

Windfall Liens Under CERCLA
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I. Small Business Liability Relief and Brownfields Revitalization Act (“Brownfields Amendments”)

- A. In 2002 Congress enacted the Brownfields Amendments to encourage the redevelopment of contaminated properties.
- B. The law provides protection from CERCLA liability to bona fide prospective purchasers (BFPPs) who knowingly purchase contaminated properties.
- C. Windfall Lien:
 - (1) Congress didn't want the BFPP to reap a windfall at the taxpayer's expense by getting the increased property value resulting from EPA's efforts
 - (2) The new law permits EPA to impose a lien on the purchased property to recover the increase in the property's value attributable to the government's cleanup actions.
 - (3) The Windfall Lien is significant because of the potentially severe impact on purchasers who attempt to develop brownfields sites.

II. The Windfall Lien

- A. *Prerequisites:*
 - (i) EPA must perform a response action at the property for which there are unrecovered costs of the United States.
 - (ii) The response action must increase the fair market value of the property above the fair market value that existed before the response action was initiated.
 - (iii) The owner of the property must be a bona fide prospective purchaser.
- B. *Time of lien inception/expiration.*
 - (1) Arises at the time at which costs are first incurred by the United States with respect to a response action at the property.
 - (2) The windfall lien continues until the lien is satisfied by sale or other means, or recovery of all response costs incurred at the property.
- C. *Notice Requirements:* The windfall lien is subject to the notice requirements in § 9607(1)(3).
- D. *Statute of Limitations:* The statute of limitations applicable to CERCLA actions, contained in § 9613, does not apply to the windfall lien.

III. Windfall Lien Guidance Document (“EPA Guidance”)

- A. The EPA Guidance describes the factors that will lead the government to impose a windfall lien. It is *likely* that EPA will impose a lien in situations where:
- (1) EPA has substantial unrecovered response costs, which EPA is unlikely to recover from liable parties.
 - (2) EPA’s expenditure of remediation costs will lead to a BFPP reaping a windfall.
 - (3) Real estate or commercial transactions are apparently designed to either alleviate the consequences of CERCLA liability or provide a windfall to a developer.
 - (i) For example, where the owner of property, who is liable under CERCLA, sells property to a BFPP at below fair market value and/or the sale of property is designed to avoid imposition of a § 9607(l) superfund lien (i.e., where the private parties’ actions thwart EPA’s filing of a lien against the liable prior owner).
- B. According to the EPA Guidance, it is *unlikely* that EPA will impose a windfall lien, even when EPA’s response costs have increased the fair market value of property, in situations where:
- (1) A BFPP acquires property at fair market value after the completion of all EPA response activities or where where EPA has recovered all costs of its remediation, taking into account increases in fair market value, from CERCLA responsible parties.
- C. Amount of the Windfall Lien
- (1) Generally, the value of the windfall lien will reflect only the increase in fair market value attributable to EPA’s response action that occurs after a BFPP acquires the property regardless of how much EPA expends.
 - (2) It is important to note that while the EPA Guidance provides insight into EPA’s practices, it is only guidance. The law itself does not require the limitations on the lien that are set forth in the EPA Guidance. Whether EPA will file a windfall lien is dependent upon EPA discretion, since the § 9607(r) statutory language lacks clarity. The current EPA Guidance, while helpful, does not address all situations.

IV. Vehicles for Resolving windfall lien liability concerns

- A. Comfort/Status Letters
- (1) Used for situations where EPA generally will not pursue a windfall lien.
 - (2) These letters are not legally enforceable. The model letter included in the EPA Guidance states: “This letter is provided solely for informational purposes and does not provide a release from CERCLA liability.”
 - (3) By identifying situations where EPA will generally not pursue a windfall

lien, EPA hopes to lessen the need for site-specific letters.

- (4) However, a Comfort/Status Letter can be appropriate where: such a letter may facilitate cleanup and redevelopment, there is a realistic perception or probability of CERCLA liability accruing, and there is no other mechanism to address a party's concern for liability.

B. Windfall Lien Resolution Documents

- (1) This resolution alternative applies to situations where EPA would ordinarily elect to impose a windfall lien consistent with its policies.
- (2) Section 9607(r)(2) provides alternative means for BFPPs to recompense EPA for its unrecovered response costs without the imposition of a lien.
 - (i) This provision provides EPA with the authority to resolve its lien at the time the BFPP acquires the property.
 - (ii) The BFPP can compensate EPA directly, provide some other assurance that EPA's response costs will be recouped, or opt to perform the cleanup plan itself.
 - (iii) In these situations, the BFPP will most likely pay the Government some consideration in exchange for the release from the windfall lien.
- (3) To date, EPA has entered into approximately ten agreements of this type.

V. Uncertainty and Concerns for Land Owners

A. Statute of Limitations

- (1) The § 9607(r) windfall lien is not subject to the statute of limitations contained in § 9613(g). The statute provides that the lien continues until it is resolved through sale or other means, or until EPA recovers all of its response costs.

B. Response Costs Covered by the Windfall Lien

- (1) The statute does not limit the lien to post-acquisition costs. The Guidance indicates that EPA will "generally" not attempt to recover responses costs incurred before a BFPP acquires a property. Thus, a windfall lien could cover all response costs ever incurred by the EPA (pre or post-acquisition).

C. Calculation of the Increase in Fair Market Value

- (1) The law (§ 9607(r)) states that the lien shall not exceed the increase in fair market value of the property attributable to EPA response actions at the time of property disposition.
- (2) When is "property disposition?"
- (3) Does this mean that EPA has to wait until the property is sold by the BFPP?

- (4) Is it possible to isolate the increase in fair market value attributable to EPA's actions where property values are rising on their own, or where a rezoning (or other actions taken by the property owner) also impacts the property value?

D. Lender Issues

- (1) Lenders should consider implementing procedures to protect against windfall liens affecting their collateral.
- (2) Although the windfall lien is not a "superlien" that primes existing liens, for many lenders an unanticipated junior lien can be problematic.

E. Accuracy of Phase I Environmental Assessments

- (1) Phase I Environmental Assessments may not be an accurate mechanism for discovering whether the EPA has spent money at a site.