



Superfund Law and Real Estate Transactions

For Property Owners, Lenders, Brokers, Realtors and Appraisers

This United States Environmental Protection Agency (EPA) fact sheet was developed to respond to concerns expressed by residents, businesses and financial institutions relating to the effect of Superfund law and real estate transactions in the vicinity of the San Fernando Valley Superfund Sites (SFVSS) (See Figure 1). EPA will update and reissue this fact sheet as warranted by changes in the site conditions or changes in the law and policies concerning this subject.

BACKGROUND

The San Fernando Valley Superfund Sites are located in the eastern portion of the San Fernando Valley, between the Santa Monica and San Gabriel Mountains. The San Fernando Basin is an important source of drinking water for the Los Angeles metropolitan area, the cities of Glendale, Burbank and San Fernando, and the unincorporated area of La Crescenta.

In the early 1980s, trichloroethylene (TCE) and perchloroethylene (PCE) were detected in numerous drinking water production wells above the maximum safe levels of 5 parts per billion. As a result of the widespread contamination, state and local agencies acted to provide alternative drinking water supplies, primarily by purchasing imported water from the Metropolitan Water District (MWD). In 1986, EPA included four sites (see Figure 1) in the San Fernando Valley on the National Priority List (NPL), and began coordinating efforts to investigate and clean up the regional groundwater contamination: (1) the North Hollywood Area 1, (2) Crystal Springs Area 2, (3) Verdugo Area 3 and (4) the Pollock Area 4. As a result of the large areas that are covered by individual sites, these were further broken down into more manageable Operable Units (OUs) (see Figure 1). The North Hollywood OU is currently operational as a groundwater extraction and treatment facility. At the Burbank OU, Phase I of the operation of the water treatment facility was completed earlier this year and Phase II should be in

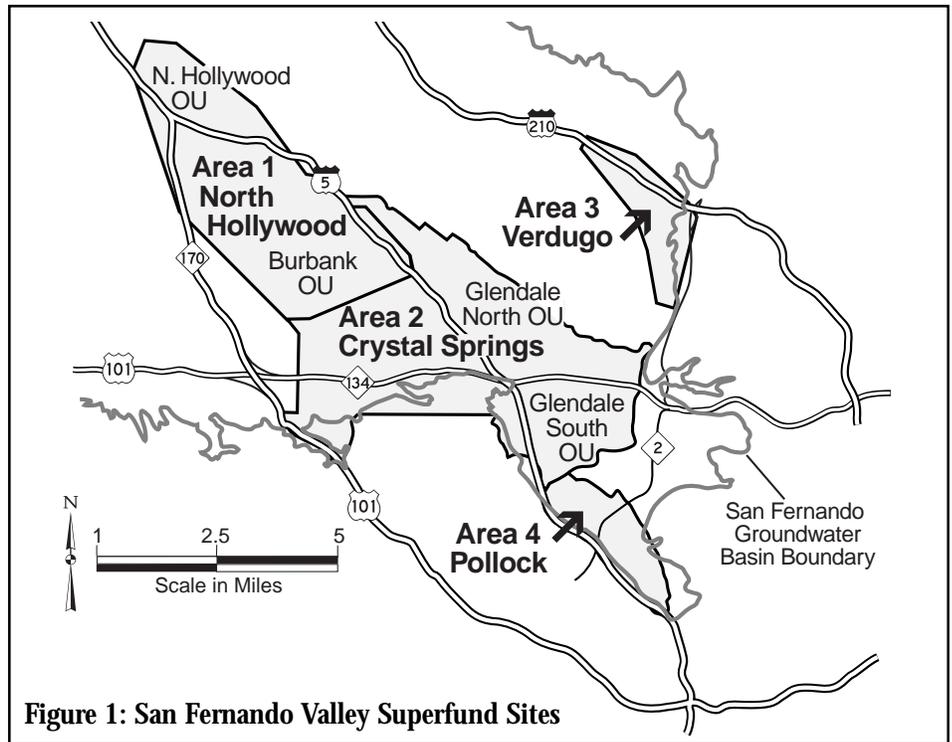


Figure 1: San Fernando Valley Superfund Sites

place shortly. The Glendale North and South OUs are in the final phases of design and construction of their water treatment plant is expected to begin shortly. The EPA is still in the process of conducting studies at the remaining two areas, Pollock and Verdugo.

Although a Superfund site or facility is sometimes believed to be a geographic area defined by property lines, it is actually the area that includes the source or sources of contamination, and any areas where a hazardous substance has come to be located. Thus it is possible that the boundaries of a Superfund site can change. The map provided (Figure 1) is meant to act as a guideline and should not be used to determine the Superfund status of a property. Accurate and current maps are available at the Superfund Records Center site repository or can be found on the San Fernando Valley web page (www.epa.gov/region09/waste/sfund/npl/sanfernando/index.htm).

SUPERFUND LIABILITY

The federal Superfund law, known officially as the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), was put into place by Congress to respond directly to uncontrolled or abandoned "releases" (spills, dumping, or other disposal) of hazardous substances. As required by CERCLA, EPA created the National Priorities List (NPL), a list of the nation's highest priority "releases" or sites. A site placed on the NPL is eligible for federal funding for long-term cleanup action where the responsible parties are unknown, unwilling, or incapable of resolving the environmental problems. CERCLA authorizes EPA to take legal action to ensure that responsible parties either clean up the pollution with EPA oversight or reimburse EPA for the cost of cleanup. With respect to releases of hazardous substances from facilities, CERCLA creates potential liability for four categories of parties: (1) current owners and operators of

the facility, (2) former owners and operators of the facility at the time that hazardous substances were disposed, (3) persons who transported hazardous substances to the facility, and (4) persons who generated waste that was disposed at the facility. The term facility is defined broadly to include any area where hazardous substances have come to be located.

The statute also provides certain exemptions from liability, such as the security exemption for lenders (see "Lender Liability" discussed later). In addition, by national policy, the EPA has chosen not to pursue certain categories of parties who might be considered potentially responsible under the law (see *Homeowners Protected From Superfund Liability* and *Owners of Contaminated Groundwater* discussed below). Furthermore, on a case by case basis, the EPA may decide not to pursue certain parties who might be considered potentially responsible (see *EPA's Enforcement Strategy with Respect to SFVSS* discussed below).

HOMEOWNERS PROTECTED FROM SUPERFUND LIABILITY

In 1991, the EPA issued the agency's Superfund policy towards owners of residential property at Superfund sites. Although the policy does not provide an exemption from potential Superfund liability for any party, it does clarify the Agency's enforcement policy with respect to residential homeowners. Pursuant to the policy, EPA will not take enforcement action against an owner of residential property to require the owner to conduct a Superfund cleanup or pay for cleanup actions at a Superfund site unless the residential homeowner's activities led to a release or threat of release of hazardous substances. In turn, the homeowner must cooperate with EPA or the state by allowing access to the property and must properly comply with any institutional controls placed on their property in order to facilitate cleanup. For purposes of the policy, EPA defines residential property consistent with the U.S. Housing and Urban Development definition: "single family residences of one to four units." The policy is limited to residential homeowners and does not extend to commercial properties, which are covered by a separate policy (see *Property Owners of Contaminated*

Groundwater Protected from Superfund Liability below). This policy is designed to alleviate concerns that the EPA may target residential homeowners or their lenders for Superfund cleanup.

LENDER LIABILITY

Under the Superfund law, in certain circumstances lenders may be considered owners or operators of Superfund sites and thereby inherit liability for the Superfund cleanup. Congress recognized the potential repercussions of this potential liability and included in the law an exemption for those parties who hold some security interest (such as a mortgage), but do not "participate in the management" of the property within a Superfund site. This exclusion was drafted to ensure that parties who merely hold a security interest in the site would not be held liable, but those who were actively involved in the management of the site could be responsible as owners or operators.

Unfortunately, the statute did not clearly distinguish between activities the lender can perform and still stay within the exemption, and activities which would be considered participating in the management of the facility. Court cases further blurred the distinction and raised significant concern among the lending community.

In response to this concern, EPA drafted a rule specifically outlining the activities that lenders could perform while avoiding Superfund liability. However, in a subsequent challenge to that rule, the U.S. Court of Appeals for the District of Columbia Circuit struck down the rule, holding that the EPA did not have the authority to specifically delineate the scope of the exemption through agency rulemaking. EPA sought clarification of the security exemption through amendments to the Superfund law which have been adopted by Congress. The amendments clarify the term "participate in management" to exclude most activities lenders normally participate in to protect a security interest.

PROPERTY OWNERS OF CONTAMINATED GROUNDWATER PROTECTED FROM SUPERFUND LIABILITY

Expanding upon the Homeowner Policy discussed above, on May 24, 1995, EPA issued its final policy regarding owners of

properties that overlie contaminated groundwater. This policy states that subject to certain conditions, where hazardous substances have come to be located on or in a property solely as the result of subsurface migration in an aquifer from a source or sources outside the property, EPA will not take Superfund enforcement actions against the owner of such property to require cleanup work or the payment of cleanup costs. The significance of this policy is that it is relevant not just to residential owners, but to all property owners including owners of commercial or industrial properties. It must be noted that the landowner must not have caused, contributed, or made the contamination worse. In addition, EPA may consider settlements under Superfund law where necessary to protect such individuals from third-party contribution law suits.

REAL ESTATE DISCLOSURE AND SUPERFUND SITE BOUNDARIES

California law does not specifically address disclosure of Superfund status in real estate transactions. However, California law requires disclosure to prospective buyers of any conditions that may materially affect the value of residential property. California law also requires a seller to disclose adverse conditions on a property that are not easily discoverable by a buyer. Both buyers and sellers need to be careful to conduct research and to make appropriate disclosures on properties that may be contaminated.

EPA'S ENFORCEMENT STRATEGY WITH RESPECT TO SFVSS

As is consistent with EPA policy, the agency has not pursued homeowners as potentially responsible parties (PRPs), where the homeowner has in no way contributed to the problem. To date, EPA has notified approximately 200 parties that they are potentially responsible for cleanup actions that are necessary. The agency is still in the process of identifying PRPs.

U.S. EPA Superfund Records Center

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EPA's San Fernando Web page: www.epa.gov/region09/waste/sfund/npl/sanfernando/index.htm