

Department of the Treasury

Executive Office for Asset Forfeiture

Directive Number: 7

DATE: October 1, 1993

SUBJECT: **Seizure and Forfeiture of Real Property That is Potentially Contaminated, or is Contaminated, with Hazardous Substances**

Congress enacted the Superfund Amendment and Reauthorization Act of 1986 (SARA)¹ to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).² Section 120(a) of the Act³ imposes the liability provisions of Section 107⁴ upon the United States. Section 120(h)⁵ of the Act sets forth notice and warranting requirements which apply whenever any agency, department or instrumentality of the United States enters into a contract for the sale or other transfer of real property which is owned by the United States and on which any hazardous substance⁶ either:

1. Has been stored⁷ for more than one year.
2. Is known to have been released⁸, or
3. Is known to have been disposed of.

On April 16, 1990, EPA promulgated its final regulations interpreting section 120(h). The Department of Treasury policy on this subject is as follows:

Departmental Policy

It is the policy of the Department of Treasury that real property that is contaminated or potentially contaminated with hazardous substances may in the exercise of discretion be seized and forfeited upon a determination by the United States Attorney (USA), in the district where the property is located, in consultation with the seizing agency and the Property Custodian, that such action is appropriate. The USA may have delegated this authority to an Assistant United States Attorney, with a provision for review by a supervisor.

This policy is applicable regardless of the type or source of the hazardous substance(s).

This policy is applicable to all cases investigated by any agency of the Department.

This policy is based on the ability of the United States to invoke an "innocent owner" defense from liability for hazardous substance contamination found on real property,

if such contamination resulted from a prior owner's activities, when the real property is acquired through involuntary means (this includes seizures and forfeitures, which are involuntary to the owner) if that federal agency (1) exercises due care once it takes possession of the property, (2) secures the property from other third party actions, and (3) provides notice of those hazardous substance conditions about which the United States knows when it transfers or sells the property.

To insure that the United States can avail itself of the "innocent owner" defense in cases involving this class of real property, once the property is seized, federal law enforcement agencies will exercise due care in relation to the property and take precautions against foreseeable acts or omissions of possible third parties. Furthermore, such real property that is forfeited will only be transferred or sold with notice of the potential or actual contamination. Notice must be based on information that is available on the basis of a complete search of agency files. This notice will be included in the contract of sale and the deed.

In light of the "innocent owner" defense, real property that is contaminated or potentially contaminated with hazardous substances due to the activities of a prior owner, should be transferred or sold "as is" and an environmental assessment and/or remediation of the contamination need not be undertaken. Whenever possible, a commitment from the buyer to clean-up the property should be obtained as a part of the contract of sale.

However, if the real property becomes contaminated with a hazardous substance after the United States becomes the owner, then the "innocent owner" defense is inapplicable to that contamination. This situation normally will arise when the United States operates a business or activity on the property that results in the storage, release or disposal of hazardous substance (e.g., gasoline station, metal plating shops, dry cleaners, printers, etc.). In this circumstance, the United States is responsible for (1) all costs of hazardous substance removal and/or remedial action; (2) providing notice of the hazardous substance to a subsequent transferee or purchaser; and (3) a warranting covenant⁹ to a subsequent transferee or purchaser. Because of the potential resulting liability and expense, the USA should approve the operation of such a business or activity only in unusual circumstances.

This policy envisions United States Attorneys exercising discretion in the seizure and forfeiture of real property that is contaminated or potentially contaminated with hazardous substances. Normally, such properties should not be forfeited unless there is at least \$30,000 in net equity belonging to the defendant. **Furthermore, such properties should not be forfeited when there is reason to believe that property is substantially contaminated with hazardous substances and that such contamination would render the property unmarketable.** Clean-up costs

can be considerable particularly when the water table is involved. In making this determination, the USA may order an environmental assessment which will be paid from the Treasury Forfeiture Fund.

If at any point the USA elects, in the exercise of his or her discretion, not to proceed because significant contamination renders the property unmarketable, the USA should consider the following alternatives.

1. The filing of a release of Lis Pendens (assuming a Lis Pendens had been filed) containing notice of the reason (significant contamination) for dismissal of the forfeiture suit;
2. The filing of some other document in the county deed records containing notice of the significant contamination, if such filing is permitted under state law;
3. Notification of a federal, state, or local environmental agency of the significant contamination for purposes of appropriate enforcement action;
4. Notification of any lien holders of the significant contamination for such action as they may want to take; and
5. Consideration of prosecution, civilly, or criminally, for violations of the environmental laws by the private owners. The U.S. Attorneys Office should contact the Environment Division (Environmental Crimes or Environmental Enforcement Sections).

None of these alternatives is mandatory. Ultimately, it is within the discretion of the USA to decide how best to proceed when an election not to proceed with forfeiture is made.

Questions concerning this policy should be directed to the Executive Office for Asset Forfeiture at 202-622-9600.

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¹ Public L. No. 99-499, 100 Stat. 1996.

² 42 U.S.C. 9601 et seq.

³ 42 U.S.C. 9620 (a).

⁴ 42 U.S.C. 9607.

⁵ 42 U.S.C. 9620 (h).

⁶ Hazardous substances means that group of substances defined as hazardous under CERCLA (42 U.S.C. 9601 (14) and 40 C.F.R. 300.6), and that appear at 40 C.F.R. 302.4. See also 40 C.F.R. 261 App. VII, App. VIII and 40 C.F.R. 373.4 (a)

⁷ Storage means the holding of hazardous substances for a temporary period, at the end of which the hazardous substance is either used, neutralized, disposed of or stored elsewhere. 40 C.F.R. 373.4(b).

⁸ The term "release" is broadly defined to include, *inter alia*, any spilling, leaking, pouring, emitting, escape, leaching, or dumping of hazardous substances into the environment. See, 42 U.S.C. 9601(22). The term encompasses both the intentional and unintentional (e.g. accidental) release of hazardous substances.

Specifically,

... whenever any department, agency, or instrumentality of the United States enters into any contract for the sale or other transfer of real property which is owned by the United States and at which, during the time the property was owned by the United States, any hazardous substance was stored for one year or more, known to have been released, or disposed of, the head of such department, agency, or instrumentality must include in such contract notice of the type and quantity of such hazardous substance and notice of the time at which such storage, release, or disposal took place, to the extent such information is available on the basis of a complete search of agency file. 40 C.F.R. 373.1.

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

The notice required:

... for the storage for one year or more of hazardous substances applies only when hazardous substances are or have been stored in quantities greater than or equal to 1000 kilograms or the hazardous substance's CERCLA reportable quantity found at 40 C.F.R. 302.4, whichever is greater. Hazardous substances that are also listed under 40 C.F.R. 261.30 as acutely hazardous wastes, and that are stored for one year or more, are subject to the notice requirement when stored in quantities greater than or equal to one kilogram.

40 C.F.R. 373.2. The notice required for the know release of hazardous substances applies only when hazardous substances are or have been released in quantities greater than or equal to the substance's CERCLA reportable quantity found at 40 C.F.R. 302.4.

42 U.S.C. 9620(h) (3); 40 C.F.R. 373.1. It is envisioned that this search will involve the seizing agency's casefile(s) relating to the real property. Additionally, the search must include any documentation generated from an environmental assessment or the removal of hazardous substances from the real property.

In cases involving illegal drugs laboratories, the laboratories should be dismantled and all chemicals and equipment should be seized and removed in accordance with the DEA Agents Manual, Section 6674.0 *et seq.*

For purposes of liability under CERCLA (42 U.S.C. 9607), the United States is considered an owner of real property after a final judgment of forfeiture is entered. Ownership is not construed as including the interest which vests in the United States pursuant to the "Relation Back" doctrine. (See e.g., 21 U.S.C. 881 (h)).

Normally, the costs of removal and/or remedial action must be borne from funds available to the agency conducting operations on the property. EPA's funds, to include the Superfund, are generally not available for remedial actions on federally owned property. See 42 U.S.C. 9611(e) (3). Short term or emergency responses, known as removal actions, may be undertaken by the Superfund at federally owned properties at the discretion of the EPA.

⁹ The Covenant must warrant that:

(1) all remedial action necessary to protect human health and the environment with respect to any such substance remaining on the property has been taken before the date of such transfer, and,

(2) any additional remedial action found to be necessary after the date of such transfer shall be conducted by the United States.

42 U.S.C. 9620 (h) (3)(B).

The Chief, Environmental Quality Section, Tulsa District, U.S. Army Corps of Engineers (918-581-7877), has agreed to conduct environmental assessments for the Department on a cost basis.
