NOTE

The Transformation of Blight: Fixing the CERCLA Lessee Problem to Develop Renewable Energy

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ABSTRACT

In recent years, the Environmental Protection Agency ("EPA") has recognized a unique opportunity to solve two of the nation's environmental problems—the need for clean, renewable energy and the need to remediate contaminated sites—with one solution: the development of renewable energy on contaminated sites. Although EPA has provided databases of sites that are well-suited for renewable energy, with electrical infrastructure and extensive land, few renewable energy developers have chosen to build projects on these hazardous sites, commonly called Superfund sites.

Developers' concerns stem from the failure of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") to define the liability of a lessee for preexisting contamination, as well as the failure of the Small Business Liability Relief and Brownfields Revitalization Act ("Brownfields Amendments") to extend a defense against existing liabilities to developers who seek to lease Superfund sites. Notably, this concern is specific to renewable energy developers, who prefer to lease, rather than purchase, sites in order to align the lease term with government incentives and the revenue stream from the sale of power. Although EPA has committed to using its discretion in applying a federal purchaser defense to lessees in its administra-

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tive enforcement, courts must still consider the plain language of CERCLA, as well as controlling case law, which both lack defenses for circumstances in which a third party brings a claim against a lessee.

This Note argues that Congress should pass an amendment to CERCLA that creates a lessee defense that is modeled after California's lessee defense. By providing a defense against liability for preexisting contamination, renewable energy developers will be more likely to lease contaminated sites, and in turn, their renewable energy developments can provide both a source of energy and funding for the cleanup of those sites.

TABLE OF CONTENTS

INTRODUCTION

Since the mid-1980s, the Environmental Protection Agency ("EPA") has been taking remedial actions at a contaminated site in California, owned by the Aerojet General Corporation, using significant amounts of energy to pump and treat over 100 billion gallons of contaminated water.[1] The property, which is almost 6,000 acres, contains hazardous materials dating back to the 1950s, when it was a test site for fuel rocket propulsion systems,[2] and is just one of over 1,300 on EPA's list of prioritized contaminated sites ("Superfund sites").[3]

After more than two decades of expensive remediation, Aerojet narrowed in on a cost-efficient way to reduce the amount of energy used to treat water and reduce its environmental impact.[4] Partnering with EPA, Aerojet contracted with a solar developer to finance and build a solar farm, granting the developer a twenty-five year easement and indemnification from the site's cleanup costs and contamination,

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1 U.S. ENVTL. PROT. AGENCY, GREEN REMEDIATION AND UTILITY-SCALE SOLAR DEVELOPMENT: THE AEROJET GENERAL CORPORATION SUPERFUND SITE AND SACRAMENTO COUNTY, CALIFORNIA 2 (2010) [hereinafter EPA AEROJET], *available at* http://www.epa.gov/superfund/programs/recycle/pdf/aerojet.pdf. Under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601–9675 (2012), EPA is authorized to respond to hazardous contamination by cleaning up sites. 42 U.S.C. § 9604. As part of that authority, EPA may take removal or remedial actions. "Removal" includes short-term actions taken to address releases of hazardous waste that require prompt response in order to protect the public health. "Remedial actions" include long-term actions taken to reduce the risk of release of hazardous substances. Remedial actions include dredging, repairing leaking containers, monitoring hazardous waste, and other long-term, on-site actions. *See id.* § 9601(23)–(24) (defining "removal" and "remedial action"). This Note uses the term "remediate" to refer to remedial actions.

2 EPA AEROJET, *supra* note 1, at 1–2.

3 *NPL Site Totals by Status and Milestone*, U.S. ENVTL. PROTECTION AGENCY, http://www.epa.gov/superfund/sites/query/queryhtm/npltotal.htm (last updated Aug. 15, 2014).

4 EPA AEROJET, *supra* note 1, at 3.

and agreeing to purchase the power produced by the system.[5] With cooperation between Aerojet, the developer, EPA, and other public agencies, the Aerojet solar farm was completed in 2010 with the largest capacity of any solar photovoltaic system constructed on a private Superfund site.[6] Using clean, renewable solar photovoltaic energy, the system is connected to power lines that in turn supply energy for the site's groundwater remediation system.[7]

The Aerojet solar farm represents an opportunity that exists at the nexus between the United States' increased demand for domestic, clean energy and the over fifteen million acres of potentially contaminated land.[8] For parties seeking to remediate contaminated land, renewable energy can provide low-cost power for cleanup activities or revenue through lease payments, offsetting the total cost of remediation.[9] For developers seeking to make a profit from installing renewable energy, contaminated sites are often cheaper, contain fewer environmental resources than uncontaminated land, and provide existing infrastructure to connect and transmit electricity from the development to the purchasers.[10]

Despite these benefits, developers remain hesitant to build renewable energy on contaminated sites. As of October 2012, the Aerojet site is one of only eight Superfund sites that contain renewable energy installations, and the other seven facilities are significantly smaller than Aerojet's six megawatt solar photovoltaic facility.[11] Further, there are only nineteen brownfields—less contaminated sites—on which renewable energy has been installed.[12] EPA has made sig-

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5 *Id.* at 6.

6 *See* U.S. ENVTL. PROT. AGENCY, RE-POWERING AMERICA'S LAND INITIATIVE: RENEWABLE ENERGY PROJECTS ON POTENTIALLY CONTAMINATED LANDS, LANDFILLS, AND MINE SITES 3 (2012) [hereinafter EPA RENEWABLE ENERGY PROJECTS], *available at* http://www.epa.gov/oswercpa/docs/repowering_trackingmatrix_oct12.pdf. This Note uses the term "solar photovoltaic system" to refer to a power system comprised of arrays of photovoltaic solar panels that convert sunlight into electricity. The terms "farm," "system," and "project" are used interchangeably throughout this Note to refer to a solar photovoltaic system.

7 *See* EPA AEROJET, *supra* note 1, at 5.

8 U.S. ENVTL. PROT. AGENCY, RE-POWERING AMERICA'S LAND: POTENTIAL ADVANTAGES OF REUSING POTENTIALLY CONTAMINATED LAND FOR RENEWABLE ENERGY 2 (2012) [hereinafter EPA ADVANTAGES OF REUSING CONTAMINATED LAND FOR RENEWABLE ENERGY], *available at* http://www.epa.gov/oswercpa/docs/contaminated_land_resuse_factsheet.pdf.

9 *See* EPA AEROJET, *supra* note 1, at 2. Aerojet purchased all power generated by the solar photovoltaic system for site remediation. *See id.* at 6, 9.

10 EPA ADVANTAGES OF REUSING CONTAMINATED LAND FOR RENEWABLE ENERGY, *supra* note 8, at 2.

11 EPA RENEWABLE ENERGY PROJECTS, *supra* note 6, at 2, 3–7.

12 *Id.* at 2.

nificant efforts to encourage renewable development on contaminated sites by providing a database of sites and guidance, but developers remain concerned that they will be held liable for existing contamination after they lease these sites.[13]

Developers' concerns stem from the failure of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")[14] to define the liability of a lessee for preexisting contamination,[15] as well as the failure of the Small Business Liability Relief and Brownfields Revitalization Act ("Brownfields Amendments")[16] to extend a defense against existing liabilities to developers who seek to lease Superfund sites.[17]

This concern is especially applicable to renewable energy developers who prefer to lease, rather than purchase, sites because the lease term can last for the same amount of time that the developer contracts to sell the power produced by the system, among other reasons.[18] Although EPA has committed to use its discretion in applying a federal purchaser defense to lessees in its administrative enforcement, courts must still consider the plain language of CERCLA, which lacks a defense for situations in which a third party brings a claim against a lessee.[19]

In order to solve this problem and encourage development, the law must protect lessees. California has taken the initiative to address lessee liability by adopting a lessee defense that protects developers from contamination liability under its state program for contaminated sites.[20] Similarly, if the United States wishes to encourage more projects like the Aerojet site, Congress should use California as a model and adopt a lessee defense against liability.

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13 *See* U.S. ENVTL. PROT. AGENCY, OFFICE OF ENFORCEMENT & COMPLIANCE ASSURANCE & OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, REVISED ENFORCEMENT GUIDANCE REGARDING THE TREATMENT OF TENANTS UNDER THE CERCLA BONA FIDE PROSPECTIVE PURCHASER PROVISION 1 (2012) [hereinafter EPA 2012 REVISED TENANT GUIDANCE], *available at* http://www2.epa.gov/sites/production/files/documents/tenants-bfpp-2012-mem.pdf.

14 Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601–9675 (2012).

15 *Cf. id.* § 9607(a).

16 Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (2002) (codified as amended at 42 U.S.C. §§ 9601, 9604, 9605, 9607, 9622(g)).

17 *Cf.* 42 U.S.C. § 9601(40).

18 *See infra* Part II.C.

19 *See* EPA 2012 REVISED TENANT GUIDANCE, *supra* note 13, at 2–3 ("This guidance is not a rule and it does not create new liabilities or limit or expand obligations under any federal, state, tribal, or local law.").

20 *See* CAL. HEALTH & SAFETY CODE § 25395.102 (West 2006 & Supp. 2013).

Part I of this Note describes the uncertain legal regime for those who seek to lease contaminated sites under CERCLA, focusing on the failure of the Brownfields Amendments to create a defense that protects lessees from CERCLA liability. It concludes that, despite federal failures in addressing lessee liability, California has created a lessee defense against liability that addresses lessee liability within the state. Part II identifies the second problem—that renewable energy is needed and well-suited for contaminated sites, but that the structure of project financing for renewable energy encourages leases, rather than fee simple ownership. Part III explains that EPA's past attempts to address the lessee problem through guidance will not successfully encourage renewable energy development unless CERCLA is amended to include a lessee defense. Part IV proposes that Congress should pass a federal lessee defense that is modeled after California's lessee defense to limit developers' liability in a manner that is protective of human health and the environment.

I. THE FEDERAL LAW OF CONTAMINATED LAND DOES NOT PROVIDE FOR DEVELOPMENT UNDER LEASES

A. *Courts Extend CERCLA Liability to Lessees*

The history of CERCLA shows a hurried attempt to address a contamination problem, stopping short of a comprehensive solution and lacking a mechanism to reuse contaminated sites. CERCLA was passed in response to Love Canal, one of the nation's most highly publicized toxic waste disasters.[21] Chemical waste was buried below a Niagara Falls neighborhood and slowly caused devastating health disorders and birth defects among unsuspecting residents.[22] CERCLA was enacted in 1980 to retroactively address the problem of hazardous chemical waste by remediating and removing the pollution in place at Love Canal and other sites.[23] Specifically, CERCLA addresses "liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites."[24]

Under CERCLA, EPA ranks contaminated sites and places those with the greatest hazard to human health and the environment on the

21 Remarks on Signing H.R. 7020 into Law, 16 WEEKLY COMP. PRES. DOC. 2797 (Dec. 11, 1980).

22 Eckardt C. Beck, *The Love Canal Tragedy*, 5 EPA J. 17, 17 (1979).

23 Remarks on Signing H.R. 7020 into Law, *supra* note 21, at 2798.

24 Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767, 2767.

National Priorities List.[25] When EPA determines that a site is hazardous, it has the dual authority to require the removal or remediation of contamination.[26] EPA may take the emergency actions necessary to respond to a release of hazardous substances, a removal, or to permanently remedy existing hazardous disposals, a remedial action.[27] In return, the United States may hold any party that is potentially responsible for the contamination liable for any cost incurred in removing or remediating the contamination.[28]

Although CERCLA has created a successful system for enforcing the cleanup of sites like Love Canal, it has also created a system of uncertainty for innocent developers seeking to redevelop those sites in the future, especially those who seek to lease sites.[29] Particularly, in its original form, CERCLA did not address whether the lessee of a site could be held liable as an owner or operator of that site, and further, whether that lessee is subject to joint and several liability for past contamination.[30] Without plain language stating the extent of lessee liability, courts have been left to interpret lessee liability after EPA or a third party brings an action.

1. Lessee as an Owner or Operator

Under CERCLA, a person or entity may be held liable for the cost of cleanup if it is a current owner or operator of a facility or past owner or operator at the time that hazardous substances were disposed.[31] CERCLA defines an owner or operator as a person who owns or operates a facility.[32] Given this nebulous definition, courts have created separate legal analyses for an "owner" and for an "oper-

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25 *See* 42 U.S.C. § 9605(c) (2012).

26 *Id.* § 9604; *see also id.* § 9601(23)–(24) (defining "remove," "removal," "remedy," and "remedial action"). EPA has the authority to remove, or arrange for the removal, and provide for the remediation of a hazardous substance when there is a release or substantial threat of a release of a hazardous substance, or any pollutant that presents an "imminent and substantial danger to the public health or welfare." *Id.* § 9604(a)(1).

27 *Id.* §§ 9601(23)–(24), 9604.

28 *Id.* § 9607(a).

29 *See* 147 CONG. REC. 6233–35 (2001) (statement of Sen. Robert Smith) (stating that CERCLA needs provisions adding finality to encourage the cleanup and use of brownfields).

30 *See* Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601–9657 (2012)). CERCLA's liability section does not address whether a lessee is an owner or operator. *See* 42 U.S.C. § 9607(a).

31 42 U.S.C. § 9607(a).

32 *Id.* § 9601(20)(A). The Supreme Court has described CERCLA's definition of "owner or operator"—"any person owning or operating"—as a "bit of circularity." United States v. Bestfoods, 524 U.S. 51, 56 (1998) (internal quotation marks omitted). The Supreme Court has

ator."[33] CERCLA, however, does not directly address the liability of a lessee or any party who contracts with the fee simple titleholder of a Superfund site to gain rights of use.[34] Without a specific provision to address lessee liability, courts have tried to fit lessees into the roles of "owner" and "operator" to hold them liable for contamination.[35]

a. Lessee as an Owner

In *Commander Oil Corp. v. Barlo Equipment Corp.*,[36] a case that EPA has since used to define the test of ownership,[37] the Second Circuit held that a lessee may be held liable as an "owner" of a Superfund site if the lessee exhibits sufficient indicia of legal ownership.[38] If there are numerous restrictions on the lessee's rights and reservations by the fee title owner, a lessee would not have sufficient indicia of ownership.[39] The Second Circuit listed several indicia of ownership: the extent that the lessee uses the property, the limitation on the lessor's right to terminate the lease, the lessee's responsibilities for repairs and taxes, and the lessee's right to sublet.[40]

Regardless of whether the lessee exhibits significant control over a site, the lessee would only be an owner under the Second Circuit's definition if it benefits from the legal rights of an owner.[41] In *Commander Oil*, Barlo Equipment leased Commander Oil's site, using one lot for its petroleum-handling equipment business and subleasing a separate portion to Pasley for its chemical solvent business, which resulted in CERCLA liability.[42] Even though Barlo leased the entire

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further stated that CERCLA "unfortunately, is not a model of legislative draftsmanship." Exxon Corp. v. Hunt, 475 U.S. 355, 363 (1986).

33 *See, e.g.*, *Bestfoods*, 524 U.S. at 66 (defining an "operator" as one who "directs the workings of, manages, or conducts the affairs of a facility"); Commander Oil Corp. v. Barlo Equip. Corp., 215 F.3d 321, 329 (2d Cir. 2000).

34 *See* 42 U.S.C. § 9607(a). For purposes of this Note, the term "lease" will include both a lease and an easement, and a "lessee" will include a party who obtains interest in a site pursuant to a lease or an easement.

35 *See, e.g.*, *Commander Oil*, 215 F.3d at 329.

36 Commander Oil Corp. v. Barlo Equip. Corp., 215 F.3d 321 (2d Cir. 2000).

37 *See, e.g.*, U.S. ENVTL. PROT. AGENCY, OFFICE OF ENFORCEMENT & COMPLIANCE ASSURANCE & OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, ENFORCEMENT DISCRETION GUIDANCE REGARDING THE APPLICABILITY OF THE BONA FIDE PROSPECTIVE PURCHASER DEFINITION IN CERCLA § 104(40) TO TENANTS 3 n.3 (2009) [hereinafter EPA 2009 TENANT GUIDANCE].

38 *Commander Oil*, 215 F.3d at 330.

39 *See id.* at 329.

40 *Id.* at 330–31.

41 *Id.* at 330–32.

42 *Id.* at 324–25.

site, had the authority to sublease to Pasley, and was responsible for maintenance and taxes, Barlo's ownership rights were limited by Commander Oil.[43] Because Barlo was limited to using part of the property, was required to obtain consent before making alterations to the property, subletting, or advertising, and was held responsible for damages, and because Commander Oil retained the right to enter and use the lot, the court held that Barlo was not liable.[44] Specifically, Barlo "lacked most of the bundle of rights that comes with ownership of property."[45]

Going forward, the Second Circuit stated that it was hesitant to apply owner liability generally to lessees as compared to purchasers because the latter are more likely on notice of liability.[46] Further, a lessee's concern for environmental liability is usually limited to the extent that hazards would impair the lessee's purpose and ability to operate.[47] In other words, the greater a party's interest in investigating an environmental hazard, the more likely that it may be liable as an owner.

Other circuit courts have applied the holding in *Commander Oil* to further delineate the situations in which a lessee would maintain indicia of ownership.[48] For example, the Ninth Circuit held that a court should also use state common law to determine if a party's possessory interest amounts to ownership.[49] EPA, however, has not issued a rule on the indicia of ownership. Without further EPA guidance, potential lessees are left to interpret case law and state

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43 *Id.* at 331–32.

44 *Id.*

45 *Id.* at 332.

46 *Id.* at 330.

47 *Id.*

48 *See, e.g.*, City of Los Angeles v. San Pedro Boat Works, 635 F.3d 440, 444 (9th Cir. 2011) (holding that "owner" does not extend to holders of mere possessory interests, such as permittees, easement holders, or licensees where the owner retains control of permittees' use of property); Pateley Assocs. I, LLC v. Pitney Bowes, Inc., 704 F. Supp. 2d 140, 145–46 (D. Conn. 2010) (finding that a sale leaseback arrangement between two parties with a long-term lease limiting the owner's right to terminate created sufficient indicia of ownership to potentially place owner liability on the tenant). Using a liberal interpretation of CERCLA, under a master lease, in which the lessee can lease additional assets without negotiating new terms, or a sale-lease back arrangement, in which a party sells assets and leases them back, the lessee may be an owner under CERCLA. 1 CAROLINE N. BROUN & JAMES T. O'REILLY, RCRA AND SUPERFUND: A PRACTICE GUIDE § 9:63 (Spring 2014 ed. 2014).

49 *See San Pedro Boat Works*, 635 F.3d at 443 (finding the holder of a possessory interest in real property is distinct from an owner under California law and would not be liable as a potentially responsible party under CERCLA).

property law to determine if their activities on a contaminated site may result in ownership and liability for a site's full contamination.

b. Lessee as an Operator

While some courts have held that a lessee may be an "owner" because it asserts sufficient control over the use of a property,[50] more recently, courts have tended to analyze a lessee's control over a site to determine whether it is an "operator."[51] The Supreme Court has defined an operator as one who "directs the workings of, manages, or conducts the affairs of a facility."[52] However, district courts have interpreted the definition of operator to include varying levels of conduct, from conducting operations related to the release of pollution to simply operating on a site where hazardous substances have already been released and have migrated.[53] For example, in the 2011 decision in *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*,[54] which was affirmed by the Fourth Circuit in 2013,[55] the United States District Court for the District of South Carolina held that a lessee which directed the "day-to-day workings" of a parcel was an operator of a facility.[56] However, the court also noted that a lessee may be liable as an operator "at the time of disposal of any hazardous substance," even after the original release of a substance, and including when hazardous substances are moved or displaced (e.g., during the course of grading and filling a construction site).[57]

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50 *See, e.g.*, Louisiana v. Braselman Corp., 78 F. Supp. 2d 543, 552–53 (E.D. La. 1999) (holding a lessee liable as an owner because it asserted control over the property); Burlington N. R.R. v. Woods Indus., Inc., 815 F. Supp. 1384, 1391 (E.D. Wash. 1993) (holding that a lessee who asserts control over a property is an owner).

51 *See, e.g.*, *Commander Oil*, 215 F.3d at 328 (noting that imposing owner liability instead of operator liability would conflate two distinct categories); Ashley II of Charleston, LLC v. PCS Nitrogen, Inc., 791 F. Supp. 2d 431, 477 (D.S.C. 2011) (noting that interpreting lessees as owners for purposes of CERCLA makes operator liability redundant), *aff'd*, 714 F.3d 161 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 514 (2013).

52 United States v. Bestfoods, 524 U.S. 51, 66 (1998).

53 *Compare Commander Oil*, 215 F.3d at 332 n.3 (holding that Barlo was not liable as an owner under CERCLA because it did not manage, direct, or conduct "operations specifically related to pollution" (internal quotation marks omitted)), *with* Sherwin-Williams Co. v. ARTRA Grp., Inc., 125 F. Supp. 2d 739, 745 (D. Md. 2001) (holding that the current owner and operator of a site where hazardous substances have been released is a potentially responsible party).

54 Ashley II of Charleston, LLC v. PCS Nitrogen, Inc., 791 F. Supp. 2d 431 (D.S.C. 2011), *aff'd*, 714 F.3d 161 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 514 (2013).

55 PCS Nitrogen Inc. v. Ashley II of Charleston LLC, 714 F.3d 161 (4th Cir.), *cert. denied*, 134 S. Ct. 514 (2013).

56 *Ashley II*, 791 F. Supp. 2d at 478–79.

57 *Id.* at 478–79.

In *Ashley II*, the court ultimately held that Robin Hood Container Express ("RHCE"), which leased a small portion of the contaminated site for a mixed-use development, was an "operator."[58] It found that RHCE's operation of a drop yard on the property was sufficient for "operator" status,[59] and that it could not avoid joint and several liability by demonstrating that no disposal occurred during its operation of the facility.[60] Following this holding, potential lessees may be hesitant to lease and develop contaminated sites. After *Ashley II*, if a lessee causes any movement of preexisting contamination that results in a disposal, it may be jointly liable as an "operator" for the entire extent of the contamination on the site.

2. *An Owner or Operator Is Jointly and Severally Liable*

Building upon the lack of clarity of owner or operator liability for lessees, CERCLA's joint and several liability scheme further discourages developers from leasing contaminated sites, because a lessee who is an "owner" or "operator" could be accountable for paying full removal or remediation costs.[61] Courts have interpreted CERCLA's liability scheme to impose joint and several liability, even though the text of CERCLA does not discuss joint and several liability and there is minimal evidence of Congress's intent.[62] The Supreme Court has limited joint and several liability to cases in which the defendant cannot show a reasonable basis for apportioning harm.[63] In cases where there is a harm that cannot be apportioned between potentially liable parties, the United States may bring an action against one potentially responsible party for the full cost of cleanup, and that party may bring a cost recovery claim against other allegedly liable parties.[64] Courts have held that a defendant is liable for cleanup costs even when the government cannot trace the substances located at the site to a specific substance deposited by the defendant.[65] Even further, some courts have held that a party may be jointly and severally liable for passive migration—the movement of contamination caused by

58 *Id.* at 479.

59 *Id.*

60 *PCS Nitrogen Inc.*, 714 F.3d at 184–85.

61 *See* EPA 2012 REVISED TENANT GUIDANCE, *supra* note 13.

62 Lynda J. Oswald, *New Directions in Joint and Several Liability Under CERCLA?*, 28 U.C. DAVIS L. REV. 299, 312 (1995).

63 Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 614 (2009).

64 Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 161 (2004).

65 Oswald, *supra* note 62, at 316.

groundwater movement, rain, and wind, for example—that was released prior to ownership.[66]

Although CERCLA's broad joint and several liability scheme has encouraged parties to negotiate settlements with EPA, facilitating the government's ability to obtain retribution for cleanup costs,[67] it creates a divisibility problem that may scare developers away from leasing Superfund sites. It is difficult to show a reasonable basis for dividing harm where waste is commingled or contamination has migrated.[68] A developer, therefore, may avoid constructing anywhere on a contaminated site in fear of being liable for the entire site. Further, if a developer's actions cause the migration of contaminants, the developer may be liable as an owner or operator at the time of disposal, so a developer who leases a portion of property after the initial release of contamination may still be jointly and severally liable.[69]

Given the potential for liability, it is important to note that a lessee's expectations may not be the same as an owner's. A distinction between a lessor and lessee relationship and a seller and purchaser relationship is that a lease transaction usually involves the transfer of control over the premises for a defined period of time, resulting in overlapping liability.[70] Given this overlapping liability, a lessee would reasonably expect to be less than fully liable for any prior contamination. A lessee, therefore, may be less likely to investigate the contamination of an entire site and more likely to focus on any contamination that impedes its desired use of the site.[71] That

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66 *Compare* Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 844–46 (4th Cir. 1992) (holding that CERCLA imposed liability for ownership of property "at a time that hazardous waste was 'spilling' or 'leaking'"), *with* Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 879 (9th Cir. 2001) (rejecting the active/passive distinction and focusing on whether the movement of contaminants was a "disposal"), *and* United States v. CDMG Realty Co., 96 F.3d 706, 717 (3d Cir. 1996) (noting that limiting the "innocent owner defense" to present owners "makes sense only if passive spreading of waste in a landfill is not included in disposal").

67 Martha L. Judy & Katherine N. Probst, *Superfund at 30*, 11 VT. J. ENVTL. L. 191, 195 (2009).

68 PCS Nitrogen Inc. v. Ashley II of Charleston LLC, 714 F.3d 161, 183, 185 (4th Cir.) (noting that no discrete proof is necessary to show contribution to disposal and that a liable party cannot apportion liability when it cannot account for the soil contaminated by secondary disposal), *cert. denied*, 134 S. Ct. 514 (2013).

69 *See, e.g.*, *id.* at 181–82.

70 Donald I. Berger, *Environmental Issues in the Landlord-Tenant Context*, *in* ENVIRONMENTAL ASPECTS OF REAL ESTATE AND COMMERCIAL TRANSACTIONS 477, 477 (James B. Witkin ed., 3d ed. 2004).

71 *See generally* Kenneth F. Gray & Mark E. Beliveau, *United States: Should Tenants Worry About Environmental Liabilities for Their Leased Property?*, MONDAQ, http://www.mondaq.com/unitedstates/x/218080/Environmental+Law/Should+Tenants+Worry+about+Environmental+Liabilities+for+their+Leased+Property (last updated Jan. 28, 2013).

logic, however, does not follow the liability scheme of CERCLA, which neither addresses lessees nor provides a defense against joint and several liability, even for lessees who intend to lease the site for remediation or a specific noncontaminating use of the site. Ironically, due to the opaqueness of the law, lessees may have more incentive to investigate a property than purchasers do.

B. The Brownfields Amendments' Purchaser Defense Fails to Defend Lessees

Over two decades after the enactment of CERCLA, Congress finally took action to protect those seeking to redevelop Superfund sites, limiting the extent of joint and several liability.[72] Finally, in 2002, Congress amended CERCLA by enacting the Brownfields Amendments to provide a mechanism to shield potential innocent developers from CERCLA liability and to provide funding for states to return less contaminated sites, known as "brownfields," to productive use.[73] Although the Brownfields Amendments provided a defense for purchasers of Superfund sites, it failed to extend the defense to parties that sought to lease land directly from liable parties.

1. Congress Passed the Brownfields Amendments to Encourage Redevelopment

In passing the Brownfields Amendments, Congress sought to address the impact that contaminated sites had on surrounding neighborhoods, which were disproportionately low-income minority communities, by incentivizing developers to reuse the sites.[74] The perceived risk of CERCLA's complex liability scheme was an obstacle to successful redevelopment.[75] Specifically, critics cited CERCLA's unbalanced impact on parties who minimally contributed to contamination.[76] Prior to 2002, EPA had attempted to alleviate developers' fears by entering case-by-case agreements with developers that stipulated

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72 *See* 147 CONG. REC. 8553–56 (2001).

73 Todd S. Davis, *Brownfields Redevelopment: Creative Solutions to Historical Environmental Liabilities*, *in* ENVIRONMENTAL ASPECTS OF REAL ESTATE AND COMMERCIAL TRANSACTIONS, *supra* note 70, at 321, 330.

74 S. REP. NO. 107-2, at 24–25 (2001).

75 *Id.* at 26–27. Representative Gillmor stated: "I have heard repeated stories of businessowners who found themselves involved in serious Superfund liability litigation for . . . throwing out just regular trash . . . . The bill before us, H.R. 1831, will take a major step toward trying to bring some sanity and to bring some fairness to Superfund liability." 147 CONG. REC. 8553 (2001) (statement of Rep. Paul Gillmor).

76 *See* S. REP. NO. 107-2, at 2, 9–10.

liability, a system that was both costly and time consuming.[77] Individual agreements with purchasers enabled EPA to safeguard against further contamination during development and limit the liability of innocent parties, but EPA desired a more programmatic, efficient approach to encourage widespread development.[78] The Brownfields Amendments added a provision to CERCLA that enabled purchasers to establish a defense against liability without entering prospective purchaser agreements with EPA.[79]

A purchaser (or the tenant of that purchaser) may establish this bona fide prospective purchaser defense ("purchaser defense") by taking a series of steps. First, the purchaser must conduct an inquiry into any potential contamination on the site, notify EPA of any release of hazardous substances discovered at the site, and establish by a preponderance of the evidence that all disposals of hazardous substances occurred prior to the closing date of the purchase.[80] After acquiring the site, the developer must exercise "appropriate care," taking reasonable steps to stop any continuing release, prevent any threatened future release, and limit human or environmental exposure to any hazardous substance.[81] Further, the developer must cooperate with the party conducting the removal and remedial actions and comply with any institutional controls on, or requests for, information regarding the property.[82]

Lastly, there are two final constraints that greatly limit a developer's ability to minimize its liability in order to secure a consistent revenue stream from the development. The developer must not be affiliated with any potentially liable person through any contractual, corporate, or financial relationship, other than one created by the instrument that conveys title or by a contract for the sale of goods or services.[83] In addition, EPA is allowed to subject a purchaser to a "windfall lien," in which EPA can take unrecovered response costs from the purchaser's profit, up to the increase in the fair market value

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77 *Id.* at 11.

78 *See* U.S. ENVTL. PROT. AGENCY, OFFICE OF SITE REMEDIATION ENFORCEMENT, BONA FIDE PROSPECTIVE PURCHASERS AND THE NEW AMENDMENTS TO CERCLA 3 (2002), *available at* http://www2.epa.gov/sites/production/files/documents/bonf-pp-cercla-mem.pdf.

79 *See id.*

80 42 U.S.C. § 9601(40)(A)–(C) (2012).

81 *Id.* § 9601(40)(D).

82 *Id.* § 9601(40)(E)–(G).

83 *Id.* § 9601(40)(H).

of the facility,[84] potentially turning a developer's profits into EPA's cleanup fund.[85]

2. *The Brownfields Amendments Do Not Create a Lessee Defense that Encourages Development*

If a purchaser follows each of the elements of the purchaser defense,[86] it is exempt from joint and several liability for any disposal that occurred prior to the purchaser acquiring the site.[87] It is not easy, however, to interpret and follow portions of the purchaser defense, and it is even more difficult to determine how the defense applies to lessees. On its face, the statute states that the defense applies to a "person (or a tenant of a person) that acquires ownership of a facility . . . ."[88] Originally, it appeared that those who leased a site or portion of a site directly from an owner who had not established the purchaser defense would not qualify.[89] Therefore, a lessee could not easily contract directly with a current owner to develop a portion of a site while the owner conducted a response action to remediate the contamination. Another party would have to first purchase the Superfund site and establish the purchaser defense. Then, the lessee could establish the purchaser defense by leasing from that purchaser.[90]

Another way that a lessee could establish the purchaser defense is to establish sufficient indicia of ownership to be considered a purchaser.[91] However, the lessee would need to display sufficient legal rights to establish indicia of ownership under the Second Circuit's test.[92] A developer seeking to lease a portion of a Superfund site for a limited period of time with limited responsibility for the cleanup of the site may not meet these qualifications.

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84 *Id.* § 9607(r).

85 Fenton D. Strickland, Note, *Brownfields Remediated? How the Bona Fide Prospective Purchaser Exemption from CERCLA Liability and the Windfall Lien Inhibit Brownfield Redevelopment*, 38 IND. L. REV. 789, 804 (2005).

86 *See* 42 U.S.C. § 9601(40) (defining elements of purchaser defense).

87 *See id.* § 9607(r)(1) (stating that a bona fide prospective purchaser "shall not be liable [for a release or threatened release] as long as the bona fide prospective purchaser does not impede the performance of a response action or natural resource restoration").

88 *Id.* § 9601(40).

89 *See* EPA 2009 TENANT GUIDANCE, *supra* note 37, at 3 (stating that EPA would consider a tenant to be a bona fide prospective purchaser if the "tenant has sufficient indicia of ownership to be an owner" and "the tenant complies with [42 U.S.C. § 9601(40)] and [42 U.S.C. § 9607(r)(1)]").

90 *See id.* at 4.

91 *See id.* at 3–4 (noting that a lease does not convey the title of property and would not be exempted from an impermissible affiliation under the purchaser defense).

92 Commander Oil Corp. v. Barlo Equip. Corp., 215 F.3d 321, 329 (2d Cir. 2000).

In addition, there are provisions of the purchaser defense that do not coincide with the structure of a lease. First, the prohibition against affiliation with a potentially liable party,[93] especially if the contract alleviates or reallocates CERCLA liability,[94] suggests that a lessee cannot contract with a potentially liable party to indemnify itself against existing liability. At least one court—in *Ashley II*—has found that a contract between a lessee and potentially responsible party was a prohibited affiliation under the purchaser defense.[95] After the district court in *Ashley II* held that an indemnity agreement created an affiliation that disqualified a party from the purchaser defense,[96] EPA has since given guidance that it does not intend to treat contractual relationships that are part of the transfer of title, including those that provide for indemnification of cleanup costs, as disqualifying affiliations.[97] The Fourth Circuit, however, upheld the district court's decision without review of the affiliation holding, despite EPA's interim guidance.[98] Therefore, even if a lessee shows sufficient indicia of ownership to establish the purchaser defense, the lessee may still not be able to limit its liability if it contracts with a potentially responsible party.

Second, a lessee must clarify the definition of "disposal" because all disposals must have occurred prior to leasing the site to maintain

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93 42 U.S.C. § 9601(40)(H).

94 U.S. ENVTL. PROT. AGENCY, OFFICE OF SITE REMEDIATION ENFORCEMENT, 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 5 (2003), *available at* www2.epa.gov/sites/production/files/documents/common-elem-guide.pdf.

95 Ashley II of Charleston, LLC v. PCS Nitrogen, Inc., 791 F. Supp. 2d 431, 502–03 (D.S.C. 2011), *aff'd*, 714 F.3d 161 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 514 (2013).

96 *Id.* at 502.

97 U.S. ENVTL. PROT. AGENCY, OFFICE OF SITE REMEDIATION ENFORCEMENT, ENFORCEMENT DISCRETION GUIDANCE REGARDING THE AFFILIATION LANGUAGE OF CERCLA'S BONA FIDE PROSPECTIVE PURCHASER AND CONTIGUOUS PROPERTY OWNER LIABILITY PROTECTIONS 10 (2011), *available at* www2.epa.gov/sites/production/files/2013-11/documents/affiliation-bfpp-cpo.pdf.

98 *See* PCS Nitrogen Inc. v. Ashley II of Charleston LLC, 714 F.3d 161 (4th Cir.), *cert. denied*, 134 S. Ct. 514 (2013). Larry Schnapf, creator of the California purchaser defense, has noted that EPA's guidance has provided "helpful direction on what kinds of relationships would not be considered improper affiliations that could cause a purchaser to lose its [bona fide prospective purchaser] status." Pat Ware, *EPA's Guidance on Liability Defenses Not Working as Intended, Parties Say*, 16 Mergers & Acquisitions L. Rep. (BNA) 1564, 1566 (Oct. 28, 2013) (internal quotation marks omitted). On the other hand, some lawyers continue to suggest that lessee clients should manage legal risks of contaminated sites through indemnity agreements within lease agreements. Peter Trimarchi, *Structured Approach Can Help Solar Developers Fulfill Promise of Brownfields*, 44 Env't Rep. (BNA) 3053 (Oct. 11, 2013).

the purchaser defense.[99] If disposal includes passive migration from the spilling or leaking of hazardous waste,[100] then it would be difficult for a party to ensure that all disposals occurred prior to leasing the facility. In the past few years, courts have hesitated to extend "disposal" to passive migration, but they have affirmed that "disposal" includes spills caused by human intervention.[101] This definition of disposal holds that postacquisition redevelopment work that results in the movement of contamination may negate the availability of the purchaser defense.[102]

Third, where a lessee must exercise appropriate care to take reasonable steps to stop any continuing release, prevent any threatened future release, and limit exposure to any hazardous substance, a lessee must first determine what "appropriate care" means. For example, if a party leased a portion of a Superfund site, it is not clear if that party would be required to take reasonable steps to control the contamination on the entire site under the purchaser defense. In *PCS Nitrogen Inc. v. Ashley II of Charleston LLC*,[103] the Fourth Circuit upheld the district court's decision that despite efforts to remediate the site, an entity failed to exercise appropriate care by demolishing structures, failing to clean out sumps, and allowing debris to accumulate without investigating its contents.[104] Therefore, a lessee who seeks to remediate and redevelop a site may be liable for the movement of, or failure to move, contaminated materials, even before completing construction.

If a lessee cannot allocate liability, it will likely seek other assurances from EPA. If potential developers must enter agreements with EPA prior to redeveloping contaminated sites, then the Brownfields Amendments' purchaser defense has not fulfilled its purpose of en-

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99 42 U.S.C. § 9601(40)(A) (2012).

100 *See, e.g.*, Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 846 (4th Cir. 1992); *Ashley II*, 791 F. Supp. 2d at 499.

101 *See, e.g.*, Saline River Props., LLC v. Johnson Controls, Inc., 823 F. Supp. 2d 670, 684 (E.D. Mich. 2011) (finding that a party who took affirmative action by breaking up concrete slabs to provide a barrier to contamination could be liable for the subsequent migration of hazardous substances beneath the slabs); *Ashley II*, 791 F. Supp. 2d at 499.

102 *See* JAMES A. THORNHILL, MCGUIREWOODS LLP, BONA FIDE PROSPECTIVE PURCHASER DEFENSE UNDER CERCLA: POST-CLOSING CONCERNS AND TENANT ISSUES UPDATE 3 (2011) (explaining that Ashley was unable to meet the elements of the purchaser defense after it tore down buildings on the site, "exposing a number of cracked sumps containing hazardous substances," because it could not prove that all disposal occurred before it acquired the site), *available at* http://www.mcguirewoods.com/news-resources/publications/thornhill-cercla.pdf.

103 PCS Nitrogen Inc. v. Ashley II of Charleston LLC, 714 F.3d 161 (4th Cir.), *cert. denied*, 134 S. Ct. 514 (2013).

104 *Id.* at 181.

couraging redevelopment and making it more efficient. Although assurances, such as letters stating that EPA does not intend to bring an enforcement action against a developer, are likely helpful, they are also time consuming, especially because the statutory language provides little guidance. EPA has recognized the important role of using a leasehold interest in facilitating the cleanup and reuse of contaminated properties, specifically by allowing an entity to reuse a property while the owner retains specified control.[105] However, if the purchaser defense fails to protect lessees and EPA assurances are difficult to obtain, parties are not likely to lease and reuse contaminated sites.

C. *California Has Implemented a Lessee Defense for Non-Superfund Contaminated Sites*

Although the Brownfields Amendments' purchaser defense did not create a solution for lessees, the same statute created a system in which federal liability for lower-priority contaminated sites will be deferred if a state is pursuing a cleanup under its own brownfields program.[106] Pursuant to this provision, in the California Land Reuse and Revitalization Act of 2004,[107] California amended its state version of CERCLA that oversees lower-priority contaminated sites[108] to include a bona fide purchaser defense ("California purchaser defense").[109] Two years later, California passed an amendment to extend its purchaser defense to "bona fide ground tenants" ("California lessee defense")[110] in order to encourage investments in contaminated properties that would provide capital to facilitate site cleanup.[111]

Unlike the federal purchaser defense, which does not define whether a "disposal" includes the passive migration of hazardous substances,[112] a release under the California purchaser and lessee defenses excludes passive migration.[113] In addition to removing liability

105 *See* EPA 2009 TENANT GUIDANCE, *supra* note 37, at 4.

106 Small Business Liability Relief and Brownfields Revitalization Act § 232, 42 U.S.C. § 9605(h) (2012).

107 California Land Reuse and Revitalization Act of 2004, CAL. HEALTH & SAFETY CODE §§ 25395.60–25395.119 (West 2006 & Supp. 2013).

108 Carpenter-Presley-Tanner Hazardous Substance Account Act, CAL. HEALTH & SAFETY CODE §§ 25300–25395.15 (West 2006 & Supp. 2013).

109 HEALTH & SAFETY § 25395.69.

110 *Id.* § 25395.102.

111 CAL. S. JUDICIARY COMM., 2005–2006 REG. SESS., BILL ANALYSIS OF S.B. 989 (2005), *available at* ftp://www.lhc.ca.gov/pub/05-06/bill/sen/sb_0951-1000/sb_989_cfa_20050427_154247_sen_comm.html.

112 *See* 42 U.S.C. §§ 6903(3), 9601(29) (2012).

113 HEALTH & SAFETY §§ 25395.69(b), 25395.102(c). Unlike CERCLA, the California stat-

for passive migration, the California lessee defense requires a minimum lease term,[114] an agreement with the oversight agency and entity responsible for cleanup that allocates cleanup responsibility,[115] and an agreement to pledge all payments beyond the developer's profit to implementing the cleanup.[116] Further, the lessee is allowed to contract with the owner to obtain control and implement the development of the site.[117]

Essentially, under the California lessee defense, a lessee receives immunity from liability for costs beyond those necessary to ensure that its development does not create unreasonable risk to human health and the environment.[118] This enables a developer to lease a portion of the property prior to or during site cleanup,[119] which could provide a revenue stream for the cleanup.

II. RENEWABLE ENERGY IS NEEDED, BUT DEVELOPMENTS REQUIRE LEASES

Although CERCLA and the Brownfields Amendments have failed to create a successful framework for redeveloping contaminated sites through leases, this is only a problem if one assumes that there are developers who would only utilize leases. There is, in fact, an important area of development that requires leases, is well-suited for typical contaminated sites, and can power site cleanup efforts without creating additional on-site waste or air pollution: renewable energy.[120] Contaminated sites can meet the land requirement for renewable energy, particularly solar photovoltaic and wind energy,[121] and the energy produced by the facilities can power site remediation.

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ute only uses the term "release" and does not use the term "disposal." Under the California statute, passive migration means "leaking, leaching or movement of a hazardous material into or through the environment, for which no human activity by the bona fide purchaser . . . preceded the initial entry of that substance into the environment." *Id.* § 25395.77.

114 *Id.* § 25395.102(b)(1).

115 *Id.* § 25395.103(b)-(c).

116 *Id.* § 25395.102(b)(5)(A).

117 *Id.* § 25395.102(b)(6).

118 *Our SB 989 Legislative Accomplishment*, DAEHNKE CRUZ L. GROUP, LLP, http://www.daehnkecruz.com/sb989.php (last visited Sept. 1, 2014).

119 Kevin Daehnke, *A Little Background on Ground Lease Liability Relief at Renewable Energy Sites*, BROWNFIELD GROUND LEASE (Mar. 16, 2011), http://brownfieldgroundlease.com/?p=18.

120 *See* Robert L. Glicksman, *Solar Energy Development on the Federal Public Lands: Environmental Trade-Offs on the Road to a Lower-Carbon Future*, 3 SAN DIEGO J. CLIMATE & ENERGY L. 107, 108 (2012).

121 EPA RENEWABLE ENERGY PROJECTS, *supra* note 6, at 1. Solar photovoltaic and wind

A. *Contaminated Sites Will Accommodate the Increased Demand for Renewable Energy*

Renewable energy has the potential to decrease energy-related carbon dioxide emissions, create new jobs, and provide energy security to the United States by reducing its reliance on foreign oil.[122] With these incentives in mind, the U.S. Department of Energy predicts that the continued modest growth in demand for energy over the next two decades will partially be met with the increased production of renewable energy.[123] In response, thirty states have initiated renewable portfolio standards, which require electric utilities to provide a portion of their energy from renewable sources as of 2012.[124] Also, states continue to raise the minimum bar for renewable-sourced electricity.[125] In addition, the federal government has created incentives—primarily tax credits—to encourage renewable development, including solar, electric, and wind energy.[126] Based on predicted increases in states' renewable requirements and extensions of federal tax credits beyond their current expiration dates, the Department of Energy predicts renewable energy capacity, especially wind and solar, to more than double by 2035.[127]

Although Congress and many states have instituted incentives for power production, those incentives do not necessarily address the land requirement for renewable energy. Even with tax incentives and state programs, renewable energy is expensive, partially because it requires extensive land.[128] Renewable energy projects generally require more land than conventional sources of energy do to produce the same amount of power,[129] which suggests that large real estate costs must be factored into the overall cost of renewable development. In addition,

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projects make up almost ninety percent of renewable projects that have been installed on potentially contaminated land, landfills, and mine sites. *See id.*

122 *See, e.g.*, Glicksman, *supra* note 120, at 108–09.

123 U.S. ENERGY INFO. ADMIN., ANNUAL ENERGY OUTLOOK 2012 WITH PROJECTIONS TO 2035 2 (2012) [hereinafter ENERGY OUTLOOK 2012], *available at* http://www.eia.gov/forecasts/aeo/pdf/0383(2012).pdf.

124 *Id.* at 11–13. See http://www.dsireusa.org/ (last visited Sept. 1, 2014) for specific state-by-state renewable portfolio standard information.

125 Lincoln L. Davies, *State Renewable Portfolio Standards: Is There a "Race" and Is It "To the Top"?*, 3 SAN DIEGO J. CLIMATE & ENERGY L. 3, 6 (2012).

126 ENERGY OUTLOOK 2012, *supra* note 123, at 19 (explaining the production tax credit and investment tax credits, which provide up to thirty percent of the cost of wind projects through 2013 and solar electric projects through 2016, respectively).

127 *Id.* at 11, 19, 90.

128 *See* Robert Bryce, *The Gas Is Greener*, N.Y. TIMES, June 8, 2011, at A23.

129 For example, a 500–1000 MW coal plant would require 640 acres of land, whereas a 1000 MW wind or photovoltaic solar plant would require 46,000 or 12,160 acres, respectively.

the land needs to be close to population centers or energy infrastructure to minimize the cost of transporting electricity.[130]

Further, the land use concerns that arise in conventional energy projects also arise in renewable energy projects, implicating an additional risk that parties will challenge renewable energy projects on the basis of land use. Although environmental groups may support the idea of renewable energy as a means of producing an inexhaustible, cleaner energy source, some have resisted individual projects based on concerns about the depletion of natural resources and the conversion of land.[131] For example, the government has encouraged the development of renewable energy on public lands,[132] but many have expressed concern that projects will destroy the natural landscapes, views, resources, and wildlife habitats of pristine federal lands.[133] Although federal land is plentiful and may contain solar and wind resources that can maximize the electricity output of a project,[134] the government has sought to avoid those concerns by encouraging development on contaminated land that is less pristine and may be less susceptible to natural resource and preservation concerns.[135]

B. Contaminated Lands Are Uniquely Well-Suited for Renewable Development

Even though utility-scale renewable energy requires large amounts of land, it need not displace valuable open space when there are thousands of former commercial and industrial properties across the country that remain unused. Contaminated lands offer developers opportunities to leverage existing infrastructure—such as transmission lines that can connect the energy-generating facility to end users—streamline environmental permitting with cleanup efforts, reduce land

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Robert Glennon & Andrew M. Reeves, *Solar Energy's Cloudy Future*, 1 ARIZ. J. ENVTL. L. & POL'Y 91, 103–04 (2010).

130 EPA ADVANTAGES OF REUSING CONTAMINATED LAND FOR RENEWABLE ENERGY, *supra* note 8, at 1.

131 Glennon & Reeves, *supra* note 129, at 116–17.

132 *See* Energy Policy Act of 2005, Pub. L. No. 109-58, § 211, 199 Stat. 594, 660 (declaring that the Secretary of the Interior should seek approval of renewable energy on public lands).

133 Glicksman, *supra* note 120, at 113–15.

134 *See id.* at 120–23 (providing an overview of federal legislation promoting solar development on Bureau of Land Management land).

135 *See Siting Renewable Energy on Potentially Contaminated Lands, Landfills, and Mine Sites*, U.S. ENVTL. PROTECTION AGENCY, www.epa.gov/oswercpa (last visited Sept. 1, 2014).

costs, build sustainable land development strategies, and gain community support through land revitalization.[136]

According to EPA, there are nearly fifteen million acres of contaminated land that are suitable for solar, wind, biomass, or geothermal renewable facilities, and nearly two million of those acres are Superfund sites.[137] Renewable energy development can occur at any time in the cleanup process.[138] It is beneficial, however, to build a renewable development on an area of the site that has no contamination or where development will not pose an unacceptable risk to human health and the environment, and where it will not interfere with cleanup efforts.[139] The energy produced by that system may then be used to power the cleanup efforts at a lower price or may be sold to a third party for revenue, which is then used to offset the cost of cleanup.[140] In order to encourage renewable energy developers to take advantage of contaminated facilities, including Superfund sites, EPA has created a database of sites with assessments of development potential, as well as other tools for locating and developing projects.[141]

C. *Renewable Energy Developments Require Leases*

Despite the benefits of renewable energy, EPA's efforts have not spawned significant development on Superfund sites. As of October 2012, sixty contaminated sites were developed for renewable energy, primarily for solar photovoltaic and wind facilities, but only nine of those sites were Superfund sites, and only one of the Superfund re-

136 EPA ADVANTAGES OF REUSING CONTAMINATED LAND FOR RENEWABLE ENERGY, *supra* note 8.

137 U.S. ENVTL. PROT. AGENCY, OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, CTR. FOR PROGRAM ANALYSIS, HANDBOOK ON SITING RENEWABLE ENERGY PROJECTS WHILE ADDRESSING ENVIRONMENTAL ISSUES 1–2 (2012) [hereinafter EPA HANDBOOK], *available at* http://www.epa.gov/oswercpa/docs/handbook_siting_repowering_projects.pdf.

138 *Id.* at 6.

139 *Id.*

140 *See, e.g.*, *Aerojet's Solar Farm on Contaminated Land in California Provides Energy for Site Remediation*, 28 No. 6 HAZARDOUS WASTE CONSULTANT 1.11 (2010), *available at* 28 No. 6 HAZWC 1.11 (Westlaw).

141 EPA HANDBOOK, *supra* note 137, at 1. EPA launched the RE-Powering America's Land Initiative in 2008 as a program to facilitate the development of renewable energy on contaminated land, and since then has, among other things, screened thousands of EPA sites for renewable energy potential, provided technical resources, and put on workshops. *See* Interview by Rachel Bassler with Mathy Stanislaus, Assistant Adm'r, Office of Solid Waste & Emergency Response, U.S. Envtl. Prot. Agency (2012), *available at* http://www.epa.gov/oswercpa/docs/oswer_earthday_2012_transcript.pdf. EPA has worked with the U.S. Department of Energy's National Renewable Energy Lab to assemble decisionmaking trees and other tools for developers to screen contaminated sites. *See id.*

newable facilities—the Aerojet solar farm—had a capacity of more than one megawatt of energy.[142] Although EPA has encouraged developers to locate projects on contaminated sites, the CERCLA liability associated with leasing those sites has created a barrier to renewable development.[143]

CERCLA liability has created problems for renewable energy developers because the unique financing structure and the lifespan of renewable energy equipment require renewable energy developers to lease, rather than purchase, land. The useful life of a wind or solar project is limited to the life of the windmills or solar panels and the availability of federal and state production incentives, which in turn has led to unique methods of financing projects.[144] Over the past few years, wind and solar developers have increasingly financed projects through power purchase agreements, long-term agreements in which a party agrees to purchase power from the developer for a defined price over a defined period of time.[145] In the power purchase agreement, "a developer receives a combination of revenues and incentives that include electricity sales, sales of environmental attributes[,] . . . and state and federal tax incentives in return for paying for the project up front."[146] The customer and developer determine the payments for electricity sales that meet the developer's required rate of return, and the customer reaps the benefit of renewable energy without contributing to any upfront costs.

This structure, however, necessitates leases because the renewable developer only needs to control the site during the term of the power purchase agreement. Most solar and wind power purchase agreements have terms of ten to twenty-five years.[147] A developer is only incentivized to obtain control of a site for the length of time that

142 EPA RENEWABLE ENERGY PROJECTS, *supra* note 6, at 1–3.

143 *See infra* text accompanying notes 144–150.

144 *See* MICHAEL MENDELSOHN, CLAIRE KREYCIK, LORI BIRD, PAUL SCHWABE & KARLYNN CORY, NAT'L RENEWABLE ENERGY LAB., THE IMPACT OF FINANCIAL STRUCTURE ON THE COST OF SOLAR ENERGY 1 (2012), *available at* http://www.nrel.gov/docs/fy12osti/53086.pdf.

145 *See* KATHERINE KOLLINS, BETHANY SPEER & KARLYNN CORY, NAT'L RENEWABLE ENERGY LAB., SOLAR PV PROJECT FINANCING: REGULATORY AND LEGISLATIVE CHALLENGES FOR THIRD-PARTY PPA SYSTEM OWNERS 2–3 (2010), *available at* http://www.nrel.gov/docs/fy10osti/46723.pdf (explaining the growth of the power purchase agreements in nonresidential solar installations since 2006).

146 *Id.* at 3.

147 *See* SOLAR ENERGY INDUS. ASS'N, SOLAR POWER PURCHASE AGREEMENTS (PPAs) (2012), *available at* http://www.seia.org/sites/default/files/resources/SolarPPAs_fact%20sheet_FINAL%201.pdf; *see also* CHANDRA SHAH, U.S. DEP'T OF ENERGY, POWER PURCHASE AGREEMENTS 15 (2011), *available at* https://www1.eere.energy.gov/femp/pdfs/afo_ppa_pres.pdf.

it will profit from a power purchase agreement; therefore, renewable energy developers generally seek to obtain long-term leases rather than fee simple ownership.[148] In addition, leases offer flexibility. For example, at the end of a power purchase agreement's term, a developer may extend the term of the lease and the power purchase agreement if the system is still producing sufficient energy to make a profit, or it may agree to remove or sell the equipment and end contractual ties with a site owner,[149] minimizing the developer's control of the site to the time in which the development produces revenue.

Renewable energy developers have brought the issue of lessee liability to EPA's attention, and EPA has issued guidance on applying the purchaser defense to lessees in an attempt to alleviate concerns.[150] EPA's guidance, however, has not fixed the previously noted lessee liability problem of joint and several owner or operator liability.

III. EPA'S GUIDANCE LACKS A LEGAL REMEDY FOR THE CERCLA LESSEE PROBLEM

The importance of financing the cleanup of contaminated sites through redevelopment has increased, because the tax that originally funded Superfund sites expired almost two decades ago and the number of bankruptcies among responsible parties has increased during the economic downturn.[151] In conjunction, EPA has faced a hiring freeze and shortage in its staff that oversees the remediation of contaminated facilities in recent years.[152] Now, it is more important than ever to create legal mechanisms that will enable potentially responsible parties to fund redevelopment that is protective of human health and the environment but that requires minimal EPA oversight.[153]

Stemming from renewable developers' hesitance to utilize contaminated sites, EPA released guidance in 2009 regarding its enforce-

148 *See* EPA 2012 REVISED TENANT GUIDANCE, *supra* note 13, at 1–3 ("Leasehold interests play an important role in facilitating the cleanup and reuse of contaminated properties.").

149 *See* SOLAR ENERGY INDUS. ASS'N, *supra* note 147.

150 *See* Memorandum from U.S. Envtl. Prot. Agency, Office of Enforcement & Compliance Assurance, to Reg'l Adm'rs, Regions I–X, Transmitting Revised Enforcement Guidance Regarding the Treatment of Tenants Under the CERCLA Bona Fide Prospective Purchaser Provision and Model Comfort/Status Letters for Lessees at Renewable Energy Projects (Dec. 5, 2012), *available at* http://www2.epa.gov/sites/production/files/documents/tenants-bfpp-2012-mem.pdf.

151 Joel A. Mintz, *EPA Enforcement of CERCLA: Historical Overview and Recent Trends*, 41 Sw. L. REV. 645, 655 (2012).

152 *Id.* at 657.

153 *See infra* Part IV.

ment discretion in applying the purchaser defense to lessees.[154] In its guidance, EPA stated that a lessee would obtain the purchaser defense if it established sufficient indicia of ownership to be considered an "owner,"[155] or if it leased from an owner that had established the purchaser defense ("derivative purchaser defense").[156]

Although this guidance provided some clarity, it did not change the legal framework of CERCLA that created the ambiguity. The requirement that the lessee acquire liability as an owner before establishing the defense implied that if a lessee established ownership without the defense, then it could be liable.[157] Even with the defense, it was still unclear when a lessee would have sufficient indicia of ownership to be an "owner" under the Second Circuit's factors in *Commander Oil*.[158] For example, a lease for a renewable energy project may contain a term allowing the lessee to terminate the lease by simply giving notice,[159] which lacks indicia of ownership.[160] Alternatively, the site owner could potentially maintain responsibility for site upgrades or property taxes, whether paid directly or through an increase in power pricing,[161] another indication of a lack of indicia of ownership.

The second scenario, in which a lessee would establish the derivative purchaser defense, is also impracticable in the renewable energy setting. This scenario implied that an owner would have to purchase the property after the enactment of the Brownfields Amendments on January 11, 2002, and perform an environmental assessment to dis-

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154 *See generally* EPA 2009 TENANT GUIDANCE, *supra* note 37.

155 *See id.* at 3–4.

156 *See id.* at 4–5.

157 *Cf.* EPA 2012 REVISED TENANT GUIDANCE, *supra* note 13, at 4–5 (stating that CERCLA "provides that a person must have 'acquire[d] ownership' of the facility after January 11, 2002 in order to qualify for" the purchaser defense, and that EPA would "treat tenants as [bona fide prospective purchasers] if their lease agreement was executed after January 11, 2002 and they meet the other [bona fide prospective purchaser] provisions" (first alteration in original)).

158 Commander Oil Corp. v. Barlo Equip. Corp., 215 F.3d 321, 330–31 (2d Cir. 2000); *see also supra* Part I.A.1.a.

159 *See* ROBERT R. NARDI & JOHN H. DANIELS, JR., WIND ENERGY EASEMENT AND LEASE AGREEMENTS 11 (2005), *available at* http://www.windustry.org/sites/windustry.org/files/LandEMain.pdf.

160 *See generally* EPA 2009 TENANT GUIDANCE, *supra* note 37, at 3–4 (explaining tenants with indicia of ownership).

161 *See* SOLAR ENERGY INDUS. ASS'N, *supra* note 147 (noting that the site owner may need to make investments in the property to support installation of solar energy or comply with local ordinances and explaining the potential of the site's property taxes to rise depending on state policy).

cover contamination prior to leasing the site.[162] Therefore, a lease could not be made contemporaneously with the purchase of the contaminated property, decreasing the opportunity to develop renewable energy that could support cleanup efforts.[163] Even if a lessee leased from an owner who had established the purchaser defense, the guidance failed to state whether a lessee could maintain the purchaser defense if the owner later lost its purchaser defense (e.g., if the owner performed site work without exercising appropriate care).[164]

On notice that many prospective developers remained hesitant to pursue redevelopment of potentially contaminated property,[165] in 2012 EPA responded with more advanced guidance on the application of the purchaser defense to lessees.[166] Specifically, the 2012 guidance states that a lessee would lose the derivative purchaser defense if the owner loses the purchaser defense, but that EPA has enforcement discretion to not pursue a lessee who has met all criteria for the purchaser defense.[167] In addition, EPA clarified that a lease would be an improper affiliation under the purchaser defense because it does not convey the title of property to the lessee,[168] but that EPA has enforcement discretion in certain situations not to treat a lease as a prohibited affiliation.[169]

Most importantly, under the new guidance, EPA may exercise its enforcement discretion to grant the purchaser defense to a lessee if it meets all of the defense's requirements, and it executed the lease after the enactment of the Brownfields Amendments, even if the lessee has not established indicia of ownership or derivative liability.[170] Rather than addressing the problems with establishing the Second Circuit's indicia of ownership test or the potential loss of derivative liability,

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162 THORNHILL, *supra* note 102, at 4.

163 *Id.*

164 *Cf.* EPA 2012 REVISED TENANT GUIDANCE, *supra* note 13, at 3–4.

165 *Siting Renewable Energy Projects on Contaminated Land*, 30 No. 3 HAZARDOUS WASTE CONSULTANT 1.1, 1.3 (2012), *available at* 30 No. 3 HAZWC 1.1 (Westlaw).

166 *See generally* EPA 2012 REVISED TENANT GUIDANCE, *supra* note 13.

167 *Id.* at 3.

168 *Id.* at 4. A person seeking the purchaser defense must not be "affiliated with any other person that is potentially liable . . . [through] any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by the instruments by which title to the facility is conveyed or financed or by a contract for the sale of goods or services)." 42 U.S.C. § 9601(40)(H)(i)(II) (2012).

169 EPA 2012 REVISED TENANT GUIDANCE, *supra* note 13, at 4.

170 *Id.* (citing 42 U.S.C. §§ 9601(40)(A)–(H), 9607(4)(1)); *see also id.* at 3–5 & n.9.

EPA created a method to sign off on lessees' plans to independently establish the factors of the purchaser defense.[171]

This new guidance is a momentous change in lessee liability enforcement, but it fails to change the legal effect or efficiency of the purchaser defense as applied to lessees. EPA guidance does not create an actual lessee liability defense against third parties under CERCLA, so a court could still hold a lessee liable, regardless of EPA's enforcement discretion in applying the purchaser defense.[172] In addition, EPA's method of evaluating whether a lessee meets the criteria for the defense and enforcing its discretion is "comfort letters," in which EPA issues an assurance that it will not prosecute a lessee after considering individual site concerns.[173] This method could result in burdensome or unfair results[174] and fails to address potential third party liability.[175] In fact, EPA indicates that there are administrative burdens within the guidance, stating, "EPA generally will not engage in site-specific determinations on the applicability of this enforcement discretion guidance."[176] Although EPA has attempted to encourage renewable developers to lease contaminated sites through its enforcement discretion guidance, CERCLA and the Brownfields Amendments have created a legal regime that will continue to discourage developers from leasing contaminated sites.[177] Therefore, only a legislative solution will fix the problem.

IV. CONGRESS SHOULD IMPLEMENT A FEDERAL LESSEE DEFENSE SIMILAR TO THE CALIFORNIA LESSEE DEFENSE

A. Congress Should Pass a Lessee Defense

In order to support EPA's efforts to implement renewable development on Superfund sites, Congress must amend CERCLA to include a lessee defense. The law should incorporate EPA guidance to provide a legal defense against liability, including third party claims. The proposed Model Bona Fide Lessee Defense Amendment ("Model Amendment") to CERCLA is found in the Appendix to this Note.

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171 *See* EPA 2012 REVISED TENANT GUIDANCE, *supra* note 13, at 4–5.

172 THORNHILL, *supra* note 102, at 5.

173 *See* EPA 2012 REVISED TENANT GUIDANCE, *supra* note 13, at 5 & n.10.

174 *See supra* notes 75–78 and accompanying text.

175 *See* EPA 2012 REVISED TENANT GUIDANCE, *supra* note 13, at 2.

176 *Id.* at 5.

177 *See supra* Part I.

1. Section-by-Section Analysis

The Model Amendment would amend sections 101 and 107 of CERCLA, codified at 42 U.S.C. §§ 9601 and 9607,[178] to include a federal bona fide lessee defense ("lessee defense"). The lessee defense would be based on the current language of the purchaser defense but would be defined separately in section 9601. In the Model Amendment found in the Appendix, the unaltered words are those taken from the purchaser defense, the stricken words are those found in the purchaser defense that would be removed in the lessee defense, and the underlined words are those not found in the purchaser defense that would be added to the lessee defense. The added language was taken from California's lessee defense and adapted to conform to CERCLA's terms.

Specifically, two definitions would be added to section 101 of CERCLA—"leasehold interest" and "bona fide prospective lessee"—and one provision would be added to section 107 of CERCLA to enable the prospective lessee to contract with the owner of the site and EPA to define the scope of development and cleanup. The bona fide lessee defense, proposed section 9601(43), is modeled after the purchaser defense in section 9601(40). The lessee agreement, proposed section 9607(s), is an entirely new provision that would only apply to the lessee defense and would eliminate the need for the windfall lien provision, although it is adapted from the windfall lien provision that applies to the purchaser defense in section 9607(r). The following section-by-section analysis explains the significance of each part of the Model Amendment for renewable energy development.

Section 9601(42) Leasehold Interest

This definition would be the first reference to a lease or lessee in CERCLA,[179] and it would define the interest protected by the lessee defense. The definition explicitly includes leases and easements but also grants EPA discretion to approve other types of nonfee interests, such as those that may be associated with complex renewable energy financing.[180]

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178 42 U.S.C. §§ 9601, 9607 (2012).

179 *See* 42 U.S.C. §§ 9601–9675.

180 *See, e.g.*, Mark Regante, Milbank, Tweed, Hadley & McCloy LLP, Address at the Federal Utility Partnership Working Group: Tax Issues in Financing Renewable Energy Projects (Apr. 12, 2012) (presentation available at https://www1.eere.energy.gov/femp/pdfs/fupwg_spring12_regante.pdf).

Section 9601(43) Bona Fide Prospective Lessee

This definition qualifies a person who acquires a leasehold interest in a site for more than fifteen years and meets the specified requirements as a bona fide prospective lessee. The requirement of fifteen years ensures that a developer has a long-term investment in the site, and it is within the range of a typical renewable energy power purchase agreement.[181] Although EPA guidance suggests that it would treat a lessee as an owner under the purchaser defense if it meets the other defense requirements,[182] this provision affirmatively eliminates any potential legal requirement for a developer to show indicia of ownership and first trigger joint and several liability before establishing the purchaser defense. Under section 9601(43)(B)–(G), the lessee would need to meet the same requirements as under section 9601(40)(B)–(G) of the purchaser defense, namely: inquire into previous ownership and use of the facility, take care to stop and prevent threats from continuing or future releases, cooperate with those completing the response action, comply with any land use controls, and comply with any requests for information.[183]

Section 9601(43)(A) Disposal

The definition of disposal in the lessee defense excludes passive migration. Developers would, therefore, have a safeguard against joint and several liability for the movement of chemicals not caused by their human action. For instance, if rain causes the water below the surface of a solar development to migrate and cause further contamination, the developer would not be liable unless the development caused the movement.

Section 9601(43)(H) No Affiliation

The lessee defense would allow the developer to contract with the owner of the site to obtain control and implement the development. This differs from the purchaser defense, which only allows a contractual relationship to transfer the title of the facility. This would overrule the previously noted guidance that a lessee's contract with a site owner would be an improper affiliation under the purchaser defense because it does not convey title.[184] This change would enable the developer to contract for a leasehold interest in the site, sell power to

181 *See* SHAH, *supra* note 147, at 15.

182 *See* EPA 2012 REVISED TENANT GUIDANCE, *supra* note 13, at 4–5.

183 42 U.S.C. § 9601(40)(B)–(G).

184 EPA 2012 REVISED TENANT GUIDANCE, *supra* note 13, at 4.

the owner, and maintain a defense against liability, which are key aspects of renewable energy development.

Section 9607(s) Prospective Lessee Agreement

The lessee defense differs most from the purchaser defense in that the lessee would be required to enter an agreement with EPA and the site owner or any other entity responsible for cleaning up the site. This provision would stipulate the extent to which the lessee is liable for cleanup activities and the extent to which other entities are responsible. This type of agreement is suitable for renewable energy because these projects tend to have a defined footprint and require infrequent operations and maintenance.[185]

In addition, this provision commits the lessee to require that any revenue from the project that is attributed to the owner be assigned to fund the cleanup until the funding for the cleanup has been satisfied. This eliminates any need for EPA to place a windfall lien on the lessee that would threaten the lessee's profit and investment in the site.

B. Other Potential Proposals

1. Legislation Incorporating Lessees into the Purchaser Defense

A more straightforward attempt to solve the lessee problem would be to directly incorporate lessees into the purchaser defense without otherwise changing the language of the defense. One author has proposed an amendment to CERCLA that incorporates the lessee defense into the purchaser defense and includes an additional requirement to disclose the acquisition and use of the site, proposed plans, and site assessment to EPA.[186]

Although this provision may be more direct than the Model Amendment, it fails to address the flaws in applying the purchaser defense to lessees. Namely, the lessee would still be subject to the "no affiliations" language,[187] which has been interpreted to include indemnities from liability.[188] Further, EPA has stated in guidance that any previous exception from prohibited affiliations of CERCLA for the

185 *See* FED. ENERGY MGMT. PROGRAM, GUIDE TO INTEGRATING RENEWABLE ENERGY IN FEDERAL CONSTRUCTION (2012), *available at* http://www1.eere.energy.gov/femp/pdfs/re_construction_guide.pdf.

186 *See* Jonathan J. Nasca, Note, *Just Scratching the Surface: How EPA Denied Renewable Energy Developers the Liability Protection They Need to Repower America's Contaminated Land*, 41 HOFSTRA L. REV. 267, 307–08 (2012).

187 *See* 42 U.S.C. § 9601(40)(H).

188 Ashley II of Charleston, LLC v. PCS Nitrogen, Inc., 791 F. Supp. 2d 431, 506–07 (D.S.C. 2011), *aff'd*, 714 F.3d 161 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 514 (2013).

transfer of title does not apply to leases, so current guidance does not protect lessees.[189] In addition, the statute would not clarify whether passive migration constitutes a disposal that would cause the lessee to lose the defense.[190] Lastly, EPA could recoup all of the developer's profits by placing a windfall lien on the site.[191] To solve those problems, the Model Legislation enables the lessee to contract directly with the owner for control of the site, eliminates liability for passive migration of existing contamination on the site, and only assigns the revenue above the developer's profits to site cleanup funds.[192]

In addition, although the incorporated lessee defense may require the lessee to give notification to EPA of its planned development,[193] the Model Amendment enables EPA to approve the developer's role in the remediation action.[194] This ensures that EPA can confirm that the developer's plans are protective of human health and the environment, while limiting EPA's involvement to less than the assurances required prior to the Brownfields Amendments—and under current guidance.[195] Therefore, although a statute directly incorporating lessees into the purchaser defense would be a helpful clarification of liability, it would not fully address past concerns or alter the provisions of the purchaser defense that are specific to purchases.

2. *Status Quo: Advising Developers to Seek Comfort Letters, Sign Indemnifications, and Obtain Insurance*

Another possibility would be for Congress to maintain the status quo without addressing a lessee defense, with developers continuing to manage risk through other means under current law. In order to work within the current legal environment, lawyers have suggested that developers obtain EPA comfort letters pursuant to the 2012 guidance and similar state assurances, contract with the potentially responsible party to limit liability, and obtain environmental insurance to limit risk.[196]

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189 EPA 2012 REVISED TENANT GUIDANCE, *supra* note 13, at 4.

190 *Cf.* 42 U.S.C. § 9601(40)(A).

191 *See id.* § 9607(r).

192 *See supra* Part IV.A.

193 *See, e.g.*, Nasca, *supra* note 186, at 307.

194 *See supra* Part IV.A.

195 *See supra* Parts II.A, III.

196 *See generally* Trimarchi, *supra* note 98.

As previously mentioned, however, comfort letters do not limit third party legal actions and may be time consuming.[197] In addition, as previously mentioned, contractual limitations on liability may be considered prohibited affiliations in the context of a lease.[198] Although the risk of liability from an indemnity may be minimal, given the limited case law on the topic and EPA's guidance that indemnifications included in title transfers are not prohibited indemnifications,[199] this is still a risk for lessees under the current statutory purchaser defense.

Further, environmental insurance addresses the cost of cleanup, but it does not address the root of the problem—the liability. Parties would be forced to seek recovery of costs for which they would not otherwise be held liable under the lessee defense. Additionally, the premium for environmental insurance may be prohibitively expensive to cover potential joint and several liability of all contamination on a site. Although comfort letters, indemnification agreements, and insurance are beneficial tools in the event Congress does not amend CERCLA, they do not afford the same protection for developers and may be costly.

C. Arguments Against Model Legislation

Opponents of a federal lessee defense may claim that the lessee defense would not encourage development, or that it would be less protective of human health and the environment. On the contrary, a lessee defense will clarify liability to encourage development and fund more cleanups without compromising the current liability regime of CERCLA.

In order to demonstrate that the federal lessee defense would not be effective, critics will likely point to California's lack of renewable development on brownfields sites despite its lessee defense.[200] Of the ten states that contain renewable energy installations on contaminated sites, California has the third most installations, but it is ranked seventh in installed capacity.[201] In fact, only one of the renewable facilities located on a California contaminated site is on a site that falls under the state brownfields program (as opposed to a Superfund site).[202]

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197 *See supra* notes 173–77 and accompanying text.

198 *See supra* notes 93–98 and accompanying text.

199 *See supra* notes 93–98 and accompanying text.

200 *See* EPA RENEWABLE ENERGY PROJECTS, *supra* note 6, at 2.

201 *Id.*

202 *See id.* at 3. The West County Wastewater District site is the only site classified as a

This criticism fails to address the interconnectedness of the federal liability regime and state programs. The Brownfields Amendments created a structure similar to a federal enforcement deferral, in which EPA will not take enforcement action if a property is properly remediated and maintained under the state program.[203] EPA, however, may bring a response action if it determines a release presents an imminent and substantial endangerment or if new information reveals that the contamination is more toxic than originally anticipated.[204] Despite state brownfields programs, there may be a latent concern that federal CERCLA liability may apply, which may disincentivize a developer from utilizing a contaminated brownfield in a state program. It is difficult, therefore, to equate the effectiveness of the California tenant defense to the potential effectiveness of a federal lessee defense.

This criticism also fails to recognize the effect that economic incentives have on renewable energy development. "Incentives for renewable energy and brownfields redevelopment vary considerably among states."[205] After all, even the best cleanup and liability reforms within the CERCLA framework cannot transform a contaminated site into a renewable energy development if a developer cannot obtain financing.[206] Liability is only one aspect of development considerations, so critics will need to consider the effectiveness of the liability regime with those other factors to determine its effectiveness.

In addition, critics may argue that the federal lessee defense would not uphold EPA's goal to protect human health and the environment.[207] Maintaining protectiveness throughout the redevelopment process has been a concern since the Brownfields Amendments were passed, when critics voiced concern over the amount of responsi-

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brownfield, whereas four sites, including Aerojet's, are classified as Superfund sites, and two are classified as federal facilities. *Id.*

203 42 U.S.C. § 9628(b) (2012).

204 *Id.*

205 *Green Energy Development on Brownfield Sites*, 30 No. 2 HAZARDOUS WASTE CONSULTANT 1.1, 1.3 (2012), *available at* 30 No. 2 HAZWC 1.1 (Westlaw).

206 *See* Scott Sherman, *Government Tax and Financial Incentives in Brownfields Redevelopment: Inside the Developer's Pro Forma*, 11 N.Y.U. ENVTL. L.J. 317, 321 (2003).

207 *See* Strickland, *supra* note 85, at 794 (arguing that a prospective purchaser agreement may reflect "EPA's commitment to removing the barriers imposed by potential CERCLA liability while ensuring protection of human health and the environment," by reserving for itself the right to reject an offer from a prospective purchaser that the agency deems not in the public interest (internal quotation marks omitted)). One could argue that a lessee liability defense limits EPA's discretion because the agency would not have the same right of refusal as in ordinary Superfund purchaser contracts.

bility the statute placed in state cleanup programs and the authority given to EPA to determine cleanup methods based on future land use.[208] Contrary to prior concerns that EPA has limited its authority over brownfields redevelopment by putting more power into states' hands, this Model Amendment would increase EPA's authority to oversee development by enabling EPA to approve the scope of development within the statutory structure and by withholding profits from the renewable energy development to fund site cleanup. This would not only protect the site from further contamination, but would also enable the use of renewable energy to fund site cleanups in the future.

CONCLUSION

A federal lessee defense against CERCLA liability would allow developers to utilize contaminated sites to produce renewable energy, cleaning up the Love Canals of the past and increasing the Aerojet solar farms of the future. These developments, in turn, would promote the cleanup of hazardous sites by providing sources of power and revenue. Although the Brownfields Amendments sought to encourage development by creating a purchaser defense against CERCLA liability, Congress failed to extend the defense to lessees. Despite EPA's efforts to comfort developers through guidance and enforcement discretion, lessee liability remains subject to courts' interpretations of CERCLA's owner and operator, joint and several liability, and purchaser defense provisions. If the United States wants to take advantage of the unique opportunity to remediate contaminated land while increasing the production of renewable energy, Congress must pass a lessee defense against CERCLA liability that limits developers' liability while preserving EPA's mission to protect human health and the environment.

208 *See, e.g.*, Seth Schofield, Student Essay, *In Search of the Institution in Institutional Controls: The Failure of the Small Business Liability Relief and Brownfields Revitalization Act of 2002 and the Need for Federal Legislation*, 12 N.Y.U. ENVTL. L.J. 946, 1020–22 (2005).

APPENDIX

MODEL BONA FIDE LESSEE DEFENSE AMENDMENT[209]

§ 9601. Definitions

. . . .

(42) Leasehold interest.—

"Leasehold interest" means a nonfee interest in, and control of, real property at a site by a lease, easement, or other legal means for site access and use that is acceptable to the President.[210]

(43) Bona fide prospective lessee.—

The term "bona fide prospective lessee" means a person ~~(or a tenant of a person)~~ that acquires ~~ownership of~~ a leasehold interest in a facility with a term of fifteen years or more after January 11, 2002, and that establishes each of the following by a preponderance of the evidence:

(A) Disposal prior to acquisition

All disposal of hazardous substances at the facility occurred before the person acquired the leasehold interest in the facility. In this section, disposal does not include leaking, leaching, or movement of a hazardous material into or through the environment, for which no human activity by the bona fide prospective lessee preceded the initial entry of that substance into the environment.[211]

. . . .

(H) No affiliation

The person is not—

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209 The unaltered words are those taken from CERCLA's purchaser defense, the stricken words are those found in the purchaser defense that would be removed in the lessee defense, and the underlined words are those not found in the purchaser defense that would be added to the lessee defense. The added language was taken from California's lessee defense and adapted to conform to CERCLA's terms.

210 As authorized by section 115 of CERCLA, the President's authority to respond to a release may be delegated to EPA or another appropriate federal agency. 42 U.S.C. §§ 9604(a), 9615 (2012). The California bona fide ground tenant defense similarly includes ground leases, easements, or "other legal means for site access and use." CAL. HEALTH & SAFETY CODE § 25395.102 (West 2006 & Supp. 2013).

211 The exclusion in the disposal definition was adapted from California's definition of passive migration. *See* HEALTH & SAFETY § 25395.77 (defining passive migration as "the leaking, leaching or movement of a hazardous material into or through the environment, for which no human activity by the bona fide purchaser, innocent landowner, or contiguous property owner preceded the initial entry of that substance into the environment").

(i) potentially liable, or affiliated with any other person that is potentially liable, for response costs at a facility through—

(I) any direct or indirect familial relationship; or

(II) any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by the instruments by which ~~title to the facility is conveyed or financed~~ the person obtains control and implements the development of the site,[212] or by a contract for the sale of goods or services); or

(ii) the result of a reorganization of a business entity that was potentially liable.

. . . .

§ 9607. Liability

. . . .

(s) Prospective lessee agreement

(1) Limitation on liability

Notwithstanding subsection (a)(1) of this section, a bona fide prospective lessee ~~purchaser~~ whose potential liability for a release or threatened release is based solely on the lessee's ~~purchaser's~~ being considered to be an owner or operator of a facility shall not be liable as long as the bona fide prospective lessee ~~purchaser~~ does not impede the performance of a response action or natural resource restoration.

(2) Agreement ~~Lien~~

~~If there are unrecovered response costs incurred by the United States at a facility for which an owner of the facility is not liable by reason of paragraph (1), and if each of the conditions described in paragraph (3) is met United States shall have a lien on the facility, or may by agreement with the owner, obtain from the owner a lien on any other property or other assurance of payment satisfactory to the Administrator, for the unrecovered response costs.~~

(i) The bona fide prospective lessee shall enter into an agreement pursuant to this section with the President, and the owner or any other entity responsible for the response action that provides:

212 The exception for "instruments by which the person obtains control and implements the development of the site" in the affiliation prohibition was adapted from California's bona fide ground tenant immunity provision. *See id.* § 25395.102(b)(6)(B).

(I) the bona fide prospective lessee is responsible to the President for only the portions of the response action that the President determines to be necessary to allow the site to be used for its intended purposes without unreasonable risk to human health and the environment;

(II) the bona fide prospective lessee shall not be responsible to the President for any other response or remediation at the site, adjacent to the site, or in the vicinity of the site; and

(III) the portion of the response action to be implemented by the owner or any other entity responsible for the response action.

(ii) A bona fide prospective lessee who enters an agreement pursuant to (i) shall submit sufficient information to the President for the President to determine whether the site is eligible, whether the bona fide prospective lessee meets requirements in 9601(43), and to prepare an agreement pursuant to (i) of this section.

(iii) The bona fide prospective lessee shall agree with the owner or any other entity responsible for the response action that either of the following revenue sources be dedicated to the response action approved pursuant to this section:

(I) all payments by the bona fide prospective lessee to the site owner, at least until such time as a response action has been approved by the President and the President has determined that something less than all of the payments are sufficient to implement the response action;

(II) any alternate assets or revenue streams that are acceptable to the President.[213]

213 This language was adapted from California's bona fide ground tenant immunity provision. *See id.* §§ 25395.102(b)(5), 25395.103(a)–(c).