

January 8, 2007

NEW EPA BONA FIDE PROSPECTIVE PURCHASER MODEL AGREEMENT

On November 27, 2006, the United States Environmental Protection Agency ("EPA") issued a new Model Agreement and Order on Consent for Removal Action by a Bona Fide Prospective Purchaser ("Model Agreement") under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").

The Model Agreement may be useful to a person who meets the following criteria:

- 1) Plans to purchase contaminated property, or purchased contaminated property after January 11, 2002;
- 2) Needs or wants to perform a relatively extensive cleanup of the contamination;
- 3) Wants governmental approval of the cleanup; and
- 4) Is willing to accept some drawbacks (contractual obligations, potential penalties for noncompliance, etc.) in exchange for that governmental approval.

The following briefly describes the basis for and provisions of the Model Agreement. Other requirements and legal issues, beyond those discussed below, may apply. For further information, please contact Christopher J. Dunsky at cdunsky@honigman.com or 313.465.7364.

BFPP Exemption

Under CERCLA, the Bona Fide Prospective Purchaser ("BFPP") exemption to liability is designed to encourage the acquisition and re-use of contaminated properties. Without the exception, a person who acquires property with knowledge that it is contaminated might be considered liable for that contamination under CERCLA. By meeting certain requirements, a BFPP can acquire property that is known to be contaminated and avoid liability for that contamination.

The particular requirements of the BFPP exemption, however, are problematic in some circumstances. For example:

- Actions Beyond Reasonable Steps. In addition to meeting other requirements, the BFPP must take all "reasonable steps" to stabilize and limit exposure to the contamination. A determination of what are "reasonable steps" is necessarily site-specific, which leads to uncertainty in some cases. The EPA has

addressed such uncertainty in the past by issuing "comfort letters" describing appropriate site-specific reasonable steps. However, there was previously no mechanism to provide certainty to BFPPs who wanted to remediate a site beyond what their "reasonable steps" obligations would require.

- Windfall Lien. The exemption includes a "windfall lien" provision by which EPA may claim a lien on the contaminated property equivalent to the increase in property value resulting from any removal actions that the EPA chooses to perform on the property. Through the windfall lien, a BFPP could meet the requirements of the liability exemption, but still find itself financially impacted if the EPA chose to conduct additional activities on the property.

Model Agreement

In order to encourage BFPPs to conduct additional remedial activities beyond the minimum "reasonable steps" requirements, the Model Agreement contains provisions designed to address those and other issues, including the following:

- 1) A "Covenant Not To Sue" by the EPA, by which the EPA will relinquish its right to assert CERCLA liability against the BFPP related to the additional removal actions specified in the agreement.
- 2) A waiver of EPA's right to claim any windfall lien relating to the property.
- 3) Language indicating that the agreement is an "administrative settlement" with the EPA. This affords the BFPP the following protections in the event that the BFPP somehow loses its statutory exception to liability:
 - a) Other liable parties may not bring claims for contribution against the BFPP.
 - b) The BFPP may file claims for contribution against other liable parties.

The Model Agreement also includes several provisions designed to ensure compliance with and completion of the additional removal actions, including reimbursement of EPA oversight costs, stipulated penalties for noncompliance and/or financial assurance requirements. Those provisions may, however, be omitted or modified on a case-by-case basis.

The Model Agreement is intended for use only at sites of "federal interest" where a BFPP intends to perform "complex or significant" removal action beyond the minimum "reasonable steps" requirements. EPA will continue to address ordinary "reasonable steps" inquiries through the "comfort letter" process.

If you have any questions regarding this new development, please reply to this email and one of our Environmental Law Department attorneys will contact you.

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