only involve commercial uses); (5) underground basements or parking garages, and (6) ecological habitats.

6.5.2 Additional Environmental Investigation:

6.5.2.1 Limitations of Phase I—This guide notes that the findings, opinions, and conclusions of the *Phase I* may be limited (in some cases) within the *continuing obligations* context because the *Phase I* does not involve sampling and analysis of environmental media, the subsequent evaluation of the analytical data, and may contain opinions as to the need for additional investigation. Although the *Phase I* may provide *environmental professional* opinions on the need for additional investigation, the *Phase I* does not require such opinions. As a result, where the *Phase I* identifies significant data gaps (or where the *environmental professional* opines that additional investigations should be performed), *environmental professional* opinions on *RECs* may be inadequate for purposes of identifying *continuing obligations*. In some cases, particularly where *Phase Is* identify significant data gaps or the need for additional investigation, additional investigation may be needed to identify *releases of chemicals of concern* at the *property*.

6.5.2.2 Additional Investigation Based on Site Specifics—Generally, additional investigation could serve three purposes related to *continuing obligations*: (1) to establish that a condition previously identified as a *REC* is not actually a *REC*, (2) to further define the nature and extent of a *REC* as it relates to performing *continuing obligations* under the *property’s* anticipated use (for example, it may be necessary to know the nature and scope of a *REC* in order to identify *reasonable steps* to prevent or limit *exposure*) or (3) where a prior *Phase I* concluded that significant data gaps existed, sampling or other additional investigations may close the data gaps with respect

to performing *continuing obligations*. Whether additional investigation would be necessary and appropriate is a *property-specific* determination to be made by the *user* depending on the extent of known or unknown information, whether the nature of *RECs* and potential routes for *exposure* are understood, and the current and anticipated *property* use. If the *user* desires to conduct an additional investigation, the *user* may consider the site assessment methods set forth in Guide E1903. The *user* may also consider the site assessment methods set forth in Guide E2081 and Guide E2205.

6.6 Evaluate Nature and Scope of AULs:

6.6.1 *Objective*—Based on the review of baseline sources of information (6.3) and additional specialized sources of *AUL* information (6.4), the objective is to identify, evaluate and gain a clear understanding of the nature and scope of any restrictions, limitations, conditions, *exposures*, and/or procedures required by any *AULs* that were established or relied upon in a *response action* at the *property*.

6.6.2 *AULs, Institutional Controls and Land Use Restrictions*—CERCLA expressly lists *continuing obligations* only for *institutional controls* and *land use restrictions*, each of which represents a subset of the term *AUL*. Additional types of *AULs*, such as *engineering controls*, may also exist at a *property*. Section 1.1.2 of Guide E2091 provides a detailed overview of the main types of *AULs* that may exist at a *property*. In summary, these include:

6.6.2.1 Proprietary controls, such as restrictive covenants, equitable servitudes, easements and “deed restrictions”.

6.6.2.2 State and local government controls, such as zoning ordinances, building permits, well drilling prohibitions, advisories and covenants adopted pursuant to state law (such as a state’s version of the *Uniform Environmental Covenants Act*).

6.6.2.3 Statutory enforcement tools, such as government agency-issued orders or permits requiring (or relying upon) *AULs*.

6.6.2.4 Informational devices include notices recorded in the property records (“record notice”) as well as direct notice (“actual notice”) to parties, putting parties on notice of residual *chemicals of concern* and/or use restrictions. These notices can include government agency-issued cleanup certifications, no further action letters or similar cleanup approvals which provide notice of residual contamination and/or restrictions on the *property*. Informational devices can also include *IC/EC registries*, geographic information systems, well and water advisories, Registry Act requirements, Transfer Act requirements, educational programs, voluntary health monitoring and screening, and soil management and excavation contingencies.

6.6.2.5 *Engineering controls*, such as caps, concrete or pavement, and vapor sub-slab depressurization systems, ground water pumping systems, or cut-off slurry walls that either prevent contact with residual contamination or prevent its migration.

6.6.2.6 Access controls, such as fencing, gates, security systems, signs, and posted warnings, intended to restrict access to contaminated areas.

NOTE 8—For additional information about *AULs*, see Legal Appendix X1.7 and Guide E2091.

6.6.3 *Summarize Features of AULs*—When *AULs* have been established, relied on, or employed in connection with a *response action*, the review of both *reasonably ascertainable* baseline and specialized *AUL* sources of information will often reveal details about the nature and scope of the *AULs*. To help identify *continuing obligations* (see Steps 3 and 4), the *user* should summarize *AUL* features as follows.

6.6.3.1 *Type of AUL*—Users should identify whether the identified *AULs* qualify as either: (1) *ICs* employed in connection with a *response action*; (2) *LURs* established or relied upon in connection with a *response action*; and/or (3) *engineering controls* if required by an *IC* or *LUR*.

6.6.3.2 *CAUTION Concerning the Meaning of Land Use Restrictions*—Users who identify *AULs* will likely encounter the question of whether a particular *AUL* qualifies as a *land use restriction*. The term *land use restriction* was not defined in the *Brownfields Amendments* and has not been defined by US EPA in regulations¹⁰ or in judicial opinions. Therefore, its precise scope and meaning remains open to debate. Nonetheless, the *Brownfields Amendments* require persons seeking *LLPs* to demonstrate “compliance with any *land use restrictions* established or relied on in connection with the *response action*.” Thus, whether an *AUL* qualifies as a *land use restriction* could have serious consequences for the *user*. See Legal Appendix X1.7 for additional discussion. Users are encouraged to seek the advice of experienced environmental counsel when evaluating whether an *AUL* constitutes *land use restrictions* if they seek to apply this Guidance to satisfy *LLPs*.

6.6.3.3 *Boundaries*—*AULs* typically have fixed spatial boundaries. The boundary may be coexistent with the *property* boundaries, or the *AUL* boundary may cover a smaller or larger area. In any case, users should gain a clear understanding of the boundaries for any *AUL* affecting the *property*.

6.6.3.4 *Contamination/Contaminated Media Addressed*—*AULs* typically operate to address risks related to *chemicals of concern* in ground water, surface water, air or soil. Users should identify the *chemicals of concern* and impacted media addressed by any *AUL*.

6.6.3.5 *Exposure Pathway/AUL Objective*—The risk addressed by *AULs* is often the risk of *exposure* to residual *chemicals of concern*. Accordingly, *AULs* are often designed with the objective of preventing or limiting unacceptable *exposure* by identifying human and/or ecological receptors and severing potentially complete and complete *exposure pathways*. The *user* is referred to Guides E2081, E2091, and E2205, all of which describe (among other things) methods and procedures for evaluating the use of *AULs* to identify receptors and sever *exposure pathways*. The *user* should identify the objective of any *AUL* at the *property* and the *exposure* that any *AULs* intend to address.

6.6.3.6 *AUL Restrictions, Conditions, or Procedures Imposed*—Although *AULs* are typically imposed to meet *exposure*-related objectives, they are often reduced to specific statements concerning future activity or, in the case of *engineering controls*, specific physical measures to be employed.

¹⁰ However, EPA’s Common Elements Interim Guidance (intended as guidance for USEPA employees and the Department of Justice) discusses EPA’s view of *land use restrictions*. *USEPA Common Elements Guidance* at 6-8.

For example, *AULs* may contain statements restricting excavation below certain depths, preventing water well installation (or use), preventing residential or sensitive uses at a *property*, or a variety of other type of measures. The *user* should identify the specific restrictions, conditions, or procedures imposed by any *AULs* at the *property*.

6.6.3.7 AUL Monitoring and Maintenance Requirements—*AULs* may specify monitoring or maintenance requirements. For example, in some jurisdictions *property owners* must submit periodic reports or certifications to environmental regulatory agencies that *AULs* are working properly. In other jurisdictions, *AULs* may include provisions requiring certain maintenance, inspection, or upkeep of *engineering controls*. *Users* should identify any monitoring or maintenance requirements specified by *AULs*. Such monitoring and maintenance requirements should be included within ongoing *continuing obligations* (see 8.3).

6.7 Evaluate Nature and Scope of Releases and Exposure:

6.7.1 Objective—Based on the review of baseline sources (6.3) and additional specialized sources of *release* and *exposure* information (6.5), the objective of this subsection is to identify, evaluate and gain a clear understanding of the nature and scope of any *continuing releases*, *material threats of releases*, and any *exposure* to previous *releases of chemicals of concern* at the *property*.

6.7.2 Continuing Releases, Threatened Releases, and Exposure:

6.7.2.1 Continuing Releases—*Continuing releases* refer to *chemicals of concern* that existed at the *property* prior to the *user's* acquisition of the *property* and that continue to be released to the environment. For example, below ground *continuing releases* include conditions such as: (1) leaking underground tanks (and associated piping); (2) leaking vaults; and (3) leaking drainage systems (including sanitary and storm water conveyance systems). Examples of common sources of above-ground *continuing releases* include: (1) leaking drums or ASTs; (2) leaking piping; (3) dripping from operating machinery; and (4) cracked or breached containment structures.

6.7.2.2 CAUTION Concerning Passive Migration—Whether the term *continuing release* includes “passive migration” (for example, migration of contaminated ground water or wind-blown movement of soil), remains open to debate and various legal interpretations. Legal Appendix X1.6.3.1-X1.6.3.4 provides additional discussion of passive migration and *continuing releases*.

6.7.2.3 Threatened Releases—Threatened *releases*, for the purpose of this guide, include *material threats of releases of chemicals of concern*, such as those within containers, drums, or tanks (for example, those that are abandoned or damaged, and not empty), that existed at the *property* at the time of the *user's* acquisition.

NOTE 9—*Users* are responsible for proper management of *chemicals of concern* used, stored and/or maintained on *property*, including *chemicals of concern* remaining at the *property* from prior owners (that have not yet been released into the environment). Management of all *chemicals of concern* must be conducted in accordance with all applicable local, state, tribal, and federal law.

6.7.2.4 Exposure—Exposure refers to human, environmental, or *natural resource* contact with *chemicals of concern*. *Exposure* can qualify as unacceptable *exposure* where, after an evaluation of *exposure pathways* and receptors, the *chemical of concern* exceeds, as relevant and applicable: (i) risk-based screening levels; (ii) relevant ecological screening criteria; (iii) specific risk-based screening levels; and/or (iv) site specific ecological screening criteria. ASTM guidance, including Guide E2081 and Guide E2205, provide methodologies for evaluating unacceptable exposure. State or local regulations and guidance may also provide methodologies for evaluating unacceptable exposures.

6.7.3 Procedures for Evaluating a Continuing Release or Future Threatened Release—When the *Phase I* (or alternative AAI report) informs the *user* of a *REC* associated with a likely *release* or *material threat of a release*, the *user* should consider performing additional evaluations. For example, if a *Phase I* informs a *user* of the likely presence of a transformer containing PCBs on the second floor of a structure but, at the time of the *Phase I*, site access constraints prevent visual validation, a *user* may choose to visit the site to confirm whether a *release* is occurring or threatened, and further characterize its nature and extent. The *user*, now as the new owner, can arrange access to the second floor, and the transformer can be inspected and any releases verified. The assessment should generate sufficient information to inform any actions needed to stop an existing *release* or to prevent a threatened future *release*. Continuing the example, the *user* identifies a *continuing release* from the transformer, the *user* should sufficiently characterize the failed portion of the transformer to direct its repair, proper management of any released PCBs (for example, to prevent *exposure* with *AULs*), and remediation, if necessary to prevent *exposure*, to any released PCBs.

6.7.4 Procedures for Evaluating Exposure to Human Health, the Environment, and Natural Resources—Existing ASTM guidance, including Guide E2081 and Guide E2205, provide methodologies to characterize *exposure* to human health, environment, and *natural resources*. These referenced guides provide advice on the preparation of a *site conceptual model (SCM)* in order to determine whether any complete *exposure pathways* are present at the site considering existing use and likely future use scenarios.

6.7.4.1 Prepare a Site Conceptual Model—A *SCM* can be a useful tool when evaluating the nature and scope of *releases* and related *exposure*. A *SCM* helps provide an overall understanding of site conditions and includes the hypotheses that form the basis for elucidating *exposure pathways* and the associated *receptors*. As the *property's* use may change in the future, and new receptors could reasonably be anticipated, the *SCM* can offer guidance as to whether any future potential *exposure pathway* is complete. As such, given the current and anticipated *property* use, the *SCM* can provide a template for evaluating and inventorying *exposure pathways*, and determining the status of the *exposure pathways* as incomplete, potentially complete or complete. For complete exposure pathways, the *user* should determine whether the *exposure* would qualify as unacceptable to the associated receptor.

6.7.4.2 Understand Site Conditions—Especially in the case where baseline sources do not completely address *property* conditions, a *user* should consider the locations of known or suspected areas of residual *chemicals of concern*; complete and potentially complete *exposure pathways* for each *chemical of concern*; and the *exposure pathways* that are currently incomplete, but could become complete due to changes in site activities (for example, excavation or utility installation/repair), or failures of existing structures and infrastructure.

6.7.4.3 Predict Intended Use Scenarios on the Property—The *user* should evaluate *exposure pathways* with respect to infrastructure currently on the *property* (for example, buildings, structures, utilities, storm water conveyance systems) as well as proposed or anticipated improvements on the *property*. For example, underground utilities may provide a means for subsurface pockets of residual *chemicals of concern* to migrate. Alternatively, buried utilities may be in direct contact with *chemicals of concern*, which may pose a health risk to personnel who service those utilities. It is important to consider the potential for infrequent activities such as excavation and/or trenching to change an incomplete *exposure pathway* into a complete *exposure pathway*. When evaluating potential uses of the *property*, the *user* should consider the range of potential human and ecological receptors that may reasonably be expected to use the *property*. Human receptors may include not just employees, but also construction workers, utility service personnel, and the general public. Ecological receptors may include those species that routinely inhabit the *property* or may seasonally migrate through the *property*.

6.8 Reconsideration of Whether Continuing Obligations Should Be Performed—With the benefit of the evaluation performed in Step 2, the *user* may reassess whether *property* conditions would warrant *continuing obligations*. If the *user* makes the following findings at the completion of Step 2, the *user* may make a determination of no *continuing obligations* (see Section 9, which addresses documentation of determinations of no *continuing obligations*): (1) no *continuing releases* of *chemicals of concern* exist; (2) no threatened *releases* of *chemicals of concern* exist; (3) any previously *released chemicals of concern* do not present a complete *exposure pathway* that poses an unacceptable *exposure* to humans, the environment, or *natural resources*; (4) no *ICs* were employed in connection with any *response action* at the *property*; and (5) no *LURs* were established or relied upon by any *response action* at the *property*. If a determination of no *continuing obligations* is made, see 5.4. Section 5.4 reminds *users* that there are other *continuing obligations*, in addition to those related to *LURs*, *ICs*, and *reasonable steps*, that could be applicable in the future and that future information and knowledge could require *users* to revisit previous determinations that no *continuing obligations* are required.

6.9 Summarize Nature and Scope of Releases, Exposure and AULs—At the conclusion of Step 2, (assuming that the *user* did not make a determination of no *continuing obligations* under 6.8), the *user* should document a summary of the nature and scope of *releases*, *exposure* and *AULs* in a *continuing*

obligations plan (see Section 9). This plan will inform Step 3 (initial *continuing obligations*) and Step 4 (ongoing *continuing obligations*).

7. Step 3: Identify and Perform Initial Continuing Obligations for the Property

7.1 Scope—This step presumes the *user* has completed Step 2 (see Section 6) and, therefore, has gained a clear understanding of any *releases* and *exposure pathways*, and has identified any *AULs*, including any *ICs*, *LURs*, and *ECs* at the *property*. With Step 2 completed, the objective of this section (or Step 3) is to identify and perform the initial *continuing obligations* that should be performed given the *user's* site-specific conditions for the *property*.

NOTE 10—“Initial” will mean different things in different contexts. In the case of the *BFPP LLP*, initial likely refers to the time shortly after *property* acquisition. In the context of the *ILO* or *CPO LLP*, “initial” refers to the time shortly after gaining knowledge of a *release* of *chemicals of concern* at the *property*.

7.2 Initial Continuing Obligations—The initial *continuing obligations* covered in Step 3 include: (1) taking *reasonable steps* with respect to *releases* of *chemicals of concern*, including stopping *continuing releases*, preventing threatened future *releases*, and preventing or limiting human, environmental or *natural resource exposure* to prior *releases* of *chemical of concern*; (2) complying with any *land use restrictions* established or relied upon in connection with a *response action* at a *property*; (3) not impeding the effectiveness or integrity of any *institutional control* employed at a *property* in connection with a *response action*; and (4) initial *continuing obligations* for *engineering controls* if the control is an integral component of a *land use restriction* or *institutional control* (see 7.5).

NOTE 11—The *user* is reminded that sections 1.1.1 and 1.1.2 of this guide describe additional *continuing obligations* set forth in CERCLA but not addressed in detail in this guide. These include (1) providing full cooperation, assistance, and access to persons who are authorized to conduct *response actions* or *natural resource* restoration at a *property*; (2) complying with information requests and administrative subpoenas; and (3) providing legally required notices with respect to releases of any hazardous substances at a *property*.

7.3 Property-Specific Context—*Users* undertaking Step 3 may encounter a range of *property* conditions. On one end of the *property* spectrum, Step 2 may have revealed *releases* and *exposures* that have not been addressed. On the other end, Step 2 may reveal properties that have fully undergone cleanup at which *AULs* have already been established and relied on. Recognizing this broad range of *property* scenarios, the following subsections provide examples of *continuing obligations* that could apply. Aided by the discussion in this section, the *user* should identify and perform *continuing obligations* tailored to its *property* conditions.

7.4 Continuing Obligation Plan—The initial *continuing obligations*, as tailored for the *property*, should be documented in a *continuing obligations plan*. See Section 9 (covering *continuing obligation* documentation).

7.5 Special Case of Engineering Controls—The *Brownfields Amendments* do not expressly impose *continuing obligations* on *engineering controls*. However, *continuing obligations* may nonetheless apply to *engineering controls*. In some

circumstances, *engineering controls* are an integral component of an *IC* or *LUR* and the *continuing obligations* that are applicable to the *institutional control* or *land use restriction* would likely apply to the related *engineering control*. In those circumstances, *users* should address the *engineering control* using the same provisions of this guide applicable to the *IC* or *LUR* with which it is related. Even in the case of *engineering controls* unrelated to any *IC* or *LUR*, an *engineering control* may be needed as a *reasonable step* to prevent or limit unacceptable *exposure* to residual *chemicals of concern*.

7.6 Initial Reasonable Steps:

7.6.1 *Objective*—Taking initial *reasonable steps* is relevant in the case where Step 2 revealed unaddressed *continuing releases*, *threatened releases*, or unacceptable *exposure* to previously released *chemicals of concern*. The objective of initial *reasonable steps* is to take relatively imminent action to address such *releases* or unacceptable *exposure*. Additional *reasonable steps* may be needed on an ongoing basis. (See Section 8.)

7.6.2 *Reasonable Steps When Remediation Completed Under State Cleanup Program*—Subject to exceptions, US EPA is barred from bringing a CERCLA enforcement action at sites remediated under certain *state cleanup programs* (see Legal Appendix X1.3.5 for more details). When a *response action* has been satisfactorily performed at a *property* under the oversight of a state cleanup program, including *voluntary cleanup programs*, such action should ordinarily satisfy or be an important factor in satisfying the CERCLA LLP requirement for taking *reasonable steps* to stop any continuing *release*, prevent any threatened future *release*, and prevent or limit any human, environmental, or *natural resource exposure* to any previously released *hazardous substances*. But the extent to which such actions qualify as *reasonable steps* may be limited by the scope of the approval or the *chemicals of concern* addressed and the conditions stated within any *response action* approvals. Factors to consider in evaluating whether such a *response action* constitutes *reasonable steps* include (1) whether the *response action* addresses all *chemicals of concern* and unacceptable *exposures*, (2) whether the *response action* has been completely implemented to the satisfaction of the oversight agency, and (3) whether conditions stated within the environmental oversight agency's approval have been met at the *property*.

7.6.3 *Contact Regulatory Agencies*—Notifying regulatory agencies of actual or *material threats* of *releases* may be a *reasonable step*.

NOTE 12—*Continuing obligations* under CERCLA include the obligation to provide “legally required notice with respect to the discovery or release of hazardous substances.” Whether notification is actually “legally required” under site-specific circumstances is a matter of applicable state and federal laws. This guide gives no additional guidance on whether the presence of a *release* would trigger any laws requiring notice. *Users* questioning the need to provide legally required notices are encouraged to consult with legal counsel.

7.6.4 Examples of Initial Reasonable Steps:

7.6.4.1 *Stopping Continuing Releases*—*Reasonable steps* to stop above-ground *continuing releases* may include, but are not limited to: over packing, emptying, or properly disposing of

leaking drums or above ground storage tanks; tightening or replacing valves and/or flanges to stop dripping; emptying a large leaking container that cannot be over packed; and installing or repairing a containment structure. *Reasonable steps* to stop below-ground *continuing releases* may include, but are not limited to, emptying a tank, pipeline, or other container where practically feasible, addressing a breach from an existing containment or barrier system, or using plugs to hold back the flow.

7.6.4.2 *Preventing Future Threatened Release*—For *property* where *chemicals of concern* are stored in tank systems, *reasonable steps* may include steps to address a storage tank system as applicable (for example, emptying, removing, repairing, or replacing a storage tank system where visual or physical observations show signs of damage such as structural fatigue or chemical corrosion), and/or evaluating whether the secondary containment system has been adequately designed and built according to applicable laws and regulations. If the *user* determines that the structural integrity of the secondary containment system is questionable or not capable of meeting applicable standards, the *user* should consider taking *reasonable steps* to prevent this threatened *release*. Similarly, the *user* should consider the locations where *chemicals of concern* are stored in containers and the appropriate maintenance of such storage areas (for example, removing, emptying, or securing those existing containers that, while not leaking, show signs based on visual or physical observations of physical damage such as damage from distention with overpressure, deep dents, or heavy corrosion that appear to compromise the structural integrity of the container).

7.6.4.3 Preventing or Limiting Unacceptable Exposure:

(1) *Interim Responses*—Interim responses refer to short-term actions that address *exposure* risks. Examples of interim responses may include the removal of highly contaminated soil or the removal of “free product,” particularly where *exposure* risks are high. (See Note 13.)

(2) *Implementing “New” AULs*—Because AULs, by design, are intended to prevent or limit *exposure*, implementing “new” AULs may be a *reasonable step* to address *exposure* risks. Implementing “new” AULs may prove appropriate in the *property* scenario where Step 2 revealed *exposure* conditions that were not addressed by a *response action* (for example, where only *environmental site assessment* activities were performed to date). A “new” AUL could, for example, include the installation of an engineered barrier to prevent direct contact *exposures* or a vapor barrier or ventilation system for a potential indoor air exposure. See Guide E2091 for discussion on selection and implementation considerations for AULs.

(3) *Improve Existing AULs*—The scenario could exist where AULs were properly employed or established in the manner that was relied upon by a *response action* but, nonetheless, the *user* determines that the employed AULs failed to adequately address *exposure* risks. In such a case, it may be a *reasonable step* to implement, re-implement, re-record, or modify an AUL to prevent or limit an unacceptable risk of *exposure* to *chemicals of concern* at the *property*.

(4) *Limit Site Access*—These activities include limiting access to the *property* or areas on the *property* that may tend to have higher or potentially unacceptable risks of human *exposure*. Such activities could include building and maintaining a fence, increasing security measures, or limiting outdoor activities.

(5) *Take Reasonable Precautions Against Foreseeable Events*—Reasonable precautions should be taken to prevent *exposure* due to reasonably foreseeable acts or omissions of a third party. Examples of reasonable precautions could include notifying an excavation contractor or easement holder authorized to remove contaminated soil in the location of any contaminated soil and the need for proper handling and disposal of that soil; taking precautions to prevent or protect neighborhood children playing in an open area with either surface or shallow subsurface *chemicals of concern*; and creating “clean” utility corridors when redeveloping a site.

(6) *Prevent Migration of Existing Chemicals of Concern*—These are steps taken to prevent the migration of existing *chemicals of concern* in a manner that increases *exposure* risks. Depending on *property*-specific facts, examples of activities that could cause increased *exposure* include movement of contaminated soils to previously uncontaminated areas, installation of a drainage system for a building that pumps contaminated ground water to a ditch, or causing the migration of contaminated ground water. Depending on *property*-specific considerations, it may be prudent or necessary for a *user* to abstain from such activities in order to prevent or limit *exposure* to *chemicals of concern*.

NOTE 13—Interim responses may be *reasonable steps* even when *exposure* risks have not been affirmatively demonstrated. In some circumstances, moving forward with interim responses, even without completed assessments of *exposure* risks, may be the most cost-effective means to address potential *exposures*.

7.7. Initial Continuing Obligations for ICs and LURs:

7.7.1 *Objective*—Based on the *LURs* and *ICs* identified during Step 2 (if any), initial *continuing obligations* for *ICs* and *LURs* include the evaluation of whether: (1) *ICs* employed in connection with a *response action* have been implemented as contemplated by the *response action*; (2) the *user* is impeding the effectiveness or integrity of any such *ICs*; (3) *LURs* established or relied upon by a *response action* have been implemented as contemplated by the *response action*; (4) the *user's* activities and/or land use comply with any such *LURs*.

7.7.2 *Impeding Integrity and Effectiveness of ICs*—*IC* effectiveness refers to the ability of the *IC* to address the *exposure* pathways that it was designed to address. *IC* integrity refers to the *IC* being properly implemented and unimpaired. To evaluate whether the *user* is impeding the effectiveness or integrity of an *IC*, the *user* should evaluate whether any activities at the *property* or actions by the *user* impede the ability of the *IC* to serve the purpose for which it was employed by the *response action*. For example, hindering or failing to properly implement an *IC* could impede the *IC's* effectiveness or integrity. If an *IC* required inspection and certification, failure to perform such inspection or certification could impede the *IC's* effectiveness or integrity. If an *IC* required notification of the *IC* to future buyers, failure to do so could impede the

IC's effectiveness or integrity. If an *IC* required the construction of an *engineering control*, failure to construct the *engineering control* as required by the *IC* could impede the effectiveness or integrity of an *IC*. If an *IC* required the construction and maintenance of *engineering controls*, failure to properly maintain the *engineering control* could impede the effectiveness or integrity of an *IC*. Finally, allowing activities at the *property* that conflict with or do not adhere to conditions or restrictions set by *ICs* could impede the effectiveness or integrity of the *IC*.

7.7.3 *Compliance with Land Use Restrictions*—Compliance with *LURs* refers to whether existing land uses and activities conform with the restrictions, limitations, affirmative obligations and other requirements imposed as part of any *LUR*. For example, if an *LUR* prohibits excavation below fifteen feet, a deeper excavation would likely constitute non-compliance. Compliance with *LURs* also includes conformance with any administrative processes required by the *LUR* (for example, preparation and submission of periodic monitoring reports).

7.7.4 Examples of Initial Continuing Obligations for ICs and LURs:

7.7.4.1 *Implement ICs and LURs if Not Already Implemented*—Where Step 2 of this guide concluded that *response actions* relied upon *ICs* or *LURs* but such *ICs* or *LURs* were not employed or established, the *user* should consider implementing *ICs* or *LURs* as contemplated by the *response action*. See Guide E2091 for procedures and considerations for implementing *AULs* (including *ICs* and *LURs*).

7.7.4.2 *Take Initial Actions to Assure the Integrity and Effectiveness of ICs is Not Impeded, and Compliance with LURs*—Initial actions can be a valuable means to evaluate whether activities or circumstances are impeding the effectiveness or integrity of *ICs* (including any *engineering controls* identified by *ICs*) and whether the *property* complies with *LURs*. The following actions help to achieve these objectives:

(1) *Initial Property Inspection*—Initial *property* inspections should address (1) evidence of land uses or activities that do not comply with *LURs*, such as evidence of well use where an *LUR* prohibited such use; (2) where *ECs* were identified as being required in an *IC* or *LUR*, evidence of *ECs* that are not functioning properly, evidence of *EC* boundaries differing from boundaries specified in any associated *ICs*, or evidence of the failure to maintain or repair required *ECs*; and (3) evidence of *IC* integrity being impeded, such as evidence of excavation into engineered caps where excavation has been prohibited by an *IC*.

(2) *Property Occupant Contacts*—Where *users* do not regularly occupy some or all of the *property*, they should consider interviewing occupants of the *property* to develop a better understanding of the types of land uses and activities occurring on the *property* and whether these land uses and activities conform to the *LURs* and/or whether land uses and activities might impede the effectiveness or integrity of any *ICs* (or any *ECs* identified by *ICs*). The *user* should make property managers, tenants and other *users* of the *property* aware of the *LURs* and *ICs* and any relevant limitations and/or affirmative obligations imposed. Tenant awareness may be fostered by

written notice, signed acknowledgments or the inclusion of notice provisions in a lease.

(3) *Evaluate Title Records*—To help assure that *users* do not impede the integrity or effectiveness of an *IC* or to help comply with an *LUR*, *users* may review land title records (see Step 2) and, in turn, as part of this step (Step 3), evaluate whether prior recorded interests potentially threaten to impede the integrity or effectiveness of an *IC* or the ability to comply with an *LUR*. When reviewing *reasonably ascertainable* land title records (see Step 2), *users* should address two fundamental questions: (1) do the land records indicate whether an *IC* or *LUR* affects the *property*; and (2) do other recorded interests which affect the *property*, potentially compromise or otherwise affect such *ICs* or *LURs*? A title report should provide necessary documentation to address both questions. The first question may be addressed under a fairly straightforward process; a properly performed title search should identify whether an *LUR* or *IC* has been recorded. The second question raises more complicated issues and, in turn, may require professional judgment. Generally, interests recorded against a *property* prior to the time when the *LURs* or *ICs* were recorded (for example, a mortgage lien) will hold a higher priority than other *LURs* and *ICs*.

(4) When evaluating the integrity and effectiveness of *ICs* or *LURs* that are government controls (such as zoning ordinances or ground water use regulations), initial *continuing obligations* may also include a review of *reasonably ascertainable* government controls and applicable government records within the jurisdiction (such as records within code enforcement, building, or zoning departments), a review of whether the control remains in force, and whether any land uses on the *property* conflict with the government control. See Guide E2091 and Legal Appendix X1.7.5.

8. Step 4: Identify and Perform Ongoing Continuing Obligations for the Property

8.1 *Scope*—This section presumes that the *user* has completed Step 3 (Section 7) and, therefore, has implemented initial *continuing obligations*. Building upon and based on Steps 2 and 3, the purpose of Step 4 is to identify and perform *continuing obligation* inspections, monitoring and evaluations on an ongoing basis (ongoing *continuing obligations*). The type of ongoing *continuing obligations* will necessarily vary from *property* to *property*, but can be assigned to one of the following: (1) monitoring and evaluation (including inspections), (2) operation and maintenance, and (3) communication of *continuing obligations*. In addition, where deficiencies are discovered, ongoing *continuing obligations* may include taking corrective actions. The process of identifying and performing ongoing *continuing obligations* should begin immediately after Step 3. Even during Step 3, and throughout the *continuing obligations* planning process, the need for ongoing *continuing obligations* should begin to be considered.

8.2 *Ongoing Continuing Obligations Should be Tailored to the Property and Documented in Continuing Obligations Plan*—Based on the recommendations and examples in this section, *users* should tailor ongoing *continuing obligation*

procedures to their *property* and document anticipated ongoing *continuing obligations* in their *continuing obligations* plan. See Section 9.

8.3 *Monitoring and Evaluation*—During monitoring and evaluation, the *user* should periodically review whether activities and uses comply with *LURs*, whether the *user's* activities and land uses have impeded the continued effectiveness or integrity of *ICs*, and/or whether *reasonable steps* implemented at the *property* remain effective. The *user's* monitoring and evaluation also covers any *ECs* required by *AULs* or implemented as *reasonable steps*. Some approaches to monitoring will necessitate a *property* or occupancy inspection. Other approaches take into account *users* who are not located at the *property* but who would benefit from an approach that alerts such “absentee *users*” to potential breaches in *continuing obligations*. Monitoring and evaluation could include periodic efforts of varying frequency, ranging from continuous monitoring to periodic monitoring over several years. See 8.3.10 addressing frequency of monitoring.

8.3.1 *Agency-Required Monitoring and Evaluation*—Some jurisdictions require periodic inspection and certification of *continuing obligations*, particularly for *AULs*. Ongoing *continuing obligations* should comply with such requirements.

8.3.2 *Property Inspections*—*Property* inspections are often a critical component of *continuing obligation* monitoring and evaluation. Appendix X6 and Appendix X7 provide sample field investigation forms. Examples of inspection items include:

8.3.2.1 The inspection of *reasonable step* measures including those relying upon *exposure* barriers (for example, an engineered cap), those relying on operational equipment (for example, vapor recovery or venting systems), or those implementing *AULs* or “new” *AULs* (see 7.6.4.3) as *reasonable step* measures. Inspection of *reasonable steps* also may involve sampling of environmental media (for example, indoor air and subslab sampling to determine continued effectiveness of a vapor barrier).

8.3.2.2 Where *AULs* cover the *property*, the inspection should review the *property* for uses prohibited by the *AUL*, in order to evaluate *AUL* compliance. For example, if the *AUL* limited residential use, childcare occupancy or ground water ingestion, inspections should verify consistency with such limits.

8.3.2.3 Inspection of *ECs* should include an inspection of the condition of the *EC* to verify whether it continues to serve its intended purpose. For example, it would be prudent to observe that a fence’s physical condition is still adequate to preclude unauthorized access. Inspections may also observe that an *EC* is only temporarily adequate toward precluding access. For example, a fence may be deteriorating, and the inspection should duly note such a condition. Inspections should also look for any improper boundaries of established *ECs*, or the disrepair of *ECs*. Inspection of *ECs* may also reveal conditions indicating the likely future failure of the *EC*.

8.3.2.4 Inspections should also evaluate whether the integrity or effectiveness of the *IC* is being impeded by the *user*. For example, evidence that the *user* has excavated into an engineered cap where an *IC* relied upon an engineered cap may

constitute evidence that the *user* has impeded the integrity or effectiveness of the *IC*. However, depending on the circumstances or the conditions and allowances authorized by the *IC*, short term excavations (for example, for repairs) would often not rise to the level of an action that impeded the effectiveness or integrity of an *IC*.

8.3.3 Property Occupant Interviews—An important component of monitoring and evaluation could involve occupant interviews. *Users* who do not regularly occupy some or all of the *property* should consider interviewing occupants of the *property* to determine whether land uses and activities conform to *AULs* and other *continuing obligations*. The *user* should periodically make *property* managers, tenants and other *users* of the *property* aware, as appropriate, of the need to satisfy *continuing obligations*, including those associated with *reasonable steps* and *AUL* requirements.

8.3.4 Monitoring Property Excavations—*Users* may consider registering their obligations related to *AULs* within excavation clearance systems, which can provide a mechanism to notify *users* and excavation contractors of the existence of *AULs*. This approach may serve *users* at larger *properties*, *properties* where excavations may occur relatively frequently, and/or when the *user* is not located at the *property*.

NOTE 14—Excavation clearance registrations are not available in all states.

8.3.5 Monitoring and/or Periodically Inspecting Building, Development, Excavation and Similar Land Use Permits—Government permits are issued routinely for various land uses and activities. The permits often focus on controlling uses of the *property* that may be incompatible with or specifically prohibited by an *AUL*. For example, grading permits control excavation, day care licenses control day care activity, building permits control new construction, and water well permits control access to and use of ground water. These permitting records are often available on the Internet and commercial services, and as such would allow an interested party to monitor prospective changes in land use and activities.

8.3.6 Monitoring and/or Periodically Inspecting Zoning Ordinances or Zoning Variance Request—Monitoring zoning generally consists of confirming whether the local government has amended, issued a variance, or allowed a particular ordinance to expire. Monitoring for zoning issues involves inspecting the records of a local government to confirm within a monitoring period whether a zoning amendment, variance, or other zoning decision has been issued that could permit an activity or use at the *property* inconsistent with the *AULs* or other *continuing obligations*.

8.3.7 Government Agency Inspections and Monitoring—In some cases, state, federal, or local government agencies conduct monitoring of *continuing obligations*, particularly *AULs*. Depending on the circumstances, government-performed inspections may serve in whole or in part as the monitoring and inspection necessary to maintain *continuing obligations* on an ongoing basis.

8.3.8 Monitoring and Inspection by Property Personnel—*Property* personnel such as maintenance, security or janitorial staff may effectively assist with and/or perform *continuing obligation* monitoring, and may be trained to recognize poten-

tial breaches of *AULs* or *reasonable steps* requirements. *Property* personnel may be part of a tiered approach where the *user* may do less frequent inspections and rely on the more frequent inspection by *property* personnel.

8.3.9 Electronic Land Activity and Use Monitoring—A variety of electronic technologies exist that could help *users* to perform *continuing obligation* monitoring, especially for prospective land activities and/or permit issuances for land activities that could compromise *AULs*. A useful review of these technologies is provided in *An Overview of Land Use Control Management Systems*, published by the Interstate Technology & Regulatory Council Brownfields Team.

8.3.10 Frequency of Continuing Obligations Monitoring and Evaluation—Monitoring and evaluation could include periodic efforts of varying frequency, ranging from continuous monitoring at one extreme to periodic monitoring over several years, and some activities might be performed more frequently than others. As one point of reference, current draft EPA guidance titled “Institutional Controls: A Guide to Planning, Implementing, Maintaining, and Enforcing Institutional Controls at Contaminated Sites” recommends annual reviews for *ICs*, absent information that would support a different frequency. As another point of reference, CERCLA § 121(c) requires EPA to evaluate a remedy’s protectiveness no less than every five years in cases where EPA approved a remedy that allowed *hazardous substances* to remain. As a final point of reference, in the report titled “State Approaches to Monitoring and Oversight of Land Use Controls,” ASTSWMO reports that some states conduct *AUL* inspections and audits with frequencies ranging from one to five years. And some states require property owners to provide *AUL* evaluation reports at frequencies of one, two, or five years depending on site specifics. The monitoring and evaluation frequency should be informed by the first to occur of the following: (1) controlling statutory or regulatory requirements, or the monitoring and reporting timeframes set forth in the government’s response decision documents (if any); (2) the frequency requirements set forth in the *AULs* (if any); (3) contractual obligations imposed on a tenant or a future purchaser of the *property* to monitor or maintain *continuing obligations*; (4) any *EC* employed at the site; (5) *exposure* risks related to the toxicity and location of the residual *chemicals of concern* as well as the current and anticipated future use (and any changes in land use or land activities) of the *property* (see Note 15). Unless the foregoing factors demand otherwise, as a general rule *users* should utilize an interval that would reasonably assure that *continuing obligations* are satisfied while keeping in mind that existing practice tends never to fall below a frequency of five (5) years and is often more frequent.

NOTE 15—*AULs* developed in accordance with Guide E2091 specify inspection frequencies. Further, *AULs* that are easily damaged or moved but readily verifiable, such as on-*property* notices, monuments, signs and postings, should be evaluated more frequently (for example, annually), without the need for verification by an *environmental professional*. The *user* is directed to Guide E2091 for additional information as to the frequency of *AUL* inspections.

8.4 Maintenance and Operation—When *continuing obligations* involve physical measures (for example, *engineering controls*), maintenance of such physical measures may be

necessary. For example, an engineered cap (whether installed as a *reasonable step* or because it was required by an *AUL*) may suffer erosion or cracks from time to time, and when such deterioration compromises the intended design, maintenance and/or repair should occur. Other types of *engineering controls* may also entail operational duties. For example, a subslab depressurization system utilizes fans to draw soil gas from a structure's subslab through piping and vents it outdoors. Operational duties could include adjustments to maintain specified manometer settings associated with the fan's operation. The precise type and/or schedule for maintenance and operation could be addressed in the *continuing obligations* plan.

8.5 Communication of Ongoing Continuing Obligations—The success of *continuing obligations* over time may depend upon providing notice or information about the *continuing obligations* to third parties beyond the *user*. Such third parties include those affected or potentially affected by *continuing obligations*.

8.5.1 Persons Affected by Continuing Obligations—Persons affected by *continuing obligations* include parties or entities whose actions or omissions at the subject *property* may conflict with or compromise the *continuing obligations* applicable at the *property*, such as the general public, tenants, customers, utility service and maintenance personnel, landscaping contractors, as well as employees or agents of the *user*. For the purpose of communicating and tailoring communications about *continuing obligations* to such parties, *users* should contemplate: (a) likely routes, duration, frequency, and intensity of exposure to *chemicals of concern* in the environment at the facility; (b) degree of familiarity with *hazardous substances* and with methods of preventing excessive *exposure*; (c) ability to understand information provided to them and communicate to the *owner* or *operator*, and alternative forms of providing information including languages spoken; and (d) likely physical strengths or weaknesses, or behaviors, that affect *chemicals of concern exposure* and its consequences (for example, unsupervised young children who may consume contaminated soil).

8.5.2 Procedures to Communicate Continuing Obligations to Persons Affected by Continuing Obligations:

8.5.2.1 Signs—Signs provide information about releases, potential exposure pathways, and/or *AULs*. Depending upon the location, the audience and use of the *property*, it may be necessary to use both English and non-English languages or symbols.

8.5.2.2 Markers—Permanent markers may also be used, especially to identify boundaries of areas where land uses are limited in comparison to adjacent areas. Examples of such markers include stone or concrete columns bearing plaques, or benchmark-type markers flush with the ground surface. The boundary between two soil layers also may be marked by laying plastic mesh fence horizontally across the top of the deeper layer, or by separating the two layers with a relatively thin layer of soil that has a different color or texture. This type of marker is most commonly associated with areas where "clean" soil has been placed over deeper-lying soil that is more contaminated and is being left in place.

8.5.2.3 Lease Agreements—Tenants can be notified of specific restrictions and responsibilities by text in a lease agreement. Additionally, the lease agreement may also provide a mechanism for the tenant to provide notice to contractors who perform tenant improvements or maintenance that might breach *continuing obligations*.

8.5.2.4 IC/EC Registries, Databases, and Land Record Offices—Communication of *continuing obligations*, particularly *AULs*, in government databases often provides valuable (if not mandated) notice. Sources of governmental records include, among other things, (1) county recorder offices where land title records (for example, deeds, easements, and restrictive covenants) are recorded and provide "constructive notice" to third parties, (2) government databases or registries identifying areas where water well construction is prohibited (or requires a special permit), or (3) IC/EC Registries.

8.5.2.5 Other Media—A *user* could employ websites, newsletters or other methodologies to aid in communicating *continuing obligations* and *AULs* that could affect a party's use of the *property*.

8.6 Corrective Action—When monitoring and evaluation identifies evidence of *continuing obligations* not being performed as intended, corrective actions should be considered.

8.7 Documentation:

(1) As noted above, the anticipated monitoring and evaluation procedures and schedules, anticipated maintenance procedures and schedules, and any anticipated communication measures should be documented in a *continuing obligations* plan. See Section 9.

(2) When such monitoring, evaluation (including inspections), and/or maintenance is performed, the findings or results from these procedures should be documented in a *continuing obligations* monitoring, evaluation, and maintenance report. See Section 9.

9. Continuing Obligations Documentation

9.1 Scope—This section informs the *user* as to the documentation of *continuing obligations* which, as 1.1.14 of this guide addresses, could be useful in demonstrating performance of *continuing obligations*. Three separate reports are expected to be potentially relevant. However, depending on the site specifics only one or perhaps two reports would ordinarily be appropriate. The potentially relevant reports include: (1) a statement of no *continuing obligations* when *continuing obligations* do not apply at a *property*, (2) a *continuing obligations* plan when *continuing obligations* apply at a *property*, and (3) the associated *continuing obligations monitoring and evaluation report*, which periodically documents satisfaction of *continuing obligations*.

9.2 Common Topics for all Reports—While the objectives of these reports vary, there are common elements to all reports:

9.2.1 Property Description—The *property* description could describe the *property*, the *property* ownership, parcel identification numbers and the date of the *property* purchase.

9.2.2 Signature and Qualifications—The person responsible should sign the report. The report should include a qualification statement of the person responsible for preparation of the report.

9.2.3 *Appendices and References*—Supporting documentation should be included or referenced to support findings. The report should include a references section to identify published referenced sources relied upon in preparing the report. Each referenced source should be adequately annotated to facilitate retrieval by another party.

9.3 *Statement of No Continuing Obligations*—Appendix X2 includes a recommended report format for a finding of no *continuing obligations* at a *property*. In many cases a statement of no *continuing obligations* can be prepared as a one-page form, a sample of which is presented in Appendix X3. This statement would typically be drafted shortly after the *property* is acquired.

9.4 *Continuing Obligations Plan*—The *continuing obligations plan* (or “plan”) should be generally designed to include the items contained in the recommended report format attached as Appendix X4. In many ways, this plan forms the core output of the guide because, based on the suggestions in the guide, it documents the actions and efforts considered necessary for satisfaction of *continuing obligations*. This plan would typically be drafted shortly after the *property* is acquired in the case of a *BFPP* or, in the case of an *ILO* or *CPO*, soon after gaining knowledge or reason to know of a *release*. See 1.1.10 (addressing timing considerations). Beyond the elements listed in 9.2, the following elements cover the primary components in a *continuing obligations plan*.

9.4.1 *Site Assessment and Identification of Existing Environmental Conditions*—This section of the plan draws from information and evaluation performed under Step 1 and Step 2, and describes all existing environmental conditions, the site assessment documents used as a basis for the plan, and the current and anticipated use of *property*.

9.4.1.1 *Review of Site Assessment Documents*—This section simply documents the sources of information relied upon, including “baseline sources” and “specialized sources” of information (see Steps 1 and 2), their scope, preparation date, and general findings. Thus, this section documents the information upon which the plan relies.

9.4.1.2 *Summary of Existing Environmental Conditions*—This section of the plan summarizes the evaluation performed primarily under Step 1 and, more specifically, inventories *RECs*, releases, and *AULs*.

9.4.1.3 *Summary of General Site Use and Conditions*—Based on the assessment and evaluation procedures in Step 1 and Step 2, this section documents the general *property* conditions and anticipated uses. Documenting such information aids the design of *continuing obligations*. Existing and anticipated land use and activities may be material toward evaluating *continuing obligations*. General *property* and vicinity characteristics could include current and anticipated site improvements at and adjacent to the *property*. A description of land use and activities would describe *property* location and elevation, frequency and duration of *property* activities and use, and characteristics of any parties participating in these activities. For example, this section might explain that site redevelopment anticipates a ground level tenancy by a child-care provider with children using the space six hours per day, five days per week. *Natural resources* descriptions would

include ecological features and any *natural resources* such as ground water for drinking or agriculture.

9.4.2 *Evaluation of Existing Conditions to Determine Continuing Obligations*—As addressed in 6.9, this section of the plan summarizes the evaluation performed primarily under Step 2 and, more specifically documents the nature and scope of releases, exposure, and *AULs*, including discussion and figures and graphs (as necessary). This section provides a succinct yet comprehensive view of releases, exposures, and *AUL* requirements. The subsequent section of the plan, documents the design of *continuing obligations* based (in large part) on the summary contained in this section of the plan.

9.4.3 *Description of Initial Continuing Obligations*—Based on *continuing obligations* identified in Step 3, the *continuing obligations plan* should describe any initial *continuing obligations* the user has taken or would initially undertake, tailored to the *property* specific circumstances. This section of the plan would report findings of any initial site inspections already performed under Step 3 (for example, inspections of *AULs*, releases and exposures). And this section of the plan would include the design for *AUL*-related actions necessary to be implemented initially, undertaken to attain *AUL* compliance or to avoid impeding *AUL* integrity and effectiveness. The plan also includes the design for *reasonable step*-derived *continuing obligations* including those related to stopping or preventing releases or continuing releases, and those related to preventing exposure to human health, environment, and *natural resources*. The schedule of any initial *continuing obligations* depends on the timing of this plan. For example, some actions like stopping *continuing releases* would reasonably be completed prior to the plan’s completion, while others, like installation of a vapor barrier, might occur during future site development.

9.4.4 *Descriptions of Ongoing Continuing Obligations*—Based upon the ongoing *continuing obligations* identified under Step 4, this section of the plan would describe the nature of the efforts and schedule considered necessary, under the *property*-specific circumstances, to assure satisfaction of *continuing obligations* over the long term, including: (1) monitoring and evaluation (including inspections), (2) operation and maintenance, and (3) communication of *continuing obligation*. Reporting of ongoing *continuing obligations* is considered further in 9.5.

9.5 *Continuing Obligations Monitoring and Evaluation Report*—This report documents the periodic monitoring and evaluation efforts that would have been designed within the *continuing obligation plan*, and documents that *property* conditions are consistent with *continuing obligations* at a particular time interval during the user’s term of *property* ownership. Appendix X5 includes the recommended report format for documenting *continuing obligations* monitoring and evaluation.

9.5.1 *Monitoring, Operation and Maintenance Requirements*—This report should identify monitoring-related requirements or criteria, for the *property*, as set forth within the *continuing obligations plan* for the subject monitoring interval. This section would summarize, or simply incorporate by reference from the appropriate sections of the *continuing*

obligations plan, the type of monitoring and maintenance considered appropriate for the site.

9.5.2 Monitoring, Operation and Maintenance Procedures—This report should identify any monitoring, operation or maintenance procedures that were performed. Among other procedures, these include site inspections. To aid site inspection reporting, **Appendix X6** provides a “simple site” report form for field investigations and **Appendix X7** provides a “complex site” report form for field investigations.

9.5.3 Monitoring, Operation and Maintenance Findings—The report should record monitoring results and document ongoing operation and completion of maintenance procedures.

9.5.4 Corrective Actions Performed—This report should describe any actions taken by the *user* or agents of the *user* to correct deficiencies between *property* conditions and the requirements set forth for the *property* in the *continuing obligations plan*. The description of *corrective actions* should include the action taken, when the action was taken, and the party who completed the action.

10. Keywords

10.1 activity and use limitations; all appropriate inquiries; CERCLA; commercial real estate; continuing obligations; hazardous substances; landowner liability protections; property

APPENDIXES

(Nonmandatory Information)

X1. LEGAL BACKGROUND TO FEDERAL LAW AND THE PRACTICES OF CONTINUING OBLIGATIONS ON COMMERCIAL REAL ESTATE IMPACTED BY CHEMICALS OF CONCERN

INTRODUCTION

This appendix provides background on “*continuing obligations*” as such obligations are set forth under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended by the Superfund Amendments and Reauthorization Act (SARA), and by the Small Business Liability Relief and Brownfields Revitalization Act, 42 U.S.C. § 9601 *et seq.* This appendix first briefly overviews CERCLA liability, summarizes CERCLA defenses and landowner liability protections, and then discusses *continuing obligations* that, generally speaking, must be performed in order to be eligible for certain landowner liability protections under CERCLA. This appendix is for informational and legal background purposes; it is not intended and should not be construed as legal advice. This appendix does not replace legal advice, and because legal requirements may change with subsequent Congressional action or court interpretation, *users* are encouraged to seek legal counsel where appropriate.

X1.1 CERCLA Liability

X1.1.1 CERCLA liability arises pursuant to CERCLA § 107, 42 U.S.C. § 9607. Generally speaking, such liability attaches in connection with the *release* of “*hazardous substances*” as defined in CERCLA § 101(14), 42 U.S.C. § 9601(14). Potentially responsible parties (*PRPs*) include (1) the *owner* and *operator* of a vessel or a facility from which *hazardous substances* are released, (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such *hazardous substances* were disposed of, (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of *hazardous substances* owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such *hazardous substances*, and (4) any person who accepts or accepted any *hazardous substances* for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance. Responsible parties may be liable for

necessary costs of response, as set forth in the statute. See CERCLA § 107(a), 42 U.S.C. § 9607(a).

X1.2 Defenses to CERCLA Liability and CERCLA Liability Protections Prior to the 2002 Brownfields Amendments

X1.2.1 Prior to the *Brownfields Amendments* (discussed further below), a party that otherwise qualified as a potentially liable party under CERCLA could avoid liability only if they could establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by:

(1) an act of God;¹¹

(2) an act of war;¹²

(3) an act of a third party with whom there was no contractual relationship (the third party defense).¹³

X1.2.2 The most common defense historically asserted was the third-party defense. To prevail, a defendant must establish by a preponderance of the evidence that:

¹¹ 42 U.S.C. § 9607(b)(1).

¹² 42 U.S.C. § 9607(b)(2).

¹³ 42 U.S.C. § 9607(b)(3).

X1.2.2.1 The release or threat of release of hazardous substance was caused solely by a third party;

X1.2.2.2 The third party is not an employee or agent of the defendant, or the acts or omissions of the third party did not occur in connection with a contractual relationship to the defendant;

X1.2.2.3 The defendant exercised due care with respect to the *hazardous substances*; and

X1.2.2.4 The defendant took precautions against foreseeable acts or omissions of the third party.¹⁴

X1.2.3 Originally, the third-party defense was not available when *property* was purchased from a liable party because by definition the purchase involved a “contractual relationship.”¹⁵ To address this, the Superfund Amendments and Reauthorization Act (SARA) of 1986 added an *innocent landowner* (“ILO”) defense. The ILO excluded from the definition of “contractual relationship” a person who, at the time he or she acquired the facility, *did not know and had no reason to know*, that any hazardous substance was disposed on, in or at the facility.¹⁶ CERCLA’s 1986 SARA amendments clarified the meaning of “had no reason to know” by stating that “the defendant must have undertaken, at the time of acquisition, *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. For purposes of the preceding sentence, the court shall take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the *property* if uncontaminated, commonly known or reasonably ascertainable information about the *property*, the obviousness of the presence or likely presence of contamination at the *property*, and the ability to detect such contamination by appropriate inspection.”¹⁷

X1.2.4 The ILO defense also required purchasers or tenants to establish that they met the third prong of the test to exercise “due care” in dealing with the *hazardous substances*. CERCLA itself does not define “due care” but the legislative history and case law help to define its contours. According to the legislative history, a person must demonstrate that its actions were consistent with those that a “reasonable and prudent person would have taken in light of all relevant facts and circumstances.”¹⁸ Case law has characterized “due care” as “those steps necessary to protect the public from a health or environmental threat.”¹⁹ Because a person’s actions will be evaluated

based on the “relevant facts and circumstances,” the due care analysis is a fact-intensive inquiry and will be evaluated on a case-by-case basis.²⁰

X1.2.5 “Due care,” in the ILO context, is triggered, according to some court opinions, when a person becomes aware of a release or substantial threat of release of *hazardous substances*.²¹ Due care clearly contemplates some degree of awareness of a threat to the environment from a *release* or substantial threat of a release of a hazardous substance.²² The courts have not addressed the question whether a person without actual knowledge—but who should have become aware—of an actual or threatened release of *hazardous substances* would be deemed not to have exercised due care.

X1.2.6 The ILO defense also requires purchasers to show that they took precautions against the foreseeable acts or omissions of third parties and the consequences that could foreseeably result from such acts or omissions.²³ For discussion on ILO and third party defenses after the *Brownfields Amendments*, see X1.3.4.

X1.3 Landowner Liability Protections under the Brownfields Amendments

X1.3.1 The *Brownfields Amendments* amended CERCLA § 107 by adding two new defenses to CERCLA liability: (i) the *Contiguous Property Owner* liability defense²⁴; and (ii) the

²⁰ *Foster v. United States*, 922 F. Supp. 642 (D.D.C. 1996); *New York v. Lashins Arcade*, 91 F.3d at 361. In one case, the owner of a shopping center was able to demonstrate that it exercised due care because it took steps such as maintaining water filters, sampling drinking water, instructing tenants to avoid discharging into the septic system, inserting activity and use limitations (“AULs”) into leases and conducting periodic inspections. *New York v. Lashins Arcade*, 91 F.3d at 358. (For other examples of owners who were held to have exercised due care, see *Lincoln Props. Ltd. v. Higgins*, 823 F. Supp. 1528, 1543-1544 (E.D. Cal. 1992) (defendant sealed well casings and sewer line joints to prevent contamination); *In re Sterling Steel Treating, Inc.*, 94 B.R. 924, 929 (Bankr. E.D. Mich. 1989)). Other cases have held that a person who does not take any affirmative measures will not be able to satisfy its due care obligations. See *Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321, 325 (7th Cir. 1994); *United States v. DiBase Salem Realty Trust*, 1993 WL 729662 (D. Mass. 1993). Some courts have held that the failure to inquire about past environmental practices may constitute a lack of due care on the grounds that Congress intended CERCLA to provide incentives for private parties to investigate potential sources of contamination and initiate remediation efforts. *United States v. A&N Cleaners*, 842 F. Supp. 1543 (S.D.N.Y. 1994) (finding a genuine issue of material fact regarding whether party did not exercise due care where it failed to inquire about past use of floor drain, failed to communicate with local environmental authorities or failed to inquire about environmental compliance of commercial tenants). Other courts have held that CERCLA “does not sanction willful or negligent blindness.” *Westfarm Assocs. Ltd. v. Washington Suburban Sanitary Comm’n.*, 66 F.3d 669, 682 (4th Cir. 1995); *United States v. Monsanto Co.*, 858 F.2d 160, 169 (4th Cir. 1988); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1049 (2d Cir. 1985).

²¹ See, for example, *United States v. A&N Cleaners and Launderers*, 788 F. Supp. 1317, 1329 (S.D. N.Y. 1992).

²² *Id.*

²³ 42 U.S.C. § 9607(b)(3). For example, a municipal sewer authority was found to have failed to take adequate precautions when it knew that a dry cleaner discharged PCE into the sewer system and that there were cracks in its sewer pipes and failed to abate the foreseeable releases of PCE. *Westfarm Associates*, 66 F.3d at 683.

²⁴ 42 U.S.C. § 9607(q).

¹⁴ *New York v. Lashins Arcade*, 91 F.3d 353, 361 (2d Cir. 1996); *United States v. A&N Cleaners and Launderers*, 854 F. Supp. 229, 239 (S.D.N.Y. 1994).

¹⁵ CERCLA defines a “contractual relationship” to include “land contracts, deeds or other instruments transferring title or possession.” 42 U.S.C. §9601(35)(A). See, for example, *United States v. Occidental Chemical Corp.*, 965 F. Supp. 408, 414 (W.D.N.Y. 1997).

¹⁶ 42 U.S.C. § 9601(35)(A).

¹⁷ 42 U.S.C. § 9601(35)(B) (2001) [Note: This is pre-2002 statutory language.]

¹⁸ H.R. Rep. No. 253, 99th Cong., 2d Sess. 187 (1986).

¹⁹ *New York v. Lashins Arcade*, 91 F.3d at 361.

Bona Fide Prospective Purchaser defense.²⁵ The *Brownfields Amendments* also amended the *ILO* defense.²⁶

X1.3.1.1 Certain themes regarding the rationale for the changes are evident from the legislative history:

(1) A major purpose of the *Brownfields Amendments* was to create incentives for redevelopment of abandoned Brownfields sites. Congress found that the cost of the CERCLA liability scheme serves as a disincentive to the redevelopment of these sites.²⁷

(2) The CERCLA *LLPs* for *innocent landowners*, *contiguous property owners*, and *bona fide prospective purchasers* were intended to encourage redevelopment of these underutilized sites by protecting innocent persons from potential CERCLA liability who acquire the *property* for redevelopment.

(3) The legislative history manifests Congressional intent to strike a balance between the broad liability and remedial goals imposed on responsible parties and the goal of promoting redevelopment of Brownfields sites by removing the disincentives to redevelopment that result from the strict CERCLA liability scheme.²⁸ When a statute manifests multiple purposes, the interpretative goal is to give proper weight to each purpose, even when they might be in tension with one another, because Congress has chosen the desired compromise for reconciling these competing interests.²⁹ It would thwart this careful balance between two competing statutory interests to give undue weight to the interest served by CERCLA's broad liability and remedial goals while failing to accord due deference to the equally important statutory goal of encouraging redevelopment of underutilized Brownfield sites by narrowly construing eligibility for the *LLPs* in defining the scope of the *continuing obligations* required by CERCLA. Therefore, absent exceptional circumstances, *continuing obligations* such as taking *reasonable steps* should not include the same type of *response action* or *remedial action* obligations under CERCLA as liable parties have, such as a full groundwater investigation or removal actions.³⁰ Rather, based on the intended use of the *property*, *reasonable steps* are designed to prevent or limit human, environmental, and *natural resource exposure* to *hazardous substances* that were previously released on the *property*. Nevertheless, in certain circumstances, some removal and/or remediation may be the most expedient or cost-effective method to accomplish this goal.

(4) Congress recognized the need to establish and enhance the capabilities of state voluntary and other clean up programs and to limit federal enforcement authorities at sites cleaned up under the oversight of state and local clean up programs.³¹

(5) The legislative history provides examples of *remedial actions* that ordinarily would go beyond what generally constitutes "*continuing obligations*":³² (a) conducting groundwater investigations, (b) installing groundwater remediation systems, and (c) conducting *response actions* more properly paid for by parties that caused the contamination.³³ Congress cited with approval EPA's Final Policy Toward Owners of Property Containing Contaminated Aquifers.³⁴

(6) The legislative history also provides examples of the types of actions that could satisfy post-purchase "*reasonable steps*" in some instances, including (a) notifications to government officials, (b) erecting signs or fences to prevent public exposure, and (c) maintaining any existing barriers or other elements of a *response action* on the *property* that address the contamination.³⁵

(7) Congressional intent implies that terms such as "*reasonable steps*" and "due care" require a fact specific response at a given *property* to balance the broad liability and remedial goals of CERCLA and the goal of promoting Brownfields redevelopment.³⁶

X1.3.1.2 The landowner liability protections in the *Brownfields Amendments* apply to CERCLA only, and thus are not available as defenses against actions brought under RCRA § 7003, citizen suits brought under RCRA § 7002, RCRA corrective action permit requirements and orders, and some state enforcement actions.

X1.3.2 *Bona Fide Prospective Purchaser ("BFPP") Liability Protection*:

X1.3.2.1 The *BFPP* liability protection applies to real estate transactions occurring after January 11, 2002.³⁷

X1.3.2.2 To qualify as a *BFPP*, a person must show that: (i) all disposal of *hazardous substances* at the facility occurred prior to the *BFPP* acquiring title;³⁸ (ii) the person conducted

³¹ See S. Rep. No. 107-2, at 16 (2001).

³² Generally, *continuing obligations* include: (1) taking *reasonable steps* to stop and prevent hazardous substance releases; (2) maintain compliance with *land use restrictions* and maintain the integrity and effectiveness of *institutional controls*; and (3) other *continuing obligations* including providing legally required notices, compliance with information requests and administrative subpoenas, and providing access to persons authorized to conduct *response actions*. See guide at § 1.1.1. Note that under the *Brownfields Amendments*, compliance with information requests and legally required notices are not expressly required for persons seeking the *ILO* defense. In context, the examples used in the legislative history generally support the premise that parties seeking *LLPs* do not necessarily need to conduct clean up actions to the same degree or extent as CERCLA *PRPs* in order to satisfy the "*reasonable steps*" prong of *continuing obligations*.

³³ S. Rep. No. 107-2, at 10-11.

³⁴ *Id.* at 10. Under the Policy, "due care" does not require the *property* owner "to take any affirmative steps to investigate or prevent the activities that gave rise to the original release" where the release or threat of release was caused solely by "an unrelated third party" at a location other than the *property owner's property*. EPA's Policy Toward Owners of Property Containing Contaminated Aquifers, 60 Fed. Reg. 34790, 34791 (Jul. 3, 1995).

³⁵ *Id.* at 11.

³⁶ See *id.* at 9-13.

³⁷ 42 U.S.C. § 9601(40); 42 U.S.C. § 9607(r)(a)(1).

³⁸ 42 U.S.C. § 9601(40)(A).

²⁵ 42 U.S.C. § 9607(r); elements for the *BFPP* defense are set forth at 42 U.S.C. § 9601(40).

²⁶ 42 U.S.C. § 9601(35)(B)(j)(II).

²⁷ S. Rep. No. 107-2, at 2 (2001).

²⁸ See *id.* at 2, 11.

²⁹ See, for example, *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 94 (2002) ("Courts and agencies must respect and give effect to these sorts of compromises."); *East Bay Municipal Utility Dist. v. Dep't of Commerce*, 142 F.3d 479, 484 (D.C. Cir. 1998) (statutes are not unidirectional in purpose, they reflect balancing of competing purposes); *Davis County Solid Waste Mgmt. & Energy Recovery Special Svcs. Dist. v. EPA*, 101 F.3d 1395, 1409 (D.C. Cir. 1996) (compromise legislation may have competing legislative purposes).

³⁰ See S. Rep. No. 107-2, at 10-11 (2001); USEPA, *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 ("Common Elements")* (March 6, 2003) at 9-10. NOTE: This EPA guidance document will be referenced in this Legal Appendix as "USEPA *Common Elements Guidance*."

“all appropriate inquiries” prior to acquiring title;³⁹ and (iii) the person is not a *PRP* or affiliated with any other *PRP*.⁴⁰

X1.3.2.3 In some jurisdictions, “disposal” has been interpreted broadly, and may include some typical development activities.⁴¹ The vast majority of cases that evaluate “disposal” were not considered in the context of the 2002 *Brownfields Amendments*. However, at least one court has considered the issue in the context of the 2002 *Brownfields Amendments*, and determined, based on the particular facts at issue in that case, that “disposal” likely occurred after the *property owner* claiming the *BFPP* defense purchased the *property*.⁴² As a result, existing case law creates a potential fact-intensive issue for *users* and their counsel to consider when the *user* seeks to develop or redevelop sites with existing contamination because, under CERCLA, the *BFPP* defense does not apply where “disposal” activities occur after purchase. On the one hand, the *BFPP* defense was developed in part “to promote the clean up and reuse of Brownfields.”⁴³ On the other hand, some jurisdictions may already interpret certain redevelopment activities as “disposal.” *Users* are cautioned to consult legal counsel when seeking to maintain the *BFPP* defense while preparing for redevelopment activities.

X1.3.2.4 In addition to the threshold criteria, to qualify as a *BFPP*, one must show by a preponderance of the evidence that, after taking title, (s)he performed the following “*continuing obligations*”: (i) provided all legally required notices with respect to the discovery or release of any *hazardous substances* at the facility;⁴⁴ (ii) exercised appropriate care with respect to *hazardous substances* found by taking *reasonable steps* to stop any continuing release; prevent any threatened future releases; and prevent or limit human, environmental, or natural resource

exposure to any previously *released* hazardous substance;⁴⁵ (iii) provided full cooperation, assistance, and access to persons who are authorized to conduct *response actions* or natural resource restoration (including the cooperation and access necessary for the installation, integrity and operation of mitigation systems);⁴⁶ (iv) complied with any land use restriction established or relied on in connection with the *response action*, and did not impede the effectiveness or integrity of any institutional control employed at the vessel or facility in connection with a *response action*;⁴⁷ and (v) complied with any request for information or administrative subpoena issued under CERCLA.⁴⁸

X1.3.3 Contiguous Property Owner (“CPO”) Liability Protection:

X1.3.3.1 To protect landowners “that are essentially victims of pollution incidents caused by their neighbor’s actions,”⁴⁹ the *CPO LLP* excludes from the definition of an *owner* or *operator* one who owns real property that is contiguous to (or otherwise similarly situated to) real property and is or may be contaminated by a release or threatened release of a hazardous substance from such *property*.⁵⁰

X1.3.3.2 To qualify for the *CPO*, one must show by a preponderance of the evidence that, after taking title, (s)he: (i) did not cause, contribute, or consent to the release or threatened release;⁵¹ (ii) conducted *AAI* and did not know or have reason to know that the *property* was or could be contaminated by a release or threatened release from the contiguous *property*;⁵² and (iii) is not a *PRP* or affiliated with any other *PRP* for the *property*.⁵³

X1.3.3.3 Unlike the *BFPP* liability protection, CERCLA does not limit the availability of *CPO* liability protection to *properties* purchased after January 11, 2002.⁵⁴ Further, in its original guidance on the protection, EPA states that even if the person no longer owns the *property*, the *CPO* liability protection applies, provided the person met the elements of CERCLA § 107(q) during their ownership.⁵⁵

X1.3.3.4 In addition to the threshold requirements, *CPOs* must be prepared to show, by a preponderance of the evidence, compliance with the five *continuing obligations* listed in X1.3.2.4.⁵⁶

X1.3.3.5 EPA also provides in its guidance that a person qualifying as a *CPO* would not be required to conduct

³⁹ 42 U.S.C. § 9601(40)(B).

⁴⁰ 42 U.S.C. § 9601(40)(H). Note that the *ILO* defense does not include this “affiliation” language but instead includes the no contractual relationship requirement.

⁴¹ See for example, *United States v. Honeywell Int’l, Inc.*, 542 F. Supp. 2d 1188, 1198-99 (E.D. Cal. 2008) (developer who moved contaminated soils from one area in the site to another prior to selling the *property* qualified as an *owner* or *operator* “at the time of disposal” under CERCLA § 107(a)(2), because development activities including excavating, grading, and preparing the land for development constituted “disposal” under CERCLA). Note however, because the activity at issue in *Honeywell* occurred prior to the enactment of the *Brownfields Amendments*, the Court did not have occasion to consider whether a developer with *BFPP* status would be “disposing” of *hazardous substances* by performing development activities.

⁴² *Ashley II of Charleston v. PCS Nitrogen, Inc.*, 746 F. Supp. 2d 692, 750 (D.S.C. 2010) (“It is likely that there were disposals on the Allwaste *property* after Ashley tore down the structures on the Allwaste parcel in 2008 because the sumps contained *hazardous substances*, were cracked, and were allowed to fill with rainwater.”). The *Ashley II* court subsequently granted a Motion for Reconsideration, finding “[i]t was not the court’s intention to hold that *BFPP* status can be defeated by continued leaching of contaminants through the soil.” *Ashley II of Charleston v. PCS Nitrogen, Inc.*, No. 2:05-cv-02782-MBS, Entry No. 626, slip op. at 4 (D.S.C. May 27, 2011). The court’s Second Amended Order and Opinion was issued the same day, upholding the finding that Ashley likely engaged in disposal following its acquisition of the *property*. See ___ F. Supp. 2d ___, 2011 U.S. Dist. LEXIS 57441, *171-72 (D.S.C. May 27, 2011).

⁴³ See preamble to Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. 107-118 (2002).

⁴⁴ 42 U.S.C. § 9601(40)(C).

⁴⁵ 42 U.S.C. § 9601(40)(D).

⁴⁶ 42 U.S.C. § 9601(40)(E).

⁴⁷ 42 U.S.C. § 9601(40)(F).

⁴⁸ 42 U.S.C. § 9601(40)(G).

⁴⁹ S. Rep. No. 107-2, at 10 (2001).

⁵⁰ 42 U.S.C. § 9607(q)(1).

⁵¹ 42 U.S.C. § 9607(q)(1)(A)(i).

⁵² 42 U.S.C. § 9607(q)(1)(A)(viii).

⁵³ 42 U.S.C. § 9607(q)(1)(A)(ii).

⁵⁴ See 42 U.S.C. § 9607(q) (silent as to any effective dates). January 11, 2002 is the effective date of the *Brownfields Amendments*.

⁵⁵ See USEPA, Interim Enforcement Discretion Guidance Regarding *Contiguous Property Owners* at 6 (Jan. 13, 2004).

⁵⁶ See 42 U.S.C. § 9607(q)(1)(A)(iii)-(vii).

groundwater investigations or to install ground water remediation systems unless the EPA 1995 Final Policy Toward Owners of Property With Contaminated Aquifers otherwise would require such activity.⁵⁷

X1.3.3.6 EPA is also authorized to issue assurance to a *contiguous property owner* that no enforcement action will be initiated under CERCLA and to provide protection against claims for contribution or cost recovery.⁵⁸

X1.3.3.7 If an *owner* cannot qualify for the *CPO LLP* because it had knowledge of a release, it may still be able to qualify for the *BFPP LLP* or other defenses to liability that may be available under any other law.⁵⁹

X1.3.4 *Innocent Landowner Defense (ILO)*:

X1.3.4.1 The *ILO* defense has existed since 1986.⁶⁰

X1.3.4.2 The *Brownfields Amendments* added new requirements to the *ILO* defense by requiring that persons asserting the defense must also show by a preponderance of the evidence, post-purchase compliance with the *continuing obligations* listed in X1.3.2.4, except that there is no obligation to provide legally required notices.⁶¹

X1.3.4.3 The third party defense continues to be operative even after the *Brownfields Amendments*.⁶²

X1.3.5 *CERCLA Enforcement Bar*—CERCLA § 128(b)⁶³ creates what is commonly referred to as an “enforcement bar” to actions, at an “eligible response site.” The enforcement bar prohibits EPA from pursuing either administrative or judicial actions against a party who is addressing a release in accordance with certain State Voluntary Clean-up Programs. However, there are exceptions to this “bar.”

X1.3.5.1 First, EPA may pursue enforcement if the State requests “assistance in the performance of a *response ac-*

tion.”⁶⁴ Second, it may pursue enforcement if EPA determines the contamination is either migrating across state lines, “resulting in the need for further *response action* to protect human health or the environment,”⁶⁵ or contamination is migrating “onto *property* subject to the jurisdiction, custody, or control of a department, agency, or instrumentality of the United States and may impact the authorized purposes of the Federal *property*.”⁶⁶ Third, EPA may pursue enforcement if EPA determines that even after the remediation efforts the contamination poses “an imminent and substantial endangerment to public health or welfare or the environment” and further action is required to mitigate the release.⁶⁷ Finally, EPA may pursue enforcement if EPA determines that information which resulted in the chosen remediation was not known by the State at the time and is “such that the contamination or conditions at the facility present a threat requiring further remediation to protect public health or welfare or the environment.”⁶⁸

X1.3.5.2 A key issue with respect to the “enforcement bar” is what constitutes an “eligible response site” because the enforcement bar only applies to eligible response sites. The term was added with the *Brownfields Amendments* and means a site that “meets the definition of a Brownfield site as defined by § 101(39).”⁶⁹ This includes sites which are being remediated pursuant to the Leaking Underground Storage Tank Trust Fund,⁷⁰ as well as those for which EPA determines, on a case-by-case basis, that eligibility for the “enforcement bar” is appropriate, the development activity is protective of human health and the environment, and the development activity will promote either economic or green space or the *property* will be used for nonprofit purposes.⁷¹ On March 6, 2003, EPA issued a guidance titled “Regional Determinations Regarding Which Sites are Not ‘Eligible Response Sites’ under CERCLA § 101(41)(C)(i), as added by the Small Business Liability Relief and Brownfields Revitalization Act.”⁷² Section III of the Guidance sets forth the criteria by which EPA will determine whether a site is an “eligible response site.”

X1.4 All Appropriate Inquiries Under the *Brownfields Amendments*

X1.4.1 As discussed immediately above, in order to qualify for the *BFPP* and *CPO* liability protection as well as the *ILO* defense under the *Brownfields Amendments*, a landowner must perform *all appropriate inquiries* prior to purchasing *property*. If *all appropriate inquiries* has not been performed in accordance with the standards and practices applicable to the purchase of *property* at the time of the transaction, performing *continuing obligations* after acquiring the *property* will not make the *property owner* eligible for CERCLA *LLPs*.

X1.4.2 The *Brownfields Amendments* required EPA to adopt regulations that would define the standards and practices that

⁵⁷ 42 U.S.C. § 9607(q)(1)(D). USEPA’s *Final Policy Toward Owners of Property Containing Contaminated Aquifers Contiguous Property Owners*, 60 Fed. Reg. 34790, 34791-92 (July 3, 1995), does not require groundwater investigations or treatment except in exceptional cases such as where a *property owner* uses a groundwater well in a manner that affects the migration of contamination in the contaminated aquifer. *Id.* at 34792. See also, USEPA, *Interim Enforcement Discretion Guidance Regarding Contiguous Property Owners* (Jan. 13, 2004) (whether groundwater investigation or remediation is required will be evaluated on a site-specific facts.). The Guidance notes, that there may be certain inconsistencies between the scope of the 1995 Guidance and the 2002 Amendments. For example, the 1995 Guidance may apply for certain purchasers who take *property* with knowledge of contamination. In such case, EPA may still apply the 1995 Guidance through the exercise of its enforcement discretion. See *USEPA Common Elements Guidance* at 9.

⁵⁸ 42 U.S.C. § 9607(q)(3). EPA could also issue Site-Specific Comfort/Status Letters addressing *reasonable steps* but would typically do so only at sites with significant federal involvement. See *USEPA Common Elements Guidance* at 12. Some state agencies, however, do issue Comfort/Status Letters more routinely.

⁵⁹ 42 U.S.C. § 9607(q)(2).

⁶⁰ See discussion regarding the requirement in Section X1.2.

⁶¹ 42 U.S.C. § 9601(35)(A). See also 42 U.S.C. § 9601(35)(B)(i)(II).

⁶² 42 U.S.C. § 9607(b)(3). See also *USEPA Common Elements Guidance* at 9.

⁶³ 42 U.S.C. § 9628 (b)(1)(A) provides that “in the case of an eligible response site at which (i) there is a *release* or threatened *release* of a *hazardous substance*, pollutant, or contaminant; and (ii) a person is conducting or has completed a *response action* regarding the specific *release* that is addressed by the *response action* that is in compliance with the State program that specifically governs *response actions* for the protection of public health and the environment, the President may not use authority under this Act to take an administrative or judicial enforcement action under section 106(a) or to take a judicial enforcement action to recover response costs under section 107(a) against the person regarding the specific *release* that is addressed by the *response action*.”

⁶⁴ 42 U.S.C. § 9628 (b)(1)(B)(i).

⁶⁵ *Id.*

⁶⁶ 42 U.S.C. § 9628 (b)(1)(B)(ii).

⁶⁷ 42 U.S.C. § 9628 (b)(1)(B)(iii).

⁶⁸ 42 U.S.C. § 9628 (b)(1)(B)(iv).

⁶⁹ 42 U.S.C. § 9601 (39).

⁷⁰ 42 U.S.C. § 9628 (41)(B)(i).

⁷¹ 42 U.S.C. § 9628 (41)(B)(ii).

⁷² OSWER Directive 9230.0-107.

constitute “*all appropriate inquiries*”⁷³ by setting forth ten criteria to be included in the regulations.⁷⁴ For a description of these criteria, see Practice E1527–05, Legal Appendix § X1.2.4.2.

X1.4.3 EPA promulgated its *all appropriate inquiries* rule on November 1, 2005, and the rule became effective one year later.⁷⁵ When EPA published its final *all appropriate inquiries* Rule, it announced that environmental site assessments consistent with Practice E1527 would be considered to be in compliance with the final *all appropriate inquiries* Rule.⁷⁶ Subsequently, EPA announced that environmental site assessments consistent with Practice E2247 also would be considered to be in compliance with the final *all appropriate inquiries* Rule.⁷⁷

X1.4.3.1 The *all appropriate inquiries* rule requires that purchasers of *property* take the following actions through an environmental professional, before acquiring *property*: (i) interview past and present owners, operators and occupants;⁷⁸ (ii) review historical information;⁷⁹ (iii) search for recorded environmental cleanup liens;⁸⁰ (iv) review environmental regulatory records;⁸¹ (v) visually inspect the *property* and the adjoining *properties*;⁸² (vii) consider commonly known or reasonably ascertainable information about the *property*;⁸³ (viii) consider the degree of obviousness of the presence of releases and threatened releases at the *property* and the ability to detect contamination;⁸⁴ and (ix) prepare a written report documenting the inquiries and provide an opinion as to conditions indicative of a release, discussing data gaps that could affect the opinion, describing the qualifications of the environmental professional, and providing a certification.⁸⁵

X1.4.3.2 In addition to the *environmental professional's* activities, a purchaser of *property* must take the following actions before acquiring *property*: (i) search for environmental cleanup liens (if not performed by the environmental professional);⁸⁶ (ii) consider any specialized knowledge or experience;⁸⁷ (iii) consider the relationship of the purchase price to the value of the *property* if not contaminated;⁸⁸ and (iv) consider commonly known or *reasonably ascertainable* information about the *property* (if not performed by the environmental professional).⁸⁹

X1.4.3.3 *All appropriate inquiries* investigations must be performed within a one year period prior to the *property* transaction.⁹⁰ Many of the inquiries must be updated if performed more than six months prior to the *property* transaction.⁹¹

X1.4.3.4 The purpose of AAI is to identify before acquiring a parcel of *property* “conditions indicative of releases and threatened releases of hazardous substances on, at, in, or to the subject *property*.”⁹² If such conditions exist, AAI does not require a characterization of the nature and extent of the release and does not require sampling and analysis,⁹³ although such actions may become necessary for the *property owner* to identify *continuing obligations*.

X1.5 Continuing Obligations

X1.5.1 Under CERCLA, *continuing obligations* are expressly stated to be necessary elements for each of the *LLPs* under the *Brownfields Amendments*. Unlike the provision in the *Brownfields Amendments* directing EPA to promulgate regulations defining standards and practices that constitute “all appropriate inquiries,”⁹⁴ there is no counterpart requirement for EPA to define *continuing obligations* by regulation. As of the date of publication of this guide, no administrative rules have been promulgated further defining *continuing obligations*, and little instructive case law exists.

X1.5.2 As discussed in Section X1.3, the liability protection provisions (*BFPP*, *CPO* and the *ILO* defense, though those for the *ILO* defense vary slightly) require the performance of virtually identical *continuing obligations*. On March 6, 2003, EPA issued the Common Elements Interim Guidance memorandum which summarized EPA’s understanding of the *continuing obligations* common to all three *LLPs*.⁹⁵

X1.5.3 *Knowledge of Contamination*—The context for *continuing obligations* may differ among *BFPPs*, *ILOs* and *CPOs*. Persons qualify as *ILOs* or *CPOs* only when pre-purchase inquiry results in no knowledge or reason to know of contamination.⁹⁶ It therefore follows that *ILOs* and *CPOs* become subject to *continuing obligations* only when contamination is

⁷³ 42 U.S.C. § 9601(35)(B)(ii).

⁷⁴ 42 U.S.C. § 9601(35)(B)(iii).

⁷⁵ 70 Fed. Reg. 66070 (Nov. 1, 2005), codified at 40 C.F.R. pt. 312.

⁷⁶ 40 C.F.R. § 312.11(a); see 70 Fed. Reg. at 66081.

⁷⁷ 40 C.F.R. § 312.11(b); see 73 Fed. Reg. 78651 (Dec. 23, 2008).

⁷⁸ 40 C.F.R. § 312.23.

⁷⁹ 40 C.F.R. § 312.24.

⁸⁰ 40 C.F.R. § 312.25.

⁸¹ 40 C.F.R. § 312.26.

⁸² 40 C.F.R. § 312.27.

⁸³ 40 C.F.R. § 312.30.

⁸⁴ 40 C.F.R. § 312.31.

⁸⁵ 40 C.F.R. § 312.21(b)–(d).

⁸⁶ 40 C.F.R. § 312.5.

⁸⁷ 40 C.F.R. § 312.28.

⁸⁸ 40 C.F.R. § 312.29.

⁸⁹ 40 C.F.R. § 312.22(a)(4).

⁹⁰ 40 C.F.R. § 312.20(a).

⁹¹ 40 C.F.R. § 312.20(b).

⁹² 40 C.F.R. § 312.20(e).

⁹³ 40 C.F.R. § 312.20(g), 70 Fed. Reg. at 66101–02. Even though these are not requirements under the *all appropriate inquiries* rule, EPA has cautioned that a court could still find in site-specific circumstances that sampling and analysis should have been performed as part of *all appropriate inquiries*. 70 Fed. Reg. at 66101.

⁹⁴ See X1.4.2.

⁹⁵ As noted in note 30, this document is referenced herein as *USEPA Common Elements Guidance*. Generally, *continuing obligations* common to each of the three *LLPs* include: (1) taking *reasonable steps* to stop and prevent *hazardous substance releases*; (2) maintain compliance with *land use restrictions* and not impede the integrity and effectiveness of *institutional controls*; and (3) other *continuing obligations* including providing legally required notices, compliance with information requests and administrative subpoenas, and providing access to persons authorized to conduct *response actions*. Note that under the *Brownfields Amendments*, compliance with information requests and legally required notices are not expressly required for persons seeking the *ILO* defense.

⁹⁶ 42 U.S.C. § 9601(35)(b) (*innocent landowners*); 42 U.S.C. § 9607(q) (*contiguous property owners*).

discovered after acquiring the *property*.⁹⁷ Similarly, some due care case law, though predating the *Brownfields Amendments*, suggests that due care obligations are not triggered until an *innocent landowner* discovers contamination. Unlike *CPOs* and *ILOs*, *BFPPs* may possess knowledge of contamination prior to purchase without putting eligibility for the *BFPP* defense at risk.⁹⁸ Thus, according to EPA, *all appropriate inquiries* “will most likely inform the *bona fide prospective purchaser* as to the nature and extent of contamination on the *property* and what might be considered *reasonable steps* regarding the contamination.”⁹⁹

X1.5.4 Additional Environmental Investigation as a Continuing Obligation—The *all appropriate inquiries* rule “does not require that sampling and analysis be conducted to comply with all appropriate inquiries requirements.”¹⁰⁰ However, EPA cautions that compliance with *continuing obligations* may require sampling and analysis after *property* acquisition.¹⁰¹ USEPA’s *Common Elements Guidance* provides that, where site assessment discovers contamination, *continuing obligations* may require “certain basic actions to assess the extent of contamination...Absent such an assessment, it will be very difficult to identify *reasonable steps*.”¹⁰² There is no guidance or authority, however, which addresses the question of how much sampling, if any, *BFPPs* may need to perform to properly inform *continuing obligations*. At the time of publication of this guide, two court opinions have been issued that mention environmental sampling performed in determining whether certain parties met the *BFPP* defense. First, the District Court of South Carolina found that a party did not qualify as a *BFPP* because it did not perform sampling of sumps exposed by its activities until it was “too late to prevent possible releases” and therefore the party did not exercise “appropriate care to take reasonable steps.”¹⁰³ Second, the District Court for the Central District of California found that the plaintiff qualified as a *BFPP* in part because of its efforts to address remnant TCE discovered in underground storage tanks a few months after the plaintiff performed environmental testing of the contents of the tanks.¹⁰⁴ Neither court specifically indicated that post-purchase

environmental sampling was required, or discussed how much environmental sampling a *property owner* should perform. The *user* is cautioned to consult legal counsel when determining whether to perform post-purchase environmental sampling (and if so, how much to perform and when to perform it) when seeking to maintain CERCLA *LLPs*.

X1.5.5 Failure to disclose known contamination to future owner—Notwithstanding the requirement to perform *continuing obligations*, *innocent landowners* who acquire actual knowledge of existing contamination have a duty to disclose the existence of the contamination to future *landowners*. Failure to disclose the existence of contamination could result in the loss of the *innocent landowner* defense.¹⁰⁵

X1.6 Reasonable Steps

X1.6.1 To establish the *LLPs*, *continuing obligations* expressly require that *BFPPs*, *ILOs*, and *CPOs* take *reasonable steps* to (1) stop continuing releases, (2) prevent any threatened future releases, and (3) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substances on or from *property* owned by that person.¹⁰⁶

X1.6.2 Reasonableness—CERCLA does not define “*reasonable steps*” nor does it otherwise provide instruction on what it means to stop continuing releases, prevent threatened future releases, or prevent or limit human, environmental, or natural resource exposure to *hazardous substances* previously released on or from *property*. However, both legislative history (as discussed in **X1.3.1.1**) and EPA guidance indicate that to satisfy *continuing obligations*, a *user* is not necessarily required to undertake the same level of *response actions* that would be required of a liable party. “EPA believes Congress did not intend to create, as a general matter, the same types of response obligations that exist for a CERCLA liability party (for example, removal of contaminated soil, extraction and treatment of contaminated groundwater).”¹⁰⁷ As the guide notes, the decisions made to implement *reasonable steps* at any particular *property* will necessarily be *property-specific*. So too will be the determination as to what steps, if any, are “reasonable” in any given circumstance.

X1.6.3 Stop Continuing Releases—CERCLA defines “*release*” broadly to include, among other things, spilling, leaking, leaching, pouring, dumping and disposing into the environment.¹⁰⁸ “Disposal,” in turn, is defined by reference to its definition under RCRA (see 42 U.S.C. § 9601(29)), and means “discharge, deposit, injection, dumping, spilling, leaking, or placing.”¹⁰⁹

X1.6.3.1 Passive Migration as “disposal” or as a “release”—As described above, some Circuit Courts have held that the passive migration of *hazardous substances*

⁹⁷ See **X1.2.5**.

⁹⁸ 42 U.S.C. § 9601(40).

⁹⁹ USEPA *Common Elements Guidance* at 11.

¹⁰⁰ 70 Fed. Reg. at 66089.

¹⁰¹ *Id.* at 66101.

¹⁰² USEPA *Common Elements Guidance*, Att. B., 5.

¹⁰³ *Ashley II of Charleston v. PCS Nitrogen, Inc.*, 746 F. Supp. 2d 692, 750–753 (D.S.C. 2010). The Court found that the plaintiff did not qualify as a *BFPP* for at least three reasons: (1) the plaintiff did not prove that there was no “disposal” after it acquired the *property*; (2) the plaintiff did not prove that it exercised *appropriate care* by taking *reasonable steps* to stop *continuing releases*, prevent future threatened releases, and prevent or limit human, environmental, or natural resource exposure to previously-released *hazardous substances*; and (3) the plaintiff was improperly affiliated with a liable party. The *Ashley II* court subsequently granted a Motion for Reconsideration, emphasizing that *Ashley* was improperly affiliated with a liable party. “The reason that *Ashley* did not meet the no affiliation requirement of *BFPP* status is that *Ashley* is potentially liable for response costs due to a contractual relationship with the Holcombe and Fair Parties.” *Ashley II of Charleston v. PCS Nitrogen, Inc.*, No. 2:05-cv-02782-MBS, Entry No. 626, slip op. at 5 (D.S.C. May 27, 2011). The court’s Second Amended Order and Opinion was issued the same day, and expands upon the court’s initial evaluation of the affiliation requirement. See ___ F. Supp. 2d ___, 2011 U.S. Dist. LEXIS 57441, at *178–81.

¹⁰⁴ See also *3000 E. Imperial LLC v. Robertshaw Controls Co.*, ___ F.Supp.2d ___, 2010 WL 5464296 at *11–12 (C.D. Cal. Dec. 29, 2010).

¹⁰⁵ 42 U.S.C. § 9601(35)(C).

¹⁰⁶ 42 U.S.C. § 9607(q)(A)(iii) (for *Contiguous Property Owners*); 42 U.S.C. § 9601(35)(B)(i)(II) (for *innocent landowners*); 42 U.S.C. § 9601(40)(D) (for *BFPPs*).

¹⁰⁷ USEPA *Common Elements Guidance* at 9–10. (emphasis in original).

¹⁰⁸ 42 U.S.C. § 9601(22).

¹⁰⁹ 42 U.S.C. § 9601(29), cross-referencing RCRA § 1004(3), 42 U.S.C. § 6903(3).

constitutes “disposal.” However, the majority of Courts find that passive migration of previously released hazardous substances is not “disposal.” For example, the gradual spreading of hazardous chemicals in the ground or the passive migration of landfill contamination has been held to not constitute disposal.¹¹⁰ At least one court has held that disposal only occurs where active human conduct is involved.¹¹¹ The leaking of buried drums, however, has been held by at least one court to constitute disposal.¹¹² If “disposal” were interpreted to include passive migration, it could effectively eliminate the *BFPP* liability protection since passive migration (“disposal”) would likely occur after the party asserting the *BFPP* defense acquires the *property*.¹¹³ Several courts have recognized the distinction between the term “disposal” and the broader term “release.” Even where passive migration does not constitute “disposal,” at least one court has held that passive migration of contaminated groundwater could, nonetheless, constitute a “release” because the term “release” is broader than “disposal.”¹¹⁴ As noted above, the *Brownfields Amendments* require *BFPPs*, *contiguous property owners* and *innocent landowners* who seek to maintain liability protections to stop continuing releases. It is unclear whether passive migration constitutes a “continuing release.”

X1.6.3.2 Passive migration as a “continuing release”—The statute employs the phrase “continuing release” rather than simply “release.” Under a plain reading of the phrase, a court, in theory, could interpret the modifier “continuing” to mean any “ongoing” release, and thus determine that, to the extent passive migration constitutes a “release,” ongoing passive migration constitutes a “continuing release.” If this interpretation were widely adopted, it could significantly restrict the utility of the *BFPP* liability protection because the party seeking the *LLP* could be required to perform extensive cleanup actions in order to maintain the defense.¹¹⁵

X1.6.3.3 Passive migration as a “previously released hazardous substance”—Alternatively, passive migration often constitutes a “previously released hazardous substance,” for which *BFPPs*, *contiguous property owners* and *innocent landowners* party must take *reasonable steps* to prevent or limit exposure to such hazardous substances (as opposed to taking *reasonable steps* to “stop” a continuing release). Under this interpretation, *BFPPs*, *contiguous property owners* and *innocent landowners* would be required to take *reasonable steps* to prevent or limit exposure to these previously released hazardous substances. Whether the “*reasonable steps* to prevent or limit exposure” for passive migration will require more effort than “*reasonable steps* to stop continuing releases” for passive

migration will necessarily be a site-specific determination. However, consistent with the understanding that landowners seeking *LLPs* are generally not held to the same level of responsibility as CERCLA-liable parties,¹¹⁶ a court could conclude that passive migration does not constitute a “continuing release,” but is more appropriately considered a “previously released hazardous substance.”

X1.6.3.4 The guide cautions *users* that the issue of passive migration is unsettled and open to debate. The *user* is cautioned to seek legal counsel to determine the risks, if any, associated with any interpretation of passive migration at a particular site. Additionally, laws and judicial interpretations of such laws may change, and could render this discussion moot or no longer accurate.

X1.6.4 Prevent or limit exposure to previously released hazardous substances. Under CERCLA, *BFPPs*, *CPOs*, and *ILOs* must take *reasonable steps* to prevent or limit human, environmental, or natural resource exposure to hazardous substances previously released on or from the *property*.

X1.6.4.1 Exposure to humans—There is much guidance and policy evaluating risks of exposure to humans. Examples of these documents include EPA’s Risk Assessment Guidance for Superfund (RAGS), Guide E2081, and Guide E2091. Where possible, this guide attempts to reference existing standards for identifying and evaluating risks to humans. One example of a mechanism that can prevent or limit exposure is institutional controls. The National Contingency Plan states: “EPA expects to use *institutional controls* such as water use and deed restrictions...to supplement engineering controls as appropriate...to prevent or limit exposure to hazardous substances...”¹¹⁷

X1.6.4.2 Exposure to the environment or natural resources—The broad definitions under CERCLA of “environment” and “natural resources” coupled with the relatively limited policy and guidance evaluating exposures to the environment or natural resources is somewhat problematic for purposes of determining what *reasonable steps* should be employed to prevent or limit environmental and natural resource exposure. CERCLA defines the “environment” as “(A) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States under the Magnuson-Stevens Fishery Conservation and Management Act [16 U.S.C. §1801 *et seq.*], and (B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States.”¹¹⁸ CERCLA defines “natural resources” as any “land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the fishery conservation zone established by the Magnuson-Stevens Fishery Conservation and Management Act [16 U.S.C. §1801 *et seq.*]), any State or local government, any foreign government, any Indian tribe, or, if such resources are

¹¹⁰ *ABB Indus. Sys., Inc. v. Prime Tech., Inc.*, 120 F.3d 351,359 (2d Cir. 1997) (gradual spreading not disposal); *United States v. CDMG Realty Co.*, 96 F.3d 706, 722 (3d Cir. 1996) (passive spreading of landfill contamination not disposal); *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 879 (9th Cir. 2001) (passive migration through soil not disposal).

¹¹¹ *United States v. 150 Acres of Land*, 204 F.3d 698, 706 (6th Cir. 2000).

¹¹² *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 846 (4th Cir. 1992), *cert. denied*, 506 U.S. 940 (1992).

¹¹³ See 42 U.S.C. § 9601(40)(A).

¹¹⁴ *Castaic Lake Water Agency v. Whittaker Corp.*, 272 F.Supp.2d 1053, 1077 (C.D. Cal. 2003).

¹¹⁵ See discussion of legislative history in Section X1.3.

¹¹⁶ See, for example, *USEPA Common Elements Guidance* at 9-10.

¹¹⁷ 40 C.F.R. § 300.430(a)(1)(iii)(D).

¹¹⁸ 42 U.S.C. § 9601(8).

subject to a trust restriction on alienation, any member of an Indian tribe.”¹¹⁹ These definitions can be read broadly to include virtually all environmental media and life forms. Further complications arise when attempting to determine what constitutes a reasonable step to prevent or limit exposure to the environment or natural resources, because, by definition, chemicals of concern have already been released into the environment.

X1.6.4.3 Case law evaluating “reasonable steps”—At the time of the publication of this Guide, ASTM was aware of two trial court decisions evaluating whether a party adequately performed “reasonable steps” to qualify as a *BFPP*. First, the District Court for the District of South Carolina found that the plaintiff was a *PRP* and could not assert the *BFPP* liability protection because it did not comply with the *reasonable steps* obligation. In that case, the plaintiff demolished a building that covered certain sumps that had been identified as *RECs* in the *all appropriate inquiry* analysis, and did not test the contents of the sump or take steps to minimize potential environmental exposures “until it was too late to prevent possible releases.”¹²⁰ Additionally, the plaintiff did not investigate or remove a debris pile for over a year and failed to maintain certain cover over portions of the site. Second, the District Court for the Central District of California found that a landowner satisfied its reasonable steps obligations where it emptied the contents of USTs a few months after purchasing the *property*, and after confirming the possible presence of TCE in the tanks.¹²¹ “Since plaintiff had the USTs emptied soon after learning that they contained a *hazardous substance*, the court finds that the plaintiff took *reasonable steps* to stop any continuing leak or to prevent any future leaks of TCE from the USTs.”¹²² Furthermore, the court found that a *reasonable steps* analysis did not require the plaintiff to remove the USTs. “It was not unreasonable for Plaintiff to leave the USTs in the ground at that time,

given that they were empty.”¹²³ Both cases were decided after lengthy fact-finding trials, and the legal analysis is dependent on the facts found by the court in each particular instance. Thus, the analysis of whether a landowner complies with the “reasonable steps” components of the CERCLA *LLP* defenses is necessarily fact-specific, consistent with legislative intent.¹²⁴

X1.6.5 Activities that may affect groundwater flow—Some activities undertaken at a *property* may affect the rate or direction of groundwater flow, such as installing or maintaining groundwater wells. Where groundwater is contaminated, such activities could conceivably impact a *property owner’s* efforts in maintaining liability protections. For example, *property owners* seeking to maintain the *contiguous property owner* liability exemption may not “cause, contribute, or consent to the *release* or threatened *release*.” 42 U.S.C. § 9607(q)(1)(A). As of the date of this publication, ASTM is aware of no case law or guidance regarding the obligations of a *contiguous property owner* who may be directly or indirectly influencing groundwater flow. Similarly, it is not clear what steps, if any, the *ILO* or *BFPP* must take to meet its obligation to “exercise[] due care with respect to the hazardous substance concerned” where groundwater is impacted to stop continuing releases, prevent future threatened releases, or prevent or limit exposure to previously released *hazardous substances*. The particular *reasonable steps* to be employed at a given *property* will depend heavily on *property*-specific facts. Thus, *users* who may perform activities that could affect groundwater flow are encouraged to consult legal counsel and environmental professionals to identify what steps, if any, should be taken at a particular site to preserve any applicable *LLP*.

X1.7 Compliance with Land Use Restrictions and Not Impeding the Effectiveness and Integrity of Institutional Controls

X1.7.1 Continuing obligations require a person (i) to be in *compliance* with any *land use restrictions* established or relied upon in connection with a *response action*; and (ii) *not to impede the effectiveness or integrity* of any *institutional controls* employed in connection with a *response action*. These are statutory terms used by Congress in the *Brownfields Amendments* to CERCLA,¹²⁵ but Congress did not provide specific definitions of “*land use restrictions*” (or “*LURs*”).

¹¹⁹ 42 U.S.C. § 9601(16).

¹²⁰ See *Ashley II of Charleston*, 746 F. Supp. 2d 692, 751–752 (D.S.C. 2010). Notably, when analyzing the *reasonable steps* requirements, the *Ashley II* court explained that the reasonable step obligation is intended to be evaluated in a manner consonant with the existing CERCLA due care requirement. The *Ashley II* court subsequently issued a Second Amended Order and Opinion (2011 U.S. Dist. LEXIS 57441, ___ F. Supp. 2d ___ (D.S.C. May 27, 2011) and granted a Motion for Reconsideration of its order. See *Ashley II of Charleston v. PCS Nitrogen, Inc.*, No. 2:05-cv-02782-MBS, Entry No. 626, slip op. at 5 (D.S.C. May 27, 2011). The Second Amended Order and Opinion retains the reasonable steps explanation from the earlier opinion. See ___ F. Supp. 2d ___, 2011 U.S. Dist. LEXIS 57441, at *174-77.

¹²¹ See also *3000 E. Imperial LLC v. Robertshaw Controls Co.*, ___ F. Supp. 2d ___, 2010 WL 5464296, at *11-12 (C.D. Cal. Dec. 29, 2010).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ See X1.3.

¹²⁵ See 42 U.S.C. §9601(35)(A) (ILO); 42 U.S.C. §9601(40)(F) (BFPP); 42 U.S.C. §9607(q)(1)(A)(v) (CPO).

X1.7.2 Activity and Use Limitations—ASTM Guides that address *land use restrictions* and *institutional controls* use the term *activity and use limitations* or *AULs*. *AULs* are often utilized in risk-based cleanups (where some *hazardous substances* are left in place) to sever actual or potential exposure pathways. The term *AUL*, which appears to be broader than the statutory terms “*land use restrictions*” and “*institutional controls*,” is defined in Guide E2091 as meaning:

legal or physical restrictions or limitations on the use of, or access to, a site or facility to eliminate or minimize potential *exposures to hazardous substances or petroleum products* or to prevent activities that could interfere with the effectiveness of a *response action*, to ensure maintenance of a condition of “acceptable risk” or “no significant risk” to human health and the environmental. These legal or physical restrictions are intended to prevent adverse impacts to individuals or populations that may be exposed to *hazardous substances or petroleum products*.¹²⁶

Because the purpose of this guide is to assist the *user* seeking to maintain eligibility for CERCLA *LLPs*, this guide uses the statutory terms *land use restrictions* and *institutional controls* when discussing the *property owner’s continuing obligations* under the statute to minimize the risk of confusion resulting from the use of related but not identical terminology. The guide uses the term *AUL* when referring to legal or physical restrictions in general.

X1.7.3 Compliance with Land Use Restrictions—In order to maintain eligibility for *LLPs*, the *Brownfields Amendments* require that a *user* be “in compliance with any *land use restrictions* established or relied on in connection with the *response action* at a vessel or facility.”¹²⁷

X1.7.3.1 “Land Use Restrictions” Is An Undefined Term—The term *LUR* is not defined in the statute or its legislative history. A review of EPA regulations and case law also indicates neither EPA nor the courts have defined *LUR* in the context of the “compliance” requirements of the *Brownfields Amendments*. However, EPA has proffered an interpretation of *LUR* in non-binding agency guidance published in 2003, which is discussed below.¹²⁸ When a statute uses terminology without providing a definition, courts usually give words their ordinary meaning.¹²⁹ The phrase “any *land use restrictions*” can be understood to refer to limitations on the use and enjoyment of *property*, and the modifier “any” signals an expansive inter-

pretation.¹³⁰ But giving the statutory text its ordinary meaning leaves some important questions unanswered. For example, one very critical question is what constitutes a “restriction” that is subject to a compliance obligation? Congress provided a partial answer by limiting the compliance obligation to “*land use restrictions* established or relied on in connection with the *response action* at a vessel or facility.”¹³¹ However, the language of the statute does not resolve the issue of whether Congress imposed new federal compliance obligations on future *property owners* that, absent the *Brownfields Amendments*, would not otherwise apply to future owners, either because the terms of the “restriction” apply only to the *property owner* at the time of the *response action* or because state property law does not bind future *owners* in the absence of an enforceable document or instrument.¹³²

X1.7.3.2 Divergent interpretations of “LURs”—These uncertainties have led to divergent views as to what constitutes an *LUR* that requires compliance as a precondition for maintaining an *LLP*. To assist the *users* of this guide, we summarize alternative interpretations for informational purposes without attempting to resolve the debated views. Ultimately, judicial or congressional resolution will be needed. Until a definitive interpretation has emerged, *users* are strongly encouraged to consult with legal counsel to identify any emerging congressional, administrative or judicial developments regarding the meaning of *LURs* under the *Brownfields Amendments*.

Some practitioners interpret the phrase “any *land use restrictions*” to mean all restrictive language relied on in connection with a *response action*. Under this “broad” view, the statutory language is interpreted to mean that, in exchange for liability protection, any limitations related to land use must be complied with *whenever* “established or relied on in connection with a *response action*.” Such limitations could be contained in the language of environmental reports, risk assessments, remedy design documents, records of decision, and in No Further Action letters, even if the documents would not otherwise create legally binding obligations on the person seeking a CERCLA defense. The proponents of this “broad” view argue that Congress intended the phrase “any *LURs*” to be interpreted broadly to include limitations on the use or enjoyment of

¹²⁶ The term *AUL* is used in other contexts as well. In Massachusetts, for example, “[a]n Activity and Use Limitation (AUL) functions like a deed restriction imposed by the *owner of property* defining limits on use of the *property*...*AULs* are used as economy savers in remediation--an *owner* or other party can avoid or minimize the need to do additional remediation by restricting the *property* to uses that would not be incompatible with the contaminants on the *property*.” *McLellan Highway Corp. v. United States*, 95 F.Supp. 2d 1, 5 n.3 (D. Mass. 2000). Additionally, the Uniform Environmental Covenants Act (UECA) defines *AUL* to mean “restrictions or obligations created under this [State UECA] with respect to real *property*.” NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM ENVIRONMENTAL COVENANT ACT §2 (avail. at www.environmentalcovenants.org) referred to herein as “UECA.”

¹²⁷ 42 U.S.C. §9601(40)(F)(i) (*BFPP*) (emphasis added). Similar language also applies to *innocent landowners* and *contiguous property owners*. 42 U.S.C. §§9601(35)(A), 9607(q)(1)(A)(v).

¹²⁸ *USEPA Common Elements* at 6-8.

¹²⁹ See, for example, *S.D. Warren Co. v. Maine Bd. of Envtl. Protection*, 547 U.S. 370, 376 (2006); *United States v. Santos*, 553 U.S. 507, 511 (2008) (Plurality)

¹³⁰ See, for example, *Boyle v. United States*, 556 U.S. ___, 129 S.Ct. 2237, 2243 (2009) (Word “any” ensures interpretive breadth); *New York v. EPA*, 443 F.3d 880, 885-87 (D.C. Cir. 2006), *cert. denied*, 550 U.S. 928 (2007) (Modifier “any” in statutory context requires expansive interpretation).

¹³¹ See note 125. This is an important limitation. Persons wishing to maintain eligibility for *LLPs* would not need to comply with any restrictions that were not directly required in the context of a *response action* (for example, for aesthetic, conservation or commercial purposes). Instead of requiring compliance with any and all restrictions directly required at a site, Congress explicitly requires compliance with restrictions that are “in connection” with a *response action*.

¹³² In other parts of the *Brownfields Amendments*, Congress was clearly aware of the distinction between a *continuing obligation* to comply with a pre-existing requirement as an eligibility condition for *LLPs* (see, for example, 42 U.S.C. §9601(40)(C) (*BFPP* must provide all legally required notices)) and an obligation to comply with a new requirement (see, for example, 42 U.S.C. §9601(40)(E) (requirement to provide full cooperation, assistance, and access to persons conducting *response actions*)).

property on all present and future *property owners* seeking *LLP*, so long as that limitation was relied upon as part of a *response action*.

The proponents of the broad view also point to USEPA's *Common Elements Guide*, in which EPA stated that the "*Brownfields Amendments* require compliance with *land use restrictions* relied on in connection with the *response action*, even if those restrictions have not been properly implemented through the use of an enforceable *institutional control*."¹³³ EPA further stated that *land use restrictions* may be contained in "risk assessments, remedy decision documents, remedy design documents, permits, orders, and consent decrees."¹³⁴ Under this interpretation, even if an *LUR* is not enforceable against the new *property owner*, compliance would be a necessary condition as one of several eligibility conditions for maintaining *LLPs* along with not impeding *institutional controls* and taking *reasonable steps*. For example, this obligation would include the need to request a zoning change if such a change had been recommended in the remedy decision document (but never implemented) or to enter into an environmental covenant with the state or EPA limiting day care uses on the site if an environmental covenant had been recommended or relied upon in a risk assessment but never implemented. Advocates of the broad view assert that compliance with such restrictive language is not imposing a new enforceable obligation on future *property owners*, but rather simply constitutes another requirement, along with access, cooperation and other elements, required as a *quid pro quo* for securing a CERCLA *LLP*.

In contrast, other practitioners assert that the statutory text does not expressly resolve the issue of whether Congress imposed new federal compliance obligations on future *property owners* who, absent the *Brownfields Amendments*, would not otherwise be required to comply with non-binding restrictive language. In practice, some restrictive language appears in documents applicable only to the *property owner* at the time of the *response action* or in documents that do not bind future *owners* under state *property* law. These practitioners suggest that the meaning of "*land use restrictions*" and "*institutional controls*" as those terms were used when the *Brownfields Amendments* were enacted in 2002, incorporates the specialized meanings from contemporaneous documents, such as EPA's guidance titled "Institutional Controls: A Site Manager's Guide to Identifying, Evaluating and Selecting Institutional Controls at Superfund and RCRA Corrective Action Cleanups" (Sept. 29, 2000).¹³⁵ Throughout that document, EPA used the term "*land use restriction*" or the word "restriction" by itself in

a descriptive manner to refer to a restriction or limitation on the use of *property* where a *response action* contemplates that some contamination will remain on the *property* and the aim is to minimize exposure to that contamination.¹³⁶ At the time the *Brownfields Amendments* were enacted, EPA used the term "*institutional controls*" to describe a tool for "restrict[ing] land use."¹³⁷ For the most part, the guidance indicates that "*land use restrictions*" and "*institutional controls*" are not coextensive because of varying degrees of enforceability but they do significantly overlap in scope.¹³⁸

As a result, adherents to this "narrow" interpretation of the statutory language assert that a *land use restriction* must actually bind the *property owner* seeking the *LLP* and require the *property owner* seeking the *LLP* to do or to refrain from doing certain actions on its *property* in the same manner that the party would have been bound absent the opportunity provided by the *Brownfields Amendments* to qualify for an *LLP*. Some "*land use restrictions*" run with the land; others do not. If the restrictions do not run with the land, they would not be enforceable against subsequent *property owners* and the future *property owner* would have no legal obligation to comply with them. Legally binding restrictions may be contained in permits, orders, covenants, zoning ordinances or similar devices. Under the "narrow" view of the statutory language, the obligation to comply with an *LUR* would need to be reflected in an instrument (for example, permit; order; restrictive covenant; zoning ordinance; etc.) that was *binding* on the future *property owner* and where compliance could be compelled against that future *owner*. For example, where required by a Consent Order (but not yet completed), a property owner would need to abandon inactive wells. As another example, where required by an existing restrictive covenant, a property owner would need to incorporate prohibitions against day care centers into new leases. Limitation language contained in documents that do not specifically bind a future *owner* (for example, non-binding language in risk assessments, certificates of completion, and No Further Action letters that could not be enforced against a specific party under non-CERCLA law) would not constitute *LURs* for determining compliance with *continuing obligations*. In addition to evaluating the legal question of whether a certain limitation is binding on a future *property owner*, proponents of the narrow view caution that any "limitations" that are not contained in a binding instrument may not be readily discoverable when prospective future *owners* conduct "*all appropriate inquiries*."

X1.7.4 Compliance with Unimplemented or Partially Implemented *LURs*—Under both the "broad" and "narrow" interpretations of *LUR* compliance, a *property owner* may be

¹³³ USEPA *Common Elements Guidance* at 7 (emphasis added).

¹³⁴ *Id.*

¹³⁵ Where terminology has acquired a specialized meaning or become a term of art in the context of the statute (that is, CERCLA), a "plain language" approach for CERCLA does not require vernacular usage but rather contemplates that the meaning will reflect the specialized usage given those words in the context of CERCLA—that is, the remediation of contaminated sites. See generally 2A NORMAN J& J.D. SHAMBLE SINGER, SUTHERLAND'S STATUTES AND STATUTORY CONSTRUCTION §47.30 (7th ed. 2007). See also *Bilski v. Kappos*, 561 U.S. ___, 130 S.Ct. 3218, 3238 (June 28, 2010) (Stevens, J., concurring in the judgment) (describes "ordinary, contemporary, common meaning" as "deeply flawed approach to a statute that relies on complex terms of art developed against a particular historical background") (internal quotes omitted).

¹³⁶ USEPA, *Institutional Controls: A Site Manager's Guide to Identifying, Evaluating and Selecting Institutional Controls at Superfund and RCRA Corrective Action Cleanups*, at 3, 4, 5, 12, 13, 14, 16, 20, 23 (Sept. 29, 2000). EPA also uses the phrase "land use controls" to express the same meaning. *Id.* at 3, 4, 6, 8, 12, 29, 30.

¹³⁷ *Id.* at 2. The guide describes four categories of *institutional controls*: (1) governmental controls, (2) *proprietary controls*, (3) enforcement and permit tools with *IC* components, and (4) informational devices. *Id.* at 3-4, 29.

¹³⁸ For example, EPA states that informational devices have no effect on a *property owner's* legal rights regarding use of the *property*. *Id.* at 24.

responsible for completing the implementation of *LURs* “established or relied on in connection with a *response action*,” even if such *LUR* was not fully implemented or not implemented at all by the responsible party at the *property*. Once the *user* determines that an *LUR* must be complied with to maintain *LLP*, the responsible party’s failure to implement that *LUR* and the *user*’s failure to remedy that lapse (or at the very least act in a manner consistent with the restrictions set forth in that *LUR*) may constitute a failure to comply with it, potentially resulting in a determination that the *property owner* did not qualify for the *LLP*.¹³⁹ If the *property owner* believes that implementation of the *LUR* is unnecessary or would no longer serve the purpose for which it had been originally established, the *user* should seek relief from the *LUR* by contacting the regulatory authority that had originally established it as part of the *response action*.¹⁴⁰

X1.7.5 Not Impeding the Effectiveness and Integrity of Institutional Controls:

X1.7.5.1 Institutional Controls—CERCLA does not define *institutional controls*, but EPA’s September 2000 Site Manager’s Guide provides extensive background on *institutional controls*. In addition, in USEPA’s *Common Elements Guidance*, EPA has defined *institutional controls* as “the administrative and legal controls that minimize the potential for human exposure to contamination and protect the integrity of remedies by limiting land or resource use, providing information to modify behavior or both.”¹⁴¹ *Institutional controls* include written documents in many forms (for example, ordinances, restrictions or notices recorded in property records, orders, and others) that set forth restrictions on land use or notices related to future land uses. Institutional controls may include restrictive covenants, environmental covenants and/or easements restricting land use (sometimes referred to generally as “deed restrictions”); government ordinances restricting land use, such as zoning ordinances and groundwater restriction ordinances; notices encouraging restrictions on land use, including notices recorded in property records; and other types of legal and administrative controls.

X1.7.5.2 Engineering Controls—The *Brownfields Amendments* do not expressly address whether there is an obligation to ensure compliance with, or not to impede the integrity or effectiveness of, *engineering controls*. Nevertheless, this guide suggests *continuing obligation* procedures for *engineering controls*, either because *engineering controls* are required as part of an *institutional control*, or because *engineering controls* can be effective tools to satisfy *reasonable steps* obligations. *Engineering controls*, as defined in Guide E2091 means:

Physical modifications to a site or facility used to render an *exposure pathway* or potential *exposure pathway* incomplete

(for example, slurry walls, capping, hydraulic controls for ground water, or point of use water treatment). An engineering control is a type of *AUL*.

X1.7.5.3 Obligation Not to Impede the Effectiveness or Integrity of Institutional Controls—The statutory requirement to “not [to] impede the effectiveness or integrity of any institutional control employed at the vessel or facility in connection with a *response action*” is undefined. The rationale for the use of institutional controls will necessarily be *property-specific*. As a result, the meaning of the obligation “not [to] impede the integrity and effectiveness of *institutional controls*” may require site-specific analysis. Further, it is unclear what obligation, if any, can be imposed on *users* who are not aware that certain controls (for example, zoning ordinances) were used “in connection with a *response action*.” *Users* interested in not impeding the effectiveness or integrity of *institutional controls* are encouraged to consult legal counsel.¹⁴²

X1.7.5.4 State Law—Some states require monitoring or certification of *AULs*, and in such states proper fulfillment of these requirements could be an important factor in whether the *user* is impeding the effectiveness and integrity of *institutional controls*. For example, New Jersey requires that persons responsible for an *institutional control* complete a bi-annual certification. N.J. Admin. Code tit. 7, § 26E-8.4-8.7. Arizona requires annual *institutional control* certifications. New York requires *owners* of Brownfield sites to submit annual *IC* certifications attesting that nothing has occurred that would impair the ability of the control. N.Y. Env’tl. Conserv. Law § 27-1415(f)(b).

X1.7.5.5 Monitoring Requirements within Institutional Controls—Many *AULs* and/or *institutional controls* have or will have monitoring or certification requirements. As a result, the institutional control itself may offer guidance as to efforts necessary not to impede the effectiveness or integrity of the institutional control used in conjunction with a *response action*.

X1.8 Additional Continuing Obligations

X1.8.1 Obligation to Cooperate, Assist, and Provide Access—The *Brownfields Amendments* provide that, to qualify for the *bona fide prospective purchaser* or *contiguous property owner* defenses, a person must provide:

full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration at a vessel or facility (including the cooperation and access necessary for the installation, integrity, operation, and

¹³⁹ Whether the *user* has a legal remedy to compel implementation of the *LUR* by the responsible party or seek cost recovery is beyond the scope of this guide.

¹⁴⁰ Some have argued that taking *reasonable steps* to minimize *exposure* should suffice to cure any failure to comply with an unimplemented or partially implemented *LUR*. The *continuing obligations* to take *reasonable steps* and to comply with *land use restrictions* are separate obligations in the statute and satisfying one may not constitute compliance with the other. Compare, for example, 42 U.S.C. §9601(40)(D) (*reasonable steps* requirement), with 42 U.S.C. §9601(40)(F)(i) (compliance with any *land use restrictions*).

¹⁴¹ USEPA *Common Elements Guidance* at 6-7.

¹⁴² According to the EPA view set forth in the *Common Elements Guidance*, “[i]mpeding the effectiveness or integrity of an institutional control does not require a physical disturbance or disruption of land...[i]f a landowner removed the [deed] notice the removal would impede the effectiveness of the *institutional control*...or failure to give [new purchasers] notice may impede the effectiveness and integrity...[or] if a landowner applies for a zoning change or variance when the current designated use of the *property* was intended to act as an *institutional control*. USEPA *Common Elements Guidance* at 8. However, as noted previously in this Appendix, the *Common Elements Guidance* is not legally binding. Further, while the examples provided in the *Common Elements Guidance* may constitute a failure to ‘not impede the effectiveness and integrity,’ in certain instances, as discussed in the body of this appendix above, any determination must necessarily be *property-specific*, particularly where a *user* has no notice that an institutional control was employed “in connection with a *response action*.”

maintenance of any complete or partial response actions or natural resource restoration at the vessel or facility).¹⁴³

Using slightly different wording, CERCLA imposes a similar requirement on persons to qualify for the *innocent landowner* defense. This latter provision contains no references to “vessel” or “natural resource restoration.”¹⁴⁴

X1.8.2 *Obligation to Comply with Information Requests and Administrative Subpoenas*—The Brownfields Amendments provide that to qualify for the *bona fide prospective purchaser* or *contiguous property owner* defenses, a person must comply with “any request for information or administrative subpoena” issued under CERCLA.¹⁴⁵ CERCLA does not include this element in the *innocent landowner* defense.¹⁴⁶

X1.8.3 *Obligation to Provide Legally Required Notices*:

X1.8.3.1 *The Brownfields Amendments* provide that to qualify for the *bona fide prospective purchaser* or the *contiguous landowner* defenses, a person must provide “all legally required notices with respect to the discovery or release of any hazardous substances at the facility.”¹⁴⁷ CERCLA does not include this element in the *innocent landowner* defense.¹⁴⁸ In USEPA’s *Common Elements Guidance*, EPA observes that, notwithstanding the absence of this element in the *innocent landowner* defense, a landowner “may, however, have notice obligations under federal, state and local laws.”¹⁴⁹ EPA further states its view that, even if notice is not required by this provision, notice may be required by the separate “*reasonable steps*” provision, that is, that “providing notice of the contamination to appropriate governmental authorities would be a *reasonable step* in order to prevent ‘a threatened future release’ and ‘prevent or limit . . . exposure.’”¹⁵⁰

X1.8.3.2 The term “legally required notices” is not defined in CERCLA. USEPA’s *Common Elements Guidance* states that legally required notices may include state and local obligations, as well as federal obligations, and that the individual seeking the benefits of these liability defenses has the burden of determining what notices may be required.¹⁵¹

X1.8.3.3 Determining whether there is an obligation to give notice under this provision requires determining whether a hazardous substance is involved, whether it has been discov-

ered or released, and whether the release occurred at a facility. As to each of these tasks:

X1.8.3.4 If there has been discovery of a release of any hazardous substances at the facility, then one applies knowledge of federal, state, and local law to determine whether notice must be provided, as well as the mechanical aspects of providing notice (that is, the deadline, recipient, content, method of providing, and so forth). The following information highlights federal notification obligations that may apply under CERCLA, the Resource Conservation and Recovery Act (“RCRA,” 42 U.S.C. §6901 *et seq.*), and the Federal Water Pollution Control Act (33 U.S.C. §1251 *et seq.*). It is not intended to comprehensively cover federal notification obligations. Further, state and local notification obligations are too numerous and diverse to cover in this guide. The reader should consult with knowledgeable legal counsel for such information.

(a) CERCLA Section 103(a) requires notice of any release of a “reportable quantity” of a hazardous substance, other than a federally-permitted release.¹⁵² EPA rules state that notice is required only if the quantity released exceeds the reportable quantity within a 24 hour period.¹⁵³ Notice is to be made to the National Response Center as soon as the person in charge of the facility is aware of such a release.¹⁵⁴

(b) Under RCRA, spills or leaks from hazardous waste tanks at treatment, storage, or disposal facilities must be reported within 24 hours of discovery, with a follow-up report within 30 days.¹⁵⁵ The notification must include the facility’s name, address and EPA identification number, information about the incident, waste and quantity released, and any injuries, and response information.

(c) Federal Water Pollution Control Act §311(b) requires the person in charge of a facility to make a report upon learning of an unauthorized discharge of a hazardous substance in harmful quantities into the navigable waterways, adjoining shores, or discharges affecting natural resources owned or managed by the federal government.¹⁵⁶ The reportable quantity for hazardous substances varies. Reports are to be made to the

¹⁵² 42 U.S.C. § 9603(a). Federally-permitted releases are identified at 42 U.S.C. §9601(10).

¹⁵³ 40 C.F.R. §302.6.

¹⁵⁴ Another reporting obligation in CERCLA §103(c) (42 U.S.C. § 9603(c)) required notification by June 9, 1981 of any facility that treated, stored or disposed of hazardous substances or any transporter that accepted such substances and selected a facility for treatment, storage or disposal of them. There is disagreement about whether this requirement applies to persons who learned of such treatment, storage or disposal facilities after June 9, 1981. Some USEPA staff communications suggested that this provision still applies to persons that knew of such sites and failed to report them in 1981, and to persons that identified such sites after June 9, 1981. In contrast, USEPA has also implied that this provision has no continuing function after June 9, 1981, and the only court decision on the issue rejected the position in the USEPA staff communications and held that “section 103(c) imposes a one-time reporting requirement” and that any violation of that requirement would have occurred on June 9, 1981, and not later.” *City of Toledo v. Beazer Materials & Svcs., Inc.*, 833 F.Supp. 646, 661 (N.D. Ohio 1993).

¹⁵⁵ See 40 C.F.R. §§ 264.196 & 265.196.

¹⁵⁶ 33 U.S.C. § 1321. Note that the FWPCA notification requirement, by itself, also applies to oil and to releases from vessels, in addition to releases of hazardous substances from facilities; however, because the CERCLA reporting requirement does not cover releases of oil or releases from vessels, neither of these aspects of the FWPCA notification requirement are incorporated in the CERCLA notification requirements.

¹⁴³ 42 U.S.C. §§ 9601(40)(E) & 9607(q)(1)(A)(iv).

¹⁴⁴ See 42 U.S.C. § 9601(35)(A).

¹⁴⁵ 42 U.S.C. § 9601(40)(G) (“person complies”); 42 U.S.C. § 9607(q)(1)(A)(vi) (“person is in compliance with”). In USEPA’s *Common Elements Interim Guidance*, EPA states as an exercise of enforcement discretion that an inconsequential error in responding to a request for information under CERCLA Section 104(e) may not be considered as fatal to maintaining the *bona fide prospective purchaser* and *innocent landowner* defenses. *USEPA Common Elements Guidance* at 13.

¹⁴⁶ See 42 U.S.C. §§ 9601(35) and 9607(b)(3).

¹⁴⁷ 42 U.S.C. §§ 9601(40)(C) and 9607(q)(1)(A)(vii).

¹⁴⁸ See 42 U.S.C. §§ 9601(35) and 9607(b)(3).

¹⁴⁹ See *USEPA Common Elements Guidance* at Attachment A.

¹⁵⁰ See *USEPA Common Elements Guidance* at Attachment B-Reasonable steps Questions and Answers at 1. (EPA cites legislative history, S.Rep. No.107-2, at 11 (2001), and pre-Brownfields Amendments case law, *Bob’s Beverage Inc. v. Acme, Inc.*, 169 F. Supp. 695, 716, (N.D. Ohio 1999), respectively, for the propositions that “notifying appropriate federal, state and local officials” is a typical reasonable step and that failure to timely notify federal and state agencies of groundwater contamination can be a factor in concluding that due care was not exercised.) This reference in the legislative history specifically addresses what would be a *reasonable step* for a *contiguous property owner*.

¹⁵¹ See *USEPA Common Elements Guidance* at 13.

National Response Center. Information required to be reported is identical to that which is required under CERCLA.

X2. RECOMMENDED TABLE OF CONTENTS AND REPORT FORMAT FOR STATEMENT OF NO CONTINUING OBLIGATIONS RELATED TO ACTIVITY AND USE LIMITATIONS AND REASONABLE STEPS

X2.1 Introduction

X2.1.1 Purpose

X2.2 Property Description

X2.2.1 Location and Legal Description

X2.2.2 Property Owner(s) and Purchase Transaction

X2.3 Continuing Obligations Assessment

X2.3.1 Identification of Site Assessment Documents

X2.3.2 Description of Additional Site Assessment

X2.4 Statement of No Continuing Obligations Related to Activity and Use Limitations and Reasonable Steps

X2.5 Signature(s) of Preparer

X2.6 Qualifications

X2.7 References

X2.8 Appendices

X3. REPRESENTATIVE FORM FOR STATEMENT OF NO CONTINUING OBLIGATIONS RELATED TO ACTIVITY AND USE LIMITATIONS AND REASONABLE STEPS

NOTE—To User—This form assists a user to summarize and document a statement of no continuing obligations at a property. This form is not mandatory and serves users choosing to document findings. A statement of no continuing obligations still obligates users to certain minimum requirements including a duty to cooperate with regulatory agencies, a duty to provide access and a duty to provide notice of new releases.

1. Property Description (Identify property subject to a finding of No Continuing Obligations)			
Site Address / Parcel Identification Number			
Property Owner(s)			
Property Purchase Date			
2. Reference Documents for Assessment of Continuing Obligations (All data sources should be referenced and dated. Phase I should be reviewed for their opinions and findings.)			
Phase I Environmental Site Assessment			
Other Documents or Interviews			
3. Finding Supporting a Determination of No Continuing Obligations (Consistent with ASTM guidance for Continuing Obligations, each three assessment criteria should have a finding of no, and a user should mark each column dependent upon basis. A basis of additional investigation should be developed in part 4 of this form.)			
Choose Finding Basis		Continuing Obligations Assessment Criteria	
No Based on Reference Documents	No Based on Additional Investiga- tion (see note 4)		
			a) No Institutional Controls
			b) No Land Use Restrictions
			c) No Recognized Environmental Conditions
4. Additional Data Review Supporting Review Supporting a Finding of No Continuing Obligations (Below describe findings of any further investigation that allowed a finding of a "No Achieved through Additional Investigation")			
5. Preparer's Information			
Name		Signature	
Organization		Date	

X4. RECOMMENDED TABLE OF CONTENTS AND REPORT FORMAT FOR A CONTINUING OBLIGATIONS PLAN

X4.1 Introduction

X4.1.1 Purpose

X4.2 Property Description

X4.2.1 Location and Legal Description

X4.2.2 Property Owner(s) and Property Transaction Date

X4.3 Site Assessment and Identification of Existing Environmental Conditions

X4.3.1 Review of Site Assessment Documents

X4.3.1.1 Phase I Documentation

X4.3.1.2 Phase II Documentation

X4.3.1.3 Additional Documentation

X4.3.2 Summary of Existing Environmental Conditions

X4.3.2.1 Identification of Recognized Environmental Con- ditions

X4.3.2.2 Identification of Institutional Controls

X4.3.2.3 Identification of Land Use Restrictions

X4.3.2.4 Identification of Engineering Controls

X4.3.2.5 Identification of Releases or Future Threatened Releases

X4.3.3 Summary of General Site Use and Conditions

- X4.3.3.1 Property and Vicinity General Characteristics
- X4.3.3.2 Current and Anticipated Land Use and Land Activities
- X4.3.3.3 Natural Resource Features

X4.4 Evaluation of Existing Environmental Conditions to Determine Continuing Obligations

- X4.4.1 Nature and Scope of LURs
- X4.4.2 Nature and Scope of ICs
- X4.4.3 Nature and Scope of Engineering Controls
- X4.4.4 Nature and Scope of Present or Future Threatened Releases
- X4.4.5 Nature and Scope of Exposure to Human Health and the Environment

X4.5 Description of Initial Continuing Obligations Related to Activity and Use Limitations and Reasonable Steps

- X4.5.1 Findings of Initial Site Inspection
- X4.5.2 IC or LUR (or other AULs)
 - X4.5.2.1 Action Needed (if any) to Implement IC or LUR (or other AULs)
 - X4.5.2.2 Actions Needed (if any) to Not Impede IC Effectiveness and Integrity
 - X4.5.2.3 Actions Needed (if any) to Comply With LURs
- X4.5.3 Reasonable Steps
 - X4.5.3.1 Action Taken to Stop Any Continuing Releases
 - X4.5.3.2 Action to Protect Against Any Future Threatened Release
 - X4.5.3.3 Action to Prevent Exposure to Human Health and the Environment

- X4.5.3.4 Other Reasonable Steps Needed for ICs, LURs or other AULs
- X4.5.4 Schedule for Completion of Initial Continuing Obligations

X4.6 Descriptions of Ongoing Continuing Obligations Related to Activity and Use Limitations and Reasonable Steps

- X4.6.1 Monitoring and Evaluation (including Inspections)
 - X4.6.1.1 Schedule of Monitoring and Evaluation
 - X4.6.1.2 Documentation of Monitoring and Evaluation
- X4.6.2 Operation and Maintenance
 - X4.6.2.1 Schedule of Operation and Maintenance
 - X4.6.2.2 Documentation of Operation and Maintenance
- X4.6.3 Communication of Ongoing Continuing Obligations

X4.7 Signature(s) of Preparer

X4.8 Qualifications

X4.9 References

X4.10 Appendices

- X4.10.1 Site Vicinity Map
- X4.10.2 Site Use (Re-Use) Map
- X4.10.3 Copies of AUL documents (covenants, ordinances, etc.)
- X4.10.4 Site Assessments (Phase I, Phase II, others)
- X4.10.5 Site Conceptual Model
- X4.10.6 Risk Assessment

X5. RECOMMENDED TABLE OF CONTENTS AND REPORT FORMAT FOR CONTINUING OBLIGATIONS MONITORING AND EVALUATION REPORT

X5.1 Introduction

- X5.1.1 Purpose

X5.2 Property Description

- X5.2.1 Location and Legal Description
- X5.2.2 Property Owner(s) and Property Transaction Date

X5.3 Monitoring and Operation and Maintenance Requirements

- X5.3.1 Land Activity Criteria
- X5.3.2 Land Use Criteria
- X5.3.3 Notice Criteria
- X5.3.4 Monitoring Criteria
- X5.3.5 Maintenance Record Review Criteria

X5.4 Monitoring and Operation and Maintenance Procedures

- X5.4.1 Procedures Using Visual Observation
- X5.4.2 Procedures Relying on Specialized Services
- X5.4.3 Engineered Control Inspection

- X5.4.4 Remote Monitoring System Inspection
- X5.4.5 Automated Land Activity Monitoring Systems

X5.5 Monitoring and Operation and Maintenance Findings

- X5.5.1 Land Activity Findings
- X5.5.2 Land Use Findings
- X5.5.3 Notice Findings
- X5.5.4 Monitoring Findings
- X5.5.5 Maintenance Record Review Findings

X5.6 Corrective Actions Performed

X5.7 Signature(s) of Preparer

X5.8 Qualifications

X5.9 References

X5.10 Appendices

- X5.10.1 Completed Maintenance Records
- X5.10.2 Completed Monitoring Forms
- X5.10.3 Photographs

X6. SAMPLE FORM FOR CONTINUING OBLIGATIONS FIELD INVESTIGATION AT A SIMPLE SITE

Property Information:		
Property Name:		
Property Address (APN):		
Activity and Use Limitations (AULS) applicable to this property:		
Mode of Observation (describe vantage points and extent of access):		
Date and Time of Observations:		
Property Observations:		
Land Uses ¹		Land Activities ²
Childcare	☐ No ☐ Yes	Excavation
Hospice	☐ No ☐ Yes	Dewatering
Hospital	☐ No ☐ Yes	Construction
Residential	☐ No ☐ Yes	Buried or Subsurface Utilities or Conveyances
School	☐ No ☐ Yes	
Playground or play area	☐ No ☐ Yes	
Other Outdoor Recreation	☐ No ☐ Yes	
Housing (Single or Dual)	☐ No ☐ Yes	
Other	Describe:	
¹ Observations of Potential Inconsistent Land Use (where marked Yes):		
² Observations of Potential Inconsistent Land Activities (where marked Current):		
Conclusions:		
Observer:		
	Printed Name	Signature
Observer:		
Supervisor:		

X7. SAMPLE FORM FOR CONTINUING OBLIGATIONS FIELD INVESTIGATION AT A COMPLEX SITE

X7.1 Instructions and Notes on Intended Manner of Use

X7.1.1 This form is a field investigation form. A field investigation includes the review of documentation maintained on site, and interviews with those parties identified on the first page of the form where applicable.

X7.1.2 The form is intended both as an initial field note form and a word processing template for the input of data by computer wherein fields can be expanded, added or deleted as dictated by the site. The form may serve, in simple cases, as an all-inclusive one-step evaluation when no further information is required and no remedial action is necessary.

X7.1.3 This form is a sample with suggestions based on a national scope. Local, state or regional differences may be better served by modification of this form to suit those needs.

X7.1.4 The user of this form should consider creating an electronic version of critical documents using a hand-held scanner/copier or high-resolution digital camera. Site photographs documenting conditions as they pertain to each section of this form are also of significant importance in creating a verifiable trail of evidence.

Sample Form for Continuing Obligations Field Investigation at a Complex Site

Site IDs Internal _____ State _____ Federal _____

Site Name			
Site Address			
Site Owner			
Site Operator if different than Owner			
Site Operations & Maintenance Mgr., if any			
Tax ID/Parcel No.		Date of current visit	
Tax ID/Parcel No.		Date of immediately previous visit	
Tax ID/Parcel No.		Date of initial site investigation	

Please refer to the Continuing Obligations Plan (COP) before continuing with this evaluation. If the COP is not complete, it should be completed before this evaluation is conducted.

**SECTION 1 Activity and Use Limitations (AULs)**

List all AULs identified in Steps 1 and 2 (see Section 5 and 6 of the guide) and the Continuing Obligations Plan and comment on the execution of and adherence to AULs, then list facts based on your observations that may impact effectiveness and integrity of the AULs.

None ☐

AUL	Findings

SECTION 2 Reasonable Steps (RS)

List Reasonable Steps planned or contemplated in the COP, indicate whether they have been executed, and factual evidence regarding if and how they are working.

None ☐

Reasonable Step	Findings

SECTION 3 Miscellaneous Obligations (MO)

MO1	Identify all non-confidential notices (for example, notices provided to government agencies or other parties) provided by the property owner with respect to the discovery or release of any hazardous substances or petroleum products on the property.
MO2	Identify all requests for information or administrative subpoenas (if any) that have been received from EPA or other government agencies, and describe the property owner's response.
MO3	Identify whether there have been any requests for access to the property for purposes of conducting a response action and whether the property owner has provided cooperation and assistance in connection therewith.



SECTION 4 Exposure Pathway Observations

This section is utilized for describing whether a visually or physically observed open exposure pathway (for example, leaking container or change in land use) may exist. Provide a general discussion of obvious potential exposure pathways or environmental conditions not fully-captured by previous sections of this investigation.

Has new contamination been discovered since the last visit?

☐ Yes

☐ No

If Yes, Explain:

Have contaminated media been disturbed?

☐ Yes

☐ No

If Yes, Explain:

Are there visible modifications to the site, or AULs, since the previous site visit?

☐ None

Changes:

Were previously unknown modifications to the property or AULs disclosed to the Inspector during the Interview?

☐ None

Changes:

Is there new information indicating an open exposure pathway may be present?

☐ Yes

☐ No

Explain:



SECTION 5	AUL Observations
List and describe your observations regarding the operation of AULs.	
Describe observed conditions that indicate conflicts or potential conflicts with AULs.	
Describe observed conditions that indicate impediments or potential impediments to the Effectiveness or Integrity of ICs.	
Describe observed conditions that indicate the improper operation or failure, or potential improper operation or failure of ECs.	
Describe any other observed conditions indicating that AULs are not operating as they were intended, are otherwise allowing or potentially allowing exposure to occur, or that are relevant to the operation of AULs at the property.	
Are additional Reasonable Steps needed? ☐ Yes ☐ No	
Suggest Steps:	

SECTION 6	Summary of Factual Findings
Circle the appropriate response and provide additional commentary as necessary.	
We [did/did not] observe any conditions indicating complete exposure pathways.	Comment:
We [did/did not] observe any physically or visually observable conditions indicating potentially complete or a material threat of potentially complete exposure pathways.	Comment:
We [did/did not] observe conditions that indicate (1) conflicts or potential conflicts with AULs or (2) impediments or potential impediments to the effectiveness or integrity of AULs.	Comment:
We [did/did not] observe other conditions that indicate (1) complete or potentially complete exposure pathways exist or (2) that AULs were not operating in the manner intended.	Comment:
We [did/did not] observe the apparent need for additional "reasonable steps" that should be taken on the property to stop continuing releases, prevent any threatened future releases, or prevent or limit human, environmental, or natural resource exposure to previously released hazardous substances.	Comment:
Other observations:	
Complete the conversation log. Add verifying documents, electronic media sources, maintenance log, and photos as part of this report.	
Field Inspector	Additional Investigator or Supervisor
Name:	Name:
Date:	Date:

**Conversation Interview Log**

Consultant	Conversant	Substance	Date

Document Log

Document	What does this document verify?

Electronic Media Sources Source

Document	What does this document verify?

Maintenance Log

EC	Maintenance Performed

X8. CONTINUING OBLIGATIONS SCENARIO ANALYSIS

INTRODUCTION

This appendix is provided as an instructive example of how a user may seek to apply this guide. This appendix is not comprehensive (for example, it does not address the CPO or ILO user) and thus should not be viewed as controlling. Further, the scenarios provided are examples, and may not represent the only appropriate solution for implementing continuing obligations. The identification and implementation of continuing obligations is necessarily property-specific. As a result, individual users in the same or similar circumstances may design different procedures to appropriately achieve continuing obligations.

X8.1 This appendix describes five property scenarios to illustrate the application of this guide. The scenarios are represented on Fig. X8.1.

- | | |
|----------|---|
| Parcel A | Property with historical RECs triggering continuing obligations, and landowner opts to use Voluntary Cleanup Program to guide continuing obligations. |
| Parcel B | Property with a REC which after further evaluation (Step 2) is determined not to have continuing obligations. |
| Parcel C | Property with an AUL that is monitored and maintained as a continuing obligation. |
| Parcel D | Property without RECs and is screened (Step 1) to have no continuing obligations. |
| Parcel E | Property that is Superfund site with institutional and engineering controls as well as a continuing release. Landowner relies on responsible party in implementation of continuing obligations. |

X8.2 The scenarios are developed utilizing the four steps developed within this guide. When continuing obligations do not apply, not all four steps are completed. Representative documentation is also highlighted. For each step, the representative activities completed are described and the outcome at the end of the step is presented. Other considerations that further develop or clarify a given scenario are then described.

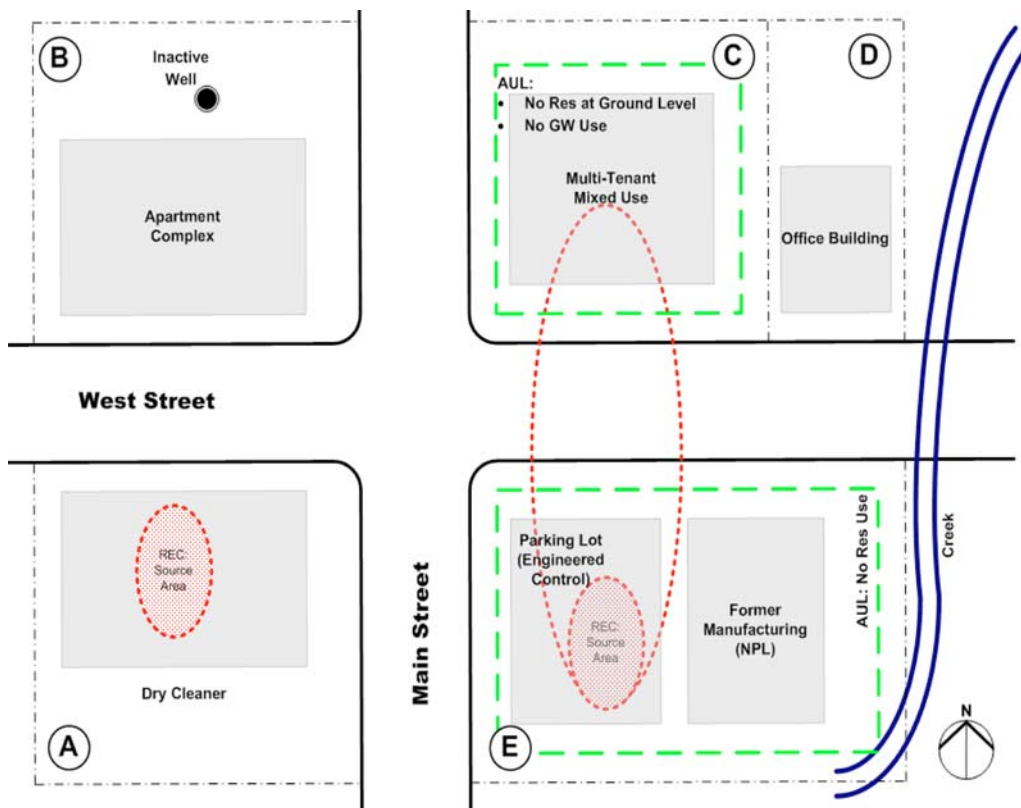


FIG. X8.1 Scenario Analysis for Continuing Obligations

Parcel A Continuing Obligations Scenario

This property is a commercial retail (bookstore). The new owner (user) is in receipt of a Phase I environmental review, and has acquired the property. The new owner seeks to redevelop the property toward a restaurant.

Parcel A is representative of sites where a REC is identified in the Phase I – in this case that the site was formerly a dry cleaner. Aside from the finding of a REC, there are other AULs impacting the property . There are numerous scenarios which could be developed for this property . Here the landowner chooses to avail themselves of the Voluntary Cleanup Program (VCP) program, and seeks a Certificate of Completion from the agency. The VCP program directives inform the development and duties for a continuing obligations plan.

Continuing Obligations Steps	Activities Conducted During Each Step	Outcome
Step 1: Initial Screening to Determine if Continuing Obligations Apply	<u>Review Phase I:</u> RECs: As a former dry cleaner, TCE in the soil is likely. AULs: None	Screening results in a determination of continuing obligations based upon REC. The user should proceed to Step 2.
Step 2: Review and Evaluate AULs and Environmental Conditions at Property	<u>Collect Additional Information:</u> User conducts Phase II and finds and delineates TCE in the soil. <u>Complete Conceptual Site Model:</u> The user prepares a CSM informed by the planned property use, and identifies a potentially complete exposure pathway .	The release could result in an unacceptable exposure to TCE. A reasonable step obligation is triggered to limit exposure within the structure. User proceeds to Step 3.
Step 3: Perform Initial Continuing Obligations	<u>Enter Voluntary Cleanup Program:</u> User provides notice of the discovery of TCE to regulatory agency, and enters VCP program. The VCP effort resolves excavation, use of an engineered liner, and recording of an environmental covenant to restrict use to non residential and limit excavation. <u>Prepare Continuing Obligations Plan:</u> User prepares COP that specifies installation of an engineered control, and specifies periodic maintenance, monitoring and notice of engineered control and institutional control.	- Property is redeveloped with Certificate of Completion issued by applicable regulatory agency. Shallow soil is excavated. Redeveloped property incorporates an engineered vapor barrier. - The landowner has recorded an environmental covenant on the property . - A continuing obligations plan is in place that describes monitoring and maintenance of engineered barrier, and monitoring of the institutional control to validate activity and use limitations. - User installs cautionary construction signs to provide notice of the existence of the engineering control.
Step 4: Perform Ongoing Continuing Obligations	<u>Monitoring:</u> User inspects vapor barrier on an annual basis, and during the inspection validates consistency of land use and activities with the environmental covenant.	- User has a maintained and integral engineered control. - Activity and use remains consistent with institutional control.
Documentation	- Prepare Continuing Obligations Plan - Prepares Annual Monitoring Report	User retains documentation of continuing obligations plan and monitoring reports.
Other Considerations	While the user could of chosen not to participate in the VCP, the obligation to provide regulatory notice of the discovery of the release provided a context through which the VCP became a viable approach in light of the regulatory scrutiny. The user could optionally rely on documentation generated through the VCP if that documentation informed their continuing obligations .	



Parcel B Continuing Obligations Scenario

This property is a multifamily apartment complex. The new owner (user) is in receipt of a Phase I environmental review, and has acquired the property. Previously the property had been a machine shop. The new owner seeks to maintain the property's use as a multifamily apartment.

Parcel B is representative of sites where RECs are identified in the Phase I, but is in subsequent analysis (Step 2) shown not to be RECs. The user also undertakes proactive removal of an abandoned well to remove any continuing obligations triggers.

Continuing Obligations Steps	Activities Conducted During Each Step	Outcome
Step 1: Initial Screening to Determine if Continuing Obligations Apply	<u>Review Phase I:</u> RECs: As a former machine shop, and REC based upon presence of regional ground water contamination. AULs: None	· Screening results in a determination of continuing obligations based upon a REC. The user should proceed to Step 2.
Step 2: Review and Evaluate AULs and Environmental Conditions at Property	<u>Collect Additional Information:</u> User conducts Phase II and does not discover hazardous substances. User conducts vapor intrusion sampling, and does not find constituents of concern. In site reconnaissance, user discovers abandoned well. <u>Prepare Site Conceptual Model:</u> User prepares SCM to evaluate exposure pathways from regional ground water contamination. The preparation of the site conceptual model informed the Phase II effort to measure for vapor intrusion.	· The user chooses to properly abandon the well to avoid any potential use of the well that could exacerbate regional ground water contamination. · The user identifies that the REC associated with regional ground water contamination does pose a complete exposure pathway, and therefore no exposure.
Step 3: Perform Initial Continuing Obligations	Not applicable	
Step 4: Perform Ongoing Continuing Obligations	Not applicable	
Documentation	· Prepare Statement of No Continuing Obligations	· User has statement of no continuing obligations.
Other Considerations	The choice to properly abandon the well is illustrative to show broad discretion a landowner holds in satisfying continuing obligations. If left intact, and activated for use, the action could potentially draw contamination that would trigger reasonable steps obligations. The approach was preemptive to remove future continuing obligations.	

Parcel C Continuing Obligations Scenario

This property is a multi-tenant property that has recently been acquired. The new owner (user) is in receipt of a Phase I environmental review, and has acquired the property. The property has been acquired through the foreclosure process. The new owner does not plan to redevelop the property.

Parcel C is representative of sites where the property has been impacted by an off-site source of contamination. The Phase I identified ground water contamination as well as the existence of an institutional control.

Continuing Obligations Steps	Activities Conducted During Each Step	Outcome
Step 1: Initial Screening to Determine if Continuing Obligations Apply	<u>Review Phase I:</u> RECs: Ground water contamination with TCE from off-site source. AULs: Institutional control limiting use to commercial business and restricting use of ground water.	Screening results in a determination of continuing obligations based upon REC and AUL. The user should proceed to Step 2.
Step 2: Review and Evaluate AULs and Environmental Conditions at Property	<u>Collect Additional Information:</u> User determines that the institutional control recorded on the property has been voided in foreclosure action. <u>Complete Conceptual Site Model:</u> The user prepares a CSM informed by the planned property use, and identifies a potentially complete exposure pathway.	- A continuing obligation exists to not impede the effectiveness and integrity of the institutional control. - Continuing obligations exist to take reasonable steps to prevent threatened releases and to prevent exposure to prior releases of hazardous substances. - User proceeds to Step 3.
Step 3: Perform Initial Continuing Obligations	<u>Prepare Continuing Obligations Plan:</u> User prepares COP that specifies installation of an engineered control, and specifies periodic maintenance, monitoring and notice of engineered control and institutional control. <u>Restore Integrity of Institutional Control:</u> The current landowner records the institutional control against the property .	- The landowner has recorded an environmental covenant on the property. - Institutional control's force is restored by new owner's recording covenant. - A communication plan to tenants informs them of use limitations as they might enact tenant improvements. Limitations are also written into leases. - A continuing obligations plan is in place that describes monitoring and maintenance institutional control to validate activity and use limitations.
Step 4: Perform Ongoing Continuing Obligations	<u>Monitoring:</u> User inspects biannually occupancies for consistency use and activities with the environmental covenant.	Activity and use remains consistent with institutional control.
Documentation	- Prepare Continuing Obligations Plan - Prepares Biannual Continuing Obligations Monitoring Report	User retains documentation of continuing obligations plan and monitoring reports.
Other Considerations	A separate valid scenario would be that the landowner would not be bound by the institutional control once it was discovered to be extinguished. While the future activities and use might have conflicted with the extinguished institutional control, any new activities would need to be judged as to whether they posed an unacceptable risk consistent with reasonable steps expectations. Ultimately, the outcome is the same. Over-time, the plume expands, and could begin to introduce a threat of vapor intrusion to the tenants. When the landowner receives notice of the potential vapor intrusion impact, and a request to investigate, the landowner chooses to be responsive to both the investigative request and installation of vapor intrusion mitigation approaches. Maintenance and monitoring of the vapor intrusion becomes an additional continuing obligation.	

Parcel D Continuing Obligations Scenario

This property is a small office building that has been recently acquired by the user. The user is in receipt of a Phase I environmental review.

Parcel D is typical of many properties where a Phase I is completed: there are no RECs, AULs or Data Gaps. Users are cautioned that AULs may not be identified within the findings of the Phase I, but instead within the section for records review.

Continuing Obligations Steps	Activities Conducted During Each Step	Outcome
Step 1: Initial Screening to Determine if Continuing Obligations Apply	Review Phase I: RECs: None AULs: None Data Gaps: None	Screening results in a determination of no continuing obligations.
Step 2: Review and Evaluate AULs and Environmental Conditions at Property	Not Applicable	No duties.
Step 3: Perform Initial Continuing Obligations	Not Applicable	No duties.
Step 4: Perform Ongoing Continuing Obligations	Not Applicable	No duties.
Documentation	· Prepare statement of no continuing obligations.	User chooses to complete a statement of no continuing obligations, though any documentation is optional.
Other Considerations	Determinations that no continuing obligations are required could be limited in duration and scope under certain circumstances. See 5.4 of this guide.	

Parcel E Continuing Obligations Scenario

This property is a former manufacturing facility that is a federal designated Superfund site. The site was purchased to be redeveloped into commercial retail. The site was purchased from the responsible party.

Parcel E is representative of a complex site where continuing obligations would exist. The Phase I was informed by numerous record documents including a Record of Decision, and a recorded institutional control. In this scenario, the responsible party would continue to be active in the service of any ongoing remediation activities.

Continuing Obligations Steps	Activities Conducted During Each Step	Outcome
Step 1: Initial Screening to Determine if Continuing Obligations Apply	<u>Review Phase I:</u> RECs: Ground water contamination with TCE. RECs: Soil contamination exists at levels above unrestricted use and unrestricted exposure, below the parking lot cap. AULs: Institutional control limiting use to commercial business, restricting use of ground water and prohibiting disruption of the engineered cap. AUL: Engineering control as parking lot.	Screening results in a determination of continuing obligations based upon REC and AUL. The user should proceed to Step 2.
Step 2: Review and Evaluate AULs and Environmental Conditions at Property	<u>Complete Conceptual Site Model:</u> The user prepares a CSM informed by the planned property use, and identifies a potentially complete exposure pathway including exposures that could occur if the parking lot cap fails. No unacceptable exposures are identified at this time.	- A continuing obligation exists to not impede the effectiveness and integrity of the institutional control, and maintain the engineering control. - A continuing obligation exists to take reasonable steps to prevent future threatened releases and prevent exposure to prior releases of hazardous substances. - User proceeds to Step 3.
Step 3: Perform Initial Continuing Obligations	<u>Prepare Continuing Obligations Plan:</u> User prepares COP that specifies installation of an engineered control, and specifies periodic maintenance, monitoring and notice of engineered control and institutional control. <u>Reasonable Steps to Prevent Releases and Prevent Exposure to Past Releases:</u> Engineered control maintenance prevents future releases and prevents exposure to prior released hazardous substances.	- Prior releases are protected by engineering control. - User assigns ongoing maintenance of engineering control to the responsible party. - A communication plan to contractors is developed. Plan includes use of the excavation clearance system to provide notice of buried engineered control to excavation contractors. - A continuing obligations plan is in place that describes monitoring and maintenance to validate activity and use limitations.
Step 4: Perform Ongoing Continuing Obligations	<u>Monitoring:</u> Biennial inspections of occupancies for consistency with use and activities allowed by the environmental covenant. Annual inspections of parking lot cap. User reviews inspection reports.	- Activity and use remains consistent with institutional control. - Engineering control is protected through site redevelopment.
Documentation	- Prepare Continuing Obligations Plan - Prepares Continuing Obligations Monitoring Report	User retains documentation of continuing obligations plan and monitoring reports.
Other Considerations	During the course of the property, a contractor damages the engineering control. The damage is detected during a periodic inspection. Corrective actions are performed and documented within the monitoring report.	

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