

# Annex E

## U.S. EPA Municipal Liability Protection Information



## **CERCLA Liability and Local Government Acquisitions and Other Activities**

Office of Site Remediation Enforcement

Local governments can play an important role in facilitating the cleanup and redevelopment of properties contaminated by hazardous substances. In particular, by acquiring contaminated properties, local governments have an opportunity to evaluate and assess public safety needs and promote redevelopment projects that will protect and improve the health, environment, and economic well-being of their communities.

One impediment to local government acquisition of contaminated property is concern about potential liability for the cleanup costs under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, also known as “Superfund” or “CERCLA,” 42 U.S.C. §§ 9601-9675.

This fact sheet addresses CERCLA liability issues for local governments and summarizes key statutory provisions and requirements.<sup>1</sup> It is intended to assist local governments by identifying CERCLA liability issues and protections that may be applicable to local governments as they consider involvement at contaminated properties.

The U.S. Environmental Protection Agency (EPA) recommends that local governments refer to the statutory language of CERCLA, the regulations at 40 C.F.R. Part 300 (known as the “National Contingency Plan”), and relevant EPA guidance (referenced at the end of this document) for more detail. EPA’s Regional offices<sup>2</sup> also may be able to provide information and assistance to local governments considering acquisition of contaminated properties. EPA also encourages local governments to consult with their state environmental protection agency and legal counsel prior to taking any action to acquire, cleanup, or redevelop contaminated property.

### **What is CERCLA?**

CERCLA outlines EPA’s authority for cleaning up properties contaminated with hazardous substances regardless of whether the properties are in use or abandoned. Additionally, CERCLA establishes a strict liability system for determining who can be held liable for the costs of cleaning up contaminated properties. CERCLA also provides EPA with robust enforcement

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<sup>1</sup> A local government also may have obligations and/or be potentially liable under other environmental statutes such as the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992 (RCRA) or state laws.

<sup>2</sup> For contact information, see <http://www.epa.gov/aboutepa/postal.html#regional>.

authorities to compel cleanups and recover EPA's response and enforcement costs incurred at these properties. Properties addressed under CERCLA authorities are commonly known as "Superfund sites."

CERCLA also includes authority for EPA to provide grant funding for the assessment and cleanup of brownfield sites. CERCLA § 101(39)(A) defines a brownfield site as "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant." Many of the properties that local governments may be interested in acquiring may qualify as brownfield sites.

For more general information about, and an overview of, CERCLA, please see EPA's website at <http://www.epa.gov/superfund/policy/cercla.htm>.

## **What are the various ways local governments become involved at contaminated properties?**

Local governments may become involved with contaminated properties in a number of ways, many of which present opportunities to facilitate cleanup or redevelopment. The ways include:

- Providing incentives to promote redevelopment (*i.e.*, zoning, tax increment financing, etc.);
- Responding to an emergency on the property;
- Transferring of tax liens;
- Collaborating with the current property owner;
- Leasing of the property by the municipality;
- Acquiring the property and "simultaneously" transferring it to a third party;
- Acquiring the property with subsequent transfer to a third party;
- Acquiring the property and managing it through a "land bank"; or
- Acquiring the property for long-term use.

## **Can a local government be liable under CERCLA?**

Yes. CERCLA is a strict liability statute that holds potentially responsible parties (PRPs) jointly and severally liable, without regard to fault, for cleanup costs incurred in response to the release or threatened release of hazardous substances. Under CERCLA § 107, a person, including a local government, may be considered a PRP<sup>3</sup> if the person:

- Is the current owner or operator of the contaminated property;
- Owned or operated the property at the time of the disposal of the hazardous substance;
- Arranged for the hazardous substances to be disposed of or treated, or transported for disposal or treatment; or
- Transported the hazardous substances to the property.

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<sup>3</sup> According to CERCLA, federally recognized tribes are not included as PRPs.

A local government that falls into one of the classes of PRPs described above may be potentially liable under CERCLA. Fortunately, CERCLA includes liability exemptions, affirmative defenses, and protections that may apply to local governments. Additionally, EPA has enforcement discretion guidance and site-specific tools that may address concerns about potential CERCLA liability.

## **Is a local government liable under CERCLA if it responds to an emergency on a contaminated property?**

Local units of government, especially fire, health, and public safety departments, are often the first responders to emergencies and other dangerous situations at contaminated properties in their communities. So as not to interfere with these activities, CERCLA § 107(d)(2) provides that state or local governments will not be liable for “costs or damages as a result of actions taken in response to an emergency created by a release or threatened release of a hazardous substance by or from property owned by another party.” *Note: This protection does not apply in cases where the local government is grossly negligent or intentionally engages in misconduct. CERCLA § 107(d)(2). Negligence and intentional misconduct are fact-specific determinations.*

In addition, CERCLA § 123 authorizes EPA to reimburse local governments for the costs of temporary emergency measures taken in response to releases within their jurisdiction. These temporary measures must be “necessary to prevent or mitigate injury to human health or the environment associated with the release or threatened release of any hazardous substance, pollutant, or contaminant.” This reimbursement is to give financial assistance to government entities that do not have a budget allocated for emergency response and cannot otherwise provide adequate response measure. The amount of the reimbursement may not exceed \$25,000 for a single response.

For more information on CERCLA § 123 reimbursements, please see EPA’s website at <http://www.epa.gov/ceppo/web/content/lawsregs/lgrover.htm>.

## **What CERCLA liability protections are available to local governments if they acquire contaminated property?**

CERCLA contains liability exemptions, affirmative defenses, and protections which may apply to a local government when it:

- Acquires contaminated property involuntarily by virtue of its function as a sovereign, CERCLA § 101(20)(D);
- Qualifies for a third party defense or innocent landowner liability protection, CERCLA §§ 107(b)(3), 101(35)(A);
- Qualifies as a bona fide prospective purchaser (BFPP) when it acquires the contaminated property, CERCLA §§ 101(40), 107(r)(1); or
- Is conducting or has completed a cleanup of a contaminated property in compliance with a state cleanup program, CERCLA § 128(b).

Each of these is discussed below in further detail.

| Key CERCLA Provisions   | Methods of Property Acquisition |            |         |                |          |                        |             |               |
|---|---------------------------------|------------|---------|----------------|----------|------------------------|-------------|---------------|
|   | Tax Foreclosure                 | Bankruptcy | Escheat | Eminent Domain | Purchase | Inheritance or Bequest | Abandonment | Gift/Donation |
| <b>Involuntary Acquisition</b><br>§ 101(20)(D)                                    | ●                               | ●          | ●       | ○              |          |                        | ●           |               |
| <b>Bona Fide Prospective Purchaser Protection</b><br>§§ 101(40) and 107(r)(1)     | ●                               | ●          | ●       | ●              | ●        | ●                      | ●           | ●             |
| <b>Third Party and Innocent Landowner Defenses</b><br>§§ 107(b)(3) and 101(35)(A) |                                 |            | ●       | ●              | ○        | ●                      |             |               |
| <b>Enforcement Bar</b><br>§ 128(b)  | ●                               | ●          | ●       | ●              | ●        | ●                      | ●           | ●             |

The method or type of property acquisition by a local government will play a critical role in the application of liability exemptions, affirmative defenses, or protections. Although most often applied in the purchase and gift/donation context, BFPP status is available for the majority of property acquisitions. *Note: In cases where it is unclear whether the involuntary acquisition exemption, affirmative defenses, or liability protections are sufficient, EPA encourages the local government to achieve and maintain BFPP status to increase certainty that it will not be liable under CERCLA.*

## **What is the meaning of “involuntary acquisition”?**

CERCLA § 101(20)(D)<sup>4</sup> provides that a unit of state or local government will not be considered an owner or operator of contaminated property (and thus is exempt from potential CERCLA liability as a PRP) if the state or local government acquired ownership or control involuntarily. This provision includes a non-exhaustive list of examples of involuntary acquisitions, including obtaining property through bankruptcy, tax delinquency, abandonment, or “other circumstances in which the government entity involuntarily acquires title by virtue of its function as sovereign.” However, it is important to note that this exemption will not apply to any state or local government that caused or contributed to the release or threatened release of a hazardous substance from the facility.

For purposes of EPA enforcement, EPA considers an involuntary acquisition or transfer to include situations “in which the government’s interest in, and ultimate ownership of, a specific asset exists only because the conduct of a non-governmental party...gives rise to a statutory or common law right to property on behalf of the government.”<sup>5</sup> Moreover, EPA acknowledges that tax foreclosure and other acquisitions by government entities often require some affirmative or volitional act by the local government.<sup>6</sup> Therefore, a government entity does not have to be completely passive during the acquisition in order for the acquisition of property to be considered involuntary under CERCLA.<sup>7</sup> Instead, EPA considers an acquisition to be involuntary if the government’s interest in, and ultimate ownership of, the property exists only because the actions of a non-governmental party give rise to the government’s legal right to control or take title to the property. For example, although a local government might be required to engage in certain discretionary or volitional actions to acquire title to a property through tax delinquency foreclosure or abandonment per state statute, EPA would consider the acquisition involuntary.<sup>8</sup>

For more information on state and local government involuntary acquisition, please see EPA’s website at <http://www.epa.gov/compliance/cleanup/revitalization/local-acquis.html>.

## **How does a local government become a bona fide prospective purchaser (BFPP)?**

A local government, whose potential liability is based solely on the fact that it knowingly purchased a contaminated property and is, therefore, considered the current owner or operator, will not be liable under CERCLA if it achieves and maintains BFPP status. BFPP status may be

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<sup>4</sup> CERCLA § 101(35)(A)(ii) also discusses involuntary acquisitions for a unit of state or local government in the context of the innocent landowner defense pursuant to CERCLA § 101(35)(A).

<sup>5</sup> Municipal Immunity from CERCLA Liability for Property Acquired through Involuntary State Action (EPA/OSRE/OSWER, 10/20/1995) at 3.

<sup>6</sup> *Id.* at 4.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

achieved even when the buyer has knowledge of the contamination on the property at the time of purchase. Moreover, EPA encourages local governments to achieve and maintain BFPP status in cases where it is unclear whether involuntary acquisition, affirmative defenses, or other liability protections may be sufficient to avoid CERCLA liability.

CERCLA §§ 101(40) and 107(r)(1) provide that a BFPP is a person or tenant of a person who acquired the property after January 11, 2002 and meets the following threshold criteria:

- All Appropriate Inquiries (AAI) were performed prior to purchase of the property pursuant to CERCLA § 101(35)(B);
- All disposal of hazardous substances occurred before the party acquired the property; and
- The party has “no affiliation” with a liable or potentially liable party.

CERCLA §§ 101(40)(C)-(G) provide additional criteria for maintaining BFPP status. These continuing obligations that must be met after acquisition of the property include:

- Complying with land use restrictions and not impeding the effectiveness of the institutional controls;
- Taking “reasonable steps” to prevent the release of hazardous substances. These obligations are site-specific, but may include preventing threatened future releases and/or limiting exposure to earlier hazardous substance releases. Institutional controls, discussed further below, may play a critical role in complying with reasonable steps;
- Providing full cooperation, assistance and access;
- Complying with information requests and administrative subpoenas; and
- Providing legally-required notices.

To remain protected from CERCLA liability for the existing contamination while it owns the property, a local government must maintain its BFPP status for as long as the potential for liability exists. Potential liability exists for as long as contamination remains on the property and/or the statute of limitations on CERCLA cost recovery actions is not in effect. It is important to note that a local government may become liable for any new contamination that may occur, even if the statute of limitations has run on existing contamination.

Although a BFPP is not liable for the cost of cleaning up the property, the property itself could be subject to a “windfall lien”<sup>9</sup> if EPA has spent money cleaning up the property after the BFPP acquires it and EPA’s cleanup efforts have increased the fair market value of the property. CERCLA § 107(r)(2). The windfall lien is limited to the lesser of EPA’s unrecovered response costs or the increase in fair market value attributable to EPA’s cleanup. EPA may be able to file a windfall lien on the property if:

- EPA spent money cleaning up the property before acquisition by a BFPP if certain requirements are met (*i.e.*, where there are substantial unreimbursed costs);
- EPA’s response action results in a significant increase in the property’s fair market value;
- There are no viable, liable parties from whom EPA could recover its costs; and

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<sup>9</sup> CERCLA contains two sections which discuss the ability of the federal government to impose liens. This fact sheet addresses the windfall provision of CERCLA § 107(r), but will not discuss liens provided under CERCLA § 107(l).

- A response action occurs while the property is owned by a person who is exempt (other than a BFPP) from CERCLA liability.

Whether EPA will perfect a windfall lien and prevent a potential windfall in such instances will be determined by site-specific circumstances and the equities of the particular situation.

For more information on AAI, please see EPA's website at <http://www.epa.gov/brownfields/aai/index.htm>. For more information on the BFPP liability protection and/or windfall liens, please see EPA's website at <http://www.epa.gov/compliance/cleanup/revitalization/bfpp.html>.

## **What are the requirements for the third party defense or innocent landowner defense?**

CERCLA § 107(b)(3) provides a "third party" affirmative defense to CERCLA liability for any owner, including local governments, that can prove, by the preponderance of the evidence, that the contamination was caused solely by the act or omission of a third party whose act or omission did not occur "in connection with a contractual relationship." Moreover, an entity asserting the CERCLA § 107(b)(3) defense must show that: a) it exercised due care with respect to the contamination; and b) it took precautions against foreseeable acts or omissions, and the consequences thereof by the third party that caused the contamination.

Congress enacted the Brownfields Amendments<sup>10</sup> and expanded the third party defense by creating exclusions to the definition of a contractual relationship. Previously, the deed transferring title between a PRP and the new landowner was a "contractual relationship" that prevented the new landowner from raising the traditional CERCLA § 107(b)(3) third party defense. To promote redevelopment and provide more certainty, Congress also clarified the "innocent landowner defense," which requires an entity to meet the criteria set forth in CERCLA § 101(35), in addition to the requirements of CERCLA § 107(b)(3). CERCLA § 101(35)(A) distinguishes three types of innocent landowners:

- Purchasers who acquire property without knowledge of contamination, CERCLA § 101(35)(A)(i);
- Governments "which acquired the facility by escheat, or through any other involuntary transfers or acquisition, or through the exercise of eminent domain authority by purchase or condemnation," CERCLA § 101(35)(A)(ii); and
- Inheritors of contaminated property, CERCLA § 101(35)(A)(iii).

For more information on qualifying for the innocent landowner defense where the purchaser acquired property without knowledge of the contamination, please see EPA's *Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchasers, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability* (Common Elements Guidance) available at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf>.

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<sup>10</sup> Small Business Liability Relief and Brownfields Revitalization Act (Pub. L. No. 107-118)(hereinafter the "Brownfields Amendments").

## **How do state response programs interact with CERCLA's enforcement bar?**

Many states have established state-specific response programs (for example, State Superfund, brownfields, and voluntary cleanup programs). These programs play a critical role in assessing and cleaning up the vast majority of our nation's brownfields and other lower-risk sites. EPA supports state response programs through:

- Grant funding to establish and enhance state programs; and
- Non-binding Memoranda of Agreement with individual states that provide general enforcement assurances to encourage assessments and cleanups pursuant to a state response program.

CERCLA § 128(b) protects local governments and other parties from EPA enforcement, subject to specific exceptions, when they comply with a state response program and are conducting or have completed a cleanup of an eligible response site, as defined by CERCLA § 101(41). This protection is known as the "enforcement bar." EPA has entered into non-binding Memoranda of Agreement with over 20 states which clarify EPA enforcement intentions under CERCLA at sites addressed in compliance with state response programs. It is important to note that while CERCLA § 128(b) may prohibit EPA from taking an enforcement action; it does not preclude third party litigation.

For more information about state voluntary cleanup programs and Memoranda of Agreement, please see EPA's website at <http://www.epa.gov/compliance/cleanup/revitalization/state.html>.

## **What should a local government do if it obtains contaminated property from a land bank or redevelopment authority?**

EPA recognizes the importance and increased use of land banks and redevelopment agencies as a tool to address abandoned or vacant properties, promote smart growth, improve existing land use practices, and support local community development. In an effort to make greater use of these tools, an increasing number of states and local governments are passing legislation creating land banks or redevelopment authorities to acquire, redevelop, and reuse abandoned properties.

While many abandoned properties that are of interest to land banks and redevelopment authorities are not likely to be contaminated, local governments should be aware that contamination and potential CERCLA liability may exist. A local government may increase the likelihood that the land bank or redevelopment authority is eligible for CERCLA liability protection by ensuring that the land bank or redevelopment authority conducts AAI prior to acquiring the property. Not only is AAI a critical requirement for obtaining most CERCLA landowner liability protections, but it also aids local governments in making informed property acquisition decisions. When acquiring abandoned contaminated properties, EPA encourages local governments to obtain BFPP status prior to acquisition if it is unclear whether other exemptions, affirmative defenses, or liability protections may apply.

## How does CERCLA liability affect eligibility for federal brownfields grant funding?

EPA brownfields grant money is available to eligible entities as defined by CERCLA § 104(k)(1). However, these funds cannot be used to pay response costs at a brownfield site for which the grantee is potentially liable under CERCLA § 107. If an applicant for brownfields grant money may be potentially liable at the site for which they are seeking funds, they must document that they qualify for one of CERCLA's liability protections. Therefore, one benefit of being covered by a CERCLA liability protection is that it enables certain non-liable entities to be potentially eligible for federal brownfields grant funding. If a local government intends to protect itself against CERCLA liability and compete for federal brownfields grant funding, it is advisable for the local government to evaluate whether it is eligible for a grant or become eligible through a liability protection before acquiring a brownfield site.

For more information about obtaining an EPA brownfields grant, grant guidelines, and discussions about the various types of grants that are available, please see EPA's website at [http://www.epa.gov/brownfields/grant\\_info/index.htm](http://www.epa.gov/brownfields/grant_info/index.htm).

### TYPES OF BROWNFIELDS FUNDING OPPORTUNITIES

CERCLA §§ 104(k)(4) and (6) authorize EPA's Brownfields Program to provide funding in a variety of ways:

- Assessment Grants
- Cleanup Grants
- Revolving Loan Fund Grants
- Job Training Grants
- Training, Research, and Technical Assistance Grants
- Targeted Brownfields Assessments
- Area-Wide Planning Pilot Program

## What protections exist when municipal solid waste is disposed of at a contaminated property?

Prior to the Brownfield Amendments, entities that disposed of municipal solid waste at contaminated properties argued that they should not be liable for the cleanup of contamination that was originally and primarily caused by industrial polluters. To address this issue, the Brownfield Amendments included CERCLA § 107(p) to create a qualified exemption from CERCLA liability for certain residential, small business, and non-profit generators of municipal waste at sites on CERCLA's National Priorities List. However, this exemption does not apply to municipalities who owned or operated a site.

For more information on the municipal solid waste exemption and EPA's guidance on the exemption, please see EPA's website at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-msw-exempt.pdf>.

## What steps might a local government take at a contaminated property to protect human health and the environment and ensure the integrity of a cleanup?

When contamination remains on a property during or after cleanup activities, institutional controls may be used alone or in combination with engineered controls to ensure protection of human health and the environment. Generally, institutional controls are designed to limit land or resource use (*e.g.*, prohibitions on residential use or extraction of ground water) and to ensure the integrity of engineered controls (*e.g.*, restrictions on excavating soils on or in the vicinity of a landfill cap).

As with engineered controls, institutional controls must be maintained, monitored, and evaluated for as long as contamination remains on the property at levels that do not allow for unrestricted use and unlimited exposure.

There are four categories of institutional controls:

- Proprietary Controls (*e.g.*, easement, real covenant, statutory covenant)
- Governmental Controls (*e.g.*, zoning, building permit, land use ordinance)
- Enforcement and Permit Tools (*e.g.*, consent decree, permit, order)
- Informational Devices (*e.g.*, deed notice, government advisory, state registry)

Whether or not a local government asserts BFPP status, it may play a key role in implementing, monitoring, and enforcing certain institutional controls – particularly for those it has the legal authority to implement or enforce. A local government also may work proactively with developers, prospective buyers and tenants, and other parties to ensure that institutional control requirements are understood and properly integrated into the planning and future reuse of the property.

If institutional controls are already in place on a particular property, it is important for local governments to understand the obligations the institutional controls impose and to consider how those obligations might be viewed by future owners, developers and property users. In some situations, EPA or the state may be willing to modify existing institutional controls to facilitate the appropriate reuse of the property as long as the engineered controls component of the cleanup will not be compromised and remains protective of human health and the environment.

For more information about institutional controls issues, please see EPA's website at <http://www.epa.gov/superfund/policy/ic/index.htm>.

### WHAT IS AN INSTITUTIONAL CONTROL?

An institutional control is a legal or administrative restriction on the use of, or access to, a contaminated property to protect:

- 1) the health of both humans and the environment; and
- 2) ongoing cleanup activities and to ensure viability of the engineered controls.

## CERCLA Liability and Local Government Acquisition of Contaminated Property: Key Documents

| Local Government Issue                             | CERCLA Provision             | Relevant EPA Documents or Guidance (if any)  |
|--|------------------------------|--|
| <b>Involuntary Acquisition</b>                     | § 101(20)(D)                 | <ul style="list-style-type: none"> <li>• Policy on Interpreting CERCLA Provisions Addressing Lenders and Involuntary Acquisitions by Government Entities (EPA/OSRE, 6/30/1997)</li> <li>• Policy on CERCLA Enforcement Against Lenders and Government Entities that Acquire Property Involuntarily (EPA/DOJ, 9/22/2005)</li> <li>• Municipal Immunity from CERCLA Liability for Property Acquired through Involuntary State Action (EPA/OSRE/OSWER, 10/20/1995)</li> <li>• Fact Sheet: The Effect of Superfund on Involuntary Acquisitions of Contaminated Property by Government Entities (EPA/OSRE, 12/31/1995)</li> </ul>   |
| <b>Third Party and Innocent Landowner Defenses</b> | §§ 107(b)(3), 101(35)(A)(ii) | <ul style="list-style-type: none"> <li>• Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchasers, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability ("Common Elements") (EPA/OSRE, 3/6/2003)</li> </ul>   |
| <b>Bona Fide Prospective Purchaser</b>             | § 101(40) and § 107(r)       | <ul style="list-style-type: none"> <li>• Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchasers, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability ("Common Elements") (EPA/OSRE, 3/6/2003)</li> <li>• Issuance of CERCLA Model Agreement and Order on Consent for Removal Action by a Bona Fide Prospective Purchaser (OSRE/USDOJ, 11/27/2006)</li> <li>• Enforcement Discretion Guidance Regarding the Applicability of the Bona Fide Prospective Purchaser Definition in CERCLA § 101(40) to Tenants (OSRE/OSWER, 1/19/2009)</li> <li>• Enforcement Discretion Guidance Regarding the Applicability of the Bona Fide Prospective Purchaser Definition in CERCLA Section 101(40) to Tenants: Frequently Asked Questions (OSRE, 11/1/2009)</li> </ul> |
| <b>Windfall Liens</b>                              | § 107(r)                     | <ul style="list-style-type: none"> <li>• Interim Enforcement Discretion Policy concerning Windfall Liens Under Section 107(r) of CERCLA (EPA/DOJ, 7/16/2003)</li> <li>• Windfall Lien Guidance: Frequently Asked Questions (OSRE, 4/1/2008)</li> <li>• Windfall Lien Administrative Procedures (OSRE, 1/8/2008)</li> </ul>   |

| <b>Local Government Issue</b>                              | <b>CERCLA Provision</b>        | <b>Relevant EPA Documents or Guidance (if any)</b>   |
|--|--------------------------------|--|
| <b>Brownfield Grants</b>                                   | § 104(k)(4) and (6)            | <ul style="list-style-type: none"> <li>• Brownfields Assessment Pilot/Grants at <a href="http://epa.gov/brownfields/assessment_grants.htm">http://epa.gov/brownfields/assessment_grants.htm</a></li> <li>• Revolving Loan Fund Pilot/Grants at <a href="http://epa.gov/brownfields/rlflst.htm">http://epa.gov/brownfields/rlflst.htm</a></li> <li>• Cleanup Grants at <a href="http://epa.gov/brownfields/cleanup_grants.htm">http://epa.gov/brownfields/cleanup_grants.htm</a></li> <li>• Area-Wide Planning Pilot Program at <a href="http://www.epa.gov/brownfields/areawide_grants.htm">http://www.epa.gov/brownfields/areawide_grants.htm</a></li> <li>• Brownfield Grant Guidelines Frequently Asked Questions at <a href="http://www.epa.gov/brownfields/proposal_guides/faqpguid.htm">http://www.epa.gov/brownfields/proposal_guides/faqpguid.htm</a></li> </ul> |
| <b>Institutional Controls</b>                              | §§ 101(40)(F), 107(q)(1)(A)(V) | <ul style="list-style-type: none"> <li>• Institutional Controls: A Citizen's Guide to Understanding Institutional Controls at Superfund, Brownfields, Federal Facilities, Underground Storage Tank, and Resource Conservation and Recovery Act Cleanups (EPA/OSWER, 2/2005)</li> <li>• Institutional Controls: A Guide to Implementing, Maintaining, and Enforcing Institutional Controls at Contaminated Sites (EPA Interim Final Draft 11/2010)</li> <li>• Institutional Controls: A Site Manager's Guide to Identifying, Evaluating and Selecting Institutional Controls at Superfund and RCRA Corrective Action Cleanups (EPA/OSWER, 9/2000)</li> </ul>  |
| <b>State Voluntary Cleanups and Memoranda of Agreement</b> | §§ 101(41), 128                | <ul style="list-style-type: none"> <li>• To see state-specific voluntary cleanup programs Memoranda of Agreement, please see <a href="http://www.epa.gov/brownfields/state_tribal/moa_mou.htm">http://www.epa.gov/brownfields/state_tribal/moa_mou.htm</a></li> </ul>  |

## Contact Information

If you have any questions about this fact sheet, please contact Cecilia De Robertis of EPA's Office of Site Remediation Enforcement at 202-564-5132 or [derobertis.cecilia@epa.gov](mailto:derobertis.cecilia@epa.gov).

*Disclaimer: This document is provided solely as general information to highlight certain aspects of a more comprehensive program. It does not provide legal advice, have any legally binding effect, or expressly or implicitly create, expand, or limit any legal rights, obligations, responsibilities, expectations, or benefits for any person. This document is not intended as a substitute for reading the statute or the guidance documents described in this document. It is the local government's sole responsibility to ensure that it obtains and retains liability protections. EPA does not offer any guarantees or warranties for or related to acquisition of a contaminated property or formerly contaminated property. It is also the local government's sole responsibility to maintain liability protection status as a contiguous property owner, bona fide prospective purchaser, or innocent land owner.*



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C., 20460

OFFICE OF  
ENFORCEMENT AND  
COMPLIANCE ASSURANCE

**MEMORANDUM**

**SUBJECT:** Superfund Liability Protections for Local Government Acquisitions after the Brownfields Utilization, Investment, and Local Development Act of 2018

**FROM:** Cynthia L. Mackey, Director  
Office of Site Remediation Enforcement

**TO:** Regional Counsels, Regions 1-10  
Superfund National Program Managers, Regions 1-10

**I. Purpose**

Local governments<sup>1</sup> often play an important role in facilitating the cleanup and redevelopment of properties contaminated by hazardous substances. By acquiring ownership or control or supporting the transfer of ownership of contaminated properties, local governments have an opportunity to evaluate and assess public safety needs and promote redevelopment projects that will protect and improve the health, environment, and economic well-being of their communities. The EPA often works with and assists local governments to facilitate the cleanup and revitalization of contaminated properties in their communities.<sup>2</sup>

Often, however, local governments perceive the potential liability for cleanup costs under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, (CERCLA, commonly known as “Superfund”) as an impediment to the acquisition of contaminated properties.<sup>3</sup> In 2018, Congress addressed this concern by enacting the Brownfields Utilization,

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<sup>1</sup> Many of the references to “local governments” in this document and to CERCLA’s liability protections are also applicable to state governments.

<sup>2</sup> For more information visit the EPA’s Land Revitalization website at <https://www.epa.gov/land-revitalization>. Local governments considering the acquisition of contaminated property should review the EPA’s *Process for Risk Evaluation, Property Analysis and Reuse Decisions for Local Governments Considering the Reuse of Contaminated Properties* on the Agency’s website at <https://www.epa.gov/land-revitalization/prepared>.

<sup>3</sup> 42 U.S.C. §§ 9601, *et seq.* A local government also may have obligations and/or be potentially liable under other environmental statutes such as the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 *et seq.* or state laws.

Investment, and Local Development Act of 2018 (BUILD Act).<sup>4</sup> The BUILD Act amended CERCLA’s Section 101(20)(D) liability protection for state and local government acquisitions of contaminated property by adding a new category of exempt acquisitions and by removing a requirement that the properties must be acquired “involuntarily.”

To assist local governments, this guidance provides an overview of CERCLA’s liability framework and protections and the EPA’s enforcement discretion policies that may apply to local governments. In addition, the EPA is clarifying its intentions by describing circumstances when it may exercise its enforcement discretion to not pursue enforcement actions against certain parties that may fall within a category of liable parties under Section 107 of CERCLA.<sup>5</sup> The EPA’s enforcement discretion is limited to the unique circumstances of each case and does not protect against third-party suits.<sup>6</sup> Courts, not the EPA, are the final arbiters of whether a party achieves liability protection. This guidance supersedes the EPA fact sheet titled *CERCLA Liability and Local Government Acquisitions and Other Activities*.<sup>7</sup>

## II. Local Government Involvement at Contaminated Properties

Local governments may become involved with contaminated properties in a number of ways, many of which present opportunities to facilitate cleanup or redevelopment. Depending on the type and manner of involvement, the local government may be concerned with potential liability under CERCLA.

Prior to acquiring ownership or control of a potentially contaminated property, all parties, including local governments, are strongly encouraged to perform an environmental site assessment, such as “all appropriate inquiries” (AAI),<sup>8</sup> to ensure they make informed decisions regarding the property’s environmental conditions. This information can help a local government ensure that its activities do not disturb or exacerbate site contamination. This information also can help to preserve its ability to satisfy certain federal or state liability protections.

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<sup>4</sup> Brownfields Utilization, Investment, and Local Development Act of 2018, Division N of Pub. L. No. 115-141, 132 Stat. 1052 (March 23, 2018).

<sup>5</sup> This guidance is reflected in the EPA’s *Revitalization Handbook: Addressing Liability Concerns at Contaminated Properties* available on the Agency’s website at <https://www.epa.gov/enforcement/revitalization-handbook>. The Revitalization Handbook provides an overview of many of the potential liability issues arising under CERCLA and other statutes associated with the assessment, cleanup, and revitalization of contaminated properties.

<sup>6</sup> Property transactions with PRPs that the EPA deems are intended to interfere with CERCLA’s liability scheme are not eligible for the EPA’s enforcement discretion.

<sup>7</sup> Office of Site Remediation Enforcement, March 2011.

<sup>8</sup> All appropriate inquiries (AAI) is a process of evaluating a property’s environmental conditions and assessing the likelihood of any contamination. Parties must conduct AAI before acquiring property to obtain certain liability protections discussed in Paragraphs IV.B. and C. below. For more information please see the Agency’s Brownfields All Appropriate Inquiries website at <https://www.epa.gov/brownfields/brownfields-all-appropriate-inquiries>.

## SOME POTENTIAL AVENUES FOR LOCAL GOVERNMENT INVOLVEMENT AT CONTAMINATED PROPERTIES

- Promoting redevelopment through municipal incentives such as zoning and use exemptions, tax increment financing, and infrastructure improvements
- Responding to emergencies and potential public health, safety, and environmental hazards
- Foreclosing on and transferring tax-delinquent properties
- Collaborating with a current owner to obtain access, investigate, clean up, and redevelop property
- Acquiring property and “simultaneously” or subsequently transferring it to a third party
- Utilizing a “land bank” or redevelopment agency to acquire, hold, lease, and/or control vacant, abandoned, and tax delinquent properties
- Acquiring property for short-term and long-term use or redevelopment
- Enforcing zoning and building codes and planning future land use
- Performing demolition, site assessment, investigation, and cleanup activities
- Securing property access and institutional controls such as deed restrictions, environmental covenants, and land use controls
- Participating in public meetings concerning the site property

The EPA recommends that local governments refer to the statutory language of CERCLA, the regulations at 40 C.F.R. Parts 300, 310, and 312, and relevant EPA documents (referenced throughout this guidance) prior to taking any action to acquire ownership or control, or to clean up or redevelop contaminated property. Local governments also should consult with the appropriate state environmental agency and their own legal counsel. Additionally, the EPA’s regional offices may be able to provide information and assistance to local governments considering the acquisition of contaminated property.

### III. Overview of CERCLA

CERCLA was enacted in 1980 in response to public concern about abandoned hazardous waste sites. CERCLA authorizes the federal government to assess and/or clean up contaminated sites and provides authority for responding to releases or threatened releases of hazardous substances, pollutants, and contaminants.

CERCLA established a comprehensive liability scheme enabling the EPA to order certain categories of parties to conduct or pay for the cleanup of releases or threatened releases of hazardous substances. The EPA may exercise its response authority through removal, remedial, and enforcement actions. The National Oil and Hazardous Substances Contingency Plan (NCP), 40 C.F.R. Part 300, provides the “blueprint” for conducting removal and remedial actions under CERCLA. Consistent with the NCP, remedial actions financed by the Hazardous Substance Superfund Trust Fund (“Fund”) are undertaken only at sites on the EPA’s National Priorities List (NPL).

There are many different types of contaminated or potentially contaminated properties subject to CERCLA in the United States. Some may be “Superfund sites” – sites where the federal government is, or plans to be, involved in cleanup efforts. Many of these sites are listed on the NPL. Other properties may be “brownfield sites” – properties where “the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.” CERCLA also includes authority for the EPA to provide grant funding for the assessment and cleanup of brownfield sites. Many of the properties that local governments may be interested in acquiring may qualify as brownfield sites. The level of contamination may vary and generally, the cleanup of brownfield sites is less complex than at Superfund sites. State and tribal response programs play a significant role in overseeing the cleanup and revitalization of brownfield sites.

Under CERCLA § 107(a), the following categories of persons may be considered potentially responsible parties (PRPs) and held liable for the costs or performance of a cleanup under CERCLA to address releases or threatened releases of hazardous substances:

- The owner or operator of the facility;
- Any person who owned or operated any facility at the time of disposal of any hazardous substance;
- Any person who arranged for the disposal or treatment, or transport for the disposal or treatment, of a hazardous substance at any facility; or
- Any person who accepted any hazardous substance for transport to a disposal or treatment facility that such person selected.

CERCLA’s liability scheme helps to ensure that wherever possible, PRPs, rather than the general public, pay for cleanups. Under CERCLA, a PRP’s liability for cleanup is interpreted as:

- Strict – A party is liable if it falls within one of the four categories of parties in CERCLA § 107(a) regardless of whether the party was at fault or negligent, or the party’s conduct was in compliance with industry standards;
- Joint and Several – If two or more parties are liable for the contamination at a site, any one or more of the parties may be held liable to the government for the entire cost of the cleanup, regardless of its contribution to the site, unless a party can show that the injury or harm at the site is divisible; and
- Retroactive – A party may be held liable even if the hazardous substance disposal occurred before CERCLA was enacted in 1980.

#### **IV. CERCLA Liability Protections for Acquisition of Contaminated Property**

Although a local government may fall into one of the classes of PRPs described above, there are liability protections that may apply to local government acquisitions of contaminated property. These protections and the EPA’s enforcement discretion documents that may apply are addressed below and in Appendices A and B.

The CERCLA liability protections that may apply to local government acquisitions of contaminated property include:

- CERCLA § 101(20)(D) exempts certain units of local government from the definition of “owner or operator” under specified circumstances.

- CERCLA §§ 101(40) and 107(r)(1) offer liability protection from “owner or operator” liability to parties that acquire a contaminated property with knowledge of the contamination and achieve and maintain their status as bona fide prospective purchasers (BFPPs).
- CERCLA §§ 107(b)(3) and 101(35)(A) provide liability protection to parties that acquire contaminated property and meet the third-party defense requirements and the innocent landowner (ILO) criteria set forth in those sections.

The method or type of property acquisition by a local government will play a critical role in the application of CERCLA liability protections. If it is unclear whether a particular liability protection may apply, a local government may consider increasing the likelihood that it will not be deemed liable by layering the available CERCLA liability protections. It is important to note that the Section 101(20)(D) exemption and BFPP liability protection do not shield government entities from any potential liability that they may have as "arrangers" or "transporters" of hazardous substances under CERCLA.

#### **A. Section 101(20)(D) State and Local Government Liability Exemption**

CERCLA § 101(20)(D), as amended by the BUILD Act, provides liability protection to state and local governments that acquire ownership or control of a contaminated property; however, it does not permanently or unconditionally insulate a government entity from potential CERCLA liability. Rather, CERCLA § 101(20)(D) provides a non-exhaustive list of examples of acquisition methods that may exempt local governments from potential liability as an “owner” or “operator” under CERCLA under certain circumstances. The BUILD Act amended CERCLA § 101(20)(D) to add a new category of exempt property acquisitions, “through seizure or otherwise in connection with law enforcement activity,” and to remove the requirement that state and local governments must acquire title to property “involuntarily.” CERCLA § 101(20)(D) now provides that “a unit of State or local government which acquired ownership or control through seizure or otherwise in connection with law enforcement activity, or through bankruptcy, tax delinquency, abandonment or other circumstances in which the government acquires title by virtue of its function as sovereign” is exempt from the definition of “owner or operator” if that government entity did not cause or contribute to the release or threatened release.

#### **STATUTORY LANGUAGE -- CERCLA § 101(20)(D) LIABILITY EXEMPTION**

*The term “owner or operator” does not include a unit of State or local government which acquired ownership or control through seizure or otherwise in connection with law enforcement activity, or through bankruptcy, tax delinquency, abandonment or other circumstances in which the government acquires title by virtue of its function as sovereign.*

*The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 107.*

While the BUILD Act provides clarity on some of the types of local government acquisitions exempt from liability, local governments may continue to have questions about the BUILD Act amendments. The EPA intends to assist local governments by clarifying when it will exercise its enforcement discretion on a number of acquisition-related issues discussed below.

The Section 101(20)(D) exemption from “owner or operator” liability does not apply if that government “has caused or contributed to the release or threatened release of a hazardous substance from the facility.” For example, some actions or omissions during ownership (such as dispersing contaminated soil during excavation and grading and failing to prevent the release of hazardous substances) may cause or contribute to a release of hazardous substances from a property and make the local government ineligible for the exemption.<sup>9</sup>

In cases where it is unclear whether the Section 101(20)(D) exemption applies – or when a local government wishes to obtain additional liability protection – the EPA encourages local governments to achieve and maintain BFPP status pursuant to CERCLA §§ 101(40) and 107(r).

### **1. “Unit of State or Local Government”**

Many state and local governments have created entities to promote the acquisition, redevelopment, and reuse of abandoned properties. These entities often are established as redevelopment authorities or land banks. Other entities may include, but are not limited to, community development agencies and special districts. Generally speaking, redevelopment authorities are created to use significant governmental powers to develop or redevelop particular properties for a particular purpose. In contrast, land banks are created to acquire the growing number of privately or public-owned urban parcels that are not being reclaimed or redeveloped by market forces. The EPA recognizes the importance and increased use of these entities as tools to address vacant and potentially contaminated properties, improve existing land use practices, and support local community development.

The EPA is clarifying its enforcement intentions regarding CERCLA § 101(20)(D)’s use of the undefined term “unit of State or local government.” The EPA generally intends to treat any entity that meets the definition of “local government” found in the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 2 C.F.R. Part 200, (“Grant Regulations”)<sup>10</sup> as a “unit of State or local government” under CERCLA § 101(20)(D). The Grant Regulations define “local government” to mean any unit of government within a state, including a: (a) county; (b) borough; (c) municipality; (d) city; (e) town; (f) township; (g) parish;

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<sup>9</sup> For additional discussion of post-acquisition activities that may or may not be considered releases under CERCLA, see the disposal discussion beginning on page 8 of the EPA’s *Enforcement Discretion Guidance Regarding Statutory Criteria for Those Who May Qualify as CERCLA Bona Fide Prospective Purchasers, Contiguous Property Owners, or Innocent Landowners* (“Common Elements Guidance”) (Office of Enforcement and Compliance Assurance, July 29, 2019) available on the Agency’s website at <https://www.epa.gov/enforcement/common-elements-guidance>.

<sup>10</sup> 2 C.F.R. 200.64.

(h) local public authority, including any public housing agency under the United States Housing Act of 1937;<sup>11</sup> (i) special district; (j) school district; (k) intrastate district; (l) council of governments, whether or not incorporated as a nonprofit corporation under state law; and (m) any other agency or instrumentality of a multi-regional or multi-intrastate local government.<sup>12</sup>

Although the Grant Regulations do not expressly include a redevelopment authority, land bank, or community development agency within its definition of “local government,” the EPA generally intends to treat such entities as a “unit of State or local government” under CERCLA § 101(20)(D). Any entity that is uncertain whether it meets the Grants Regulations definition may want to consult the appropriate state or local government for a legal opinion on the matter.

## 2. “By Virtue of its Function as Sovereign”

The CERCLA § 101(20)(D) exemption from owner or operator liability includes other circumstances in which the local government acquires title to property “by virtue of its function as sovereign.” This phrase is undefined. To provide clarity to local governments, the EPA generally intends to exercise its enforcement discretion and treat a local government acquisition as “by virtue of its function as sovereign” only when the government acquires title to the property by exercising a uniquely governmental authority via a function that is unique to its status as a governmental body. In other words, the EPA expects to use its enforcement discretion when a local government acquires title to a property via a function that can only be effectively performed by governments using a mechanism only available to governments. Such uniquely governmental functions and specific limitations on the EPA’s enforcement discretion are discussed below.

### COMMON GOVERNMENTAL PROPERTY ACQUISITIONS BY VIRTUE OF ITS FUNCTION AS SOVEREIGN

- Tax delinquency and tax lien foreclosures
- Some transfers between governmental units
- Tax increment financing transactions
- Escheat
- Eminent domain authority for a public use
- Holding an unexercised right of way
- Demolition lien foreclosure
- Foreclosure while administering a government loan, loan guarantee, or loan insurance program
- Acting as a conservator or receiver under a clear and statutory mandate or regulatory authority

<sup>11</sup> 42 U.S.C. §§ 1437, *et seq.*

<sup>12</sup> 2 C.F.R. § 200.64.

### **a. Acquisition Through Purchase, Inheritance, Bequest, Gift, or Donation**

The EPA does not intend to exercise its enforcement discretion under CERCLA for acquisitions of title to property by local governments through purchase, inheritance, bequest, gift, or donation. The BUILD Act amendments removed the term “involuntary” from CERCLA § 101(20)(D); however, voluntary acquisitions such as these were not among the governmental acquisition methods expressly added to CERCLA § 101(20)(D) by the BUILD Act. These methods of acquisition are available to private parties and are not uniquely governmental and, therefore, the EPA does not intend to treat them as “by virtue of its function as sovereign” acquisitions.<sup>13</sup>

Local governments seeking to acquire title to property through purchase, inheritance, bequest, gift, or donation should consider the availability of other liability protections, such as the BFPP liability protection under Sections 101(40) and 107(r)(1). In limited circumstances, local governments also may be eligible for the innocent landowner defense under Sections 107(b)(3) and 101(35)(A)(ii). The criteria for establishing these liability protections is discussed in Paragraphs IV.B. and IV.C. below.

### **b. Acquisition by Transfer between Government Entities**

CERCLA § 101(20)(D) does not address the acquisition of title to a contaminated property that is transferred from one government entity to another. A common example of such a transfer is when a city or county acquires the title of a tax delinquent property through tax lien foreclosure and then transfers it through a quit claim deed to a redevelopment authority, land bank, or other local government entity.

To assist local governments, the EPA is clarifying how it intends to exercise its enforcement discretion regarding the applicability of CERCLA § 101(20)(D) to intergovernmental property transfers. The EPA generally intends to treat the transferee of an intergovernmental property transfer as having acquired the title “by virtue of its function as sovereign” under CERCLA § 101(20)(D) in certain circumstances. These include when a governmental transferee acquires title to the property by exercising a uniquely governmental authority via a function that is unique to its status as a governmental body. A common example is when a land bank’s enabling statute provides that conveyances of foreclosed tax delinquent properties by a city or county to the land bank are “intergovernmental transfers” in order to exempt them from disposition requirements that may apply to transfers to private parties (*e.g.*, a requirement to use a public auction or public bidding for local government property transfers). The EPA intends to exercise its enforcement discretion in this circumstance provided the transferor and transferee have not caused or contributed to a release or threatened release and are not otherwise potentially liable under CERCLA (*e.g.*, as an arranger or transporter).

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<sup>13</sup> There may be limited situations where government entities acquire title to property through purchase, inheritance, bequest, gift or donation in a way that also may be through the exercise of a uniquely governmental authority. For instance, a government entity may exercise a uniquely governmental authority to purchase property through Tax Increment Financing to make public improvements to the property through the use of property taxes. In these limited situations, the EPA intends to exercise its enforcement discretion to treat such acquisitions as “by virtue of its function as sovereign” under Section 101(20)(D).

Property transactions with PRPs and transfers of property that the EPA deems are intended to interfere with CERCLA's liability scheme are not eligible for the EPA's enforcement discretion. A local government transferee should consider obtaining BFPP or innocent landowner status prior to the transfer of a contaminated property if it is uncertain whether it is eligible for the Section 101(20)(D) liability exemption or the EPA's enforcement discretion. The BFPP liability protection, the innocent landowner defense, and the exercise of the EPA's enforcement discretion in transfer situations, are discussed in Paragraphs IV.B. and IV.C. below.

### **c. Acquisition by Escheat**

Escheat is the reversion of private property to a government in the absence of legal claimants or heirs. CERCLA § 101(35)(A)(ii) addresses escheat; however, Section 101(20)(D) does not. Notwithstanding, escheat is a method of acquisition that occurs pursuant to the exercise of a uniquely governmental authority and via a function that is unique to a government entity's status as a governmental body. Consistent with its long-standing policy, the EPA generally intends to exercise its enforcement discretion to treat escheat as an acquisition of title that is "by virtue of its function as sovereign" and exempt from the definition of "owner or operator under Section 101(20)(D)."<sup>14</sup> A local government that acquires title to a property by escheat may also be able to establish the innocent landowner defense under Sections 107(b)(3) and 101(35)(A)(ii) of CERCLA. This defense is discussed in Paragraph IV.C. below.

### **d. Acquisition Through the Exercise of Eminent Domain Authority**

Eminent domain is the power of a government to take property from a private party and provide compensation. It can be used to acquire property for public uses and, in some instances, for private economic development. This authority is sometimes initiated and exercised in conjunction with other authorities to use or address contaminated property. The innocent landowner defense in CERCLA § 101(35)(A)(ii) addresses government acquisition "through the exercise of eminent domain authority by purchase or condemnation."<sup>15</sup> The BFPP liability protection also may be available to a local government that acquires property through the exercise of eminent domain authority.

CERCLA § 101(20)(D) does not address the exercise of eminent domain authority. The EPA generally intends to exercise its enforcement discretion to treat the exercise of eminent domain authority for a public use as an acquisition of title "by virtue of its function of sovereign" under Section 101(20)(D). Examples of eminent domain acquisitions for a public use may include, but are not limited to, parks, recreation, and civic buildings and areas to serve the general public; mass transit, infrastructure, and utility projects to serve the general public; and projects to address a threat to public health, safety, and the environment. Although it is not binding upon the EPA, the limitations on the use of funds for eminent domain in the Transportation, Housing and Urban Development, and Related Agencies Appropriations Act of 2018 informs the EPA's

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<sup>14</sup> See *Municipal Immunity from CERCLA Liability for Property Acquired through Involuntary State Action* (October 20, 1995), at 5. Available on the Agency's website at <https://www.epa.gov/enforcement/guidance-municipal-immunity-cercla-liability-property-acquired-through-involuntary-state>.

<sup>15</sup> CERCLA §§ 101(35)(A)(ii) and 107(b)(3), 42 U.S.C. §§ 9601(35)(A)(ii) and 9607(b)(3) includes several requirements, including the exercise of due care, that a government entity must meet to establish the defense.

exercise of its enforcement discretion for the eminent domain authority for public use and also may be of relevance to local government entities considering such an acquisition.<sup>16</sup>

The EPA generally does not intend to exercise its enforcement discretion to treat eminent domain acquisitions of title for economic development that primarily benefits private entities as “by virtue of its function as sovereign” under CERCLA § 101(20)(D). A local government that acquires a title to property through the use of eminent domain authority for public use or economic development that primarily benefits private entities may still be able to establish the BFPP liability protection under Sections 101(40) and 107(r) or the innocent landowner defense under Sections 107(b)(3) and 101(35)(A)(ii). These liability protections are discussed in Paragraphs IV.B. and IV.C. below.

### **B. Bona Fide Prospective Purchaser Protection**

The BFPP liability protection in CERCLA §§ 101(40) and 107(r)(1) may be available for a local government that purchases or leases contaminated property if it establishes its BFPP status prior to acquisition and maintains its BFPP status after acquisition. The BFPP protection is self-implementing but requires parties – including local governments – to demonstrate they have met the statute’s pre-acquisition “threshold criteria” and post-acquisition “continuing obligations”<sup>17</sup> described below. As another basis for liability protection, the EPA generally encourages local governments to consider layering their available liability protections and to establish and maintain BFPP status even when another liability protection may apply.

Under CERCLA §§ 101(40) and 107(r)(1), a BFPP is a person who acquires ownership of or a leasehold interest in a property after January 11, 2002, and meets the following threshold criteria:

- The person performed AAI into the previous ownership and uses of the property prior to acquisition; and
- The person is not potentially liable for response costs at the property before the acquisition and has “no affiliation” with any other party that is potentially liable for response costs at the property.

CERCLA § 101(40)(B) provides additional continuing obligations criteria for maintaining BFPP status after property acquisition, including:

- Demonstrating that all disposal of hazardous substances occurred before the party acquired the property (no disposal after acquisition);

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<sup>16</sup> Section 407 of the “Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2018,” Division L, Pub. L. No. 115-141, 132 Stat. 971, limits the use of funds for eminent domain as follows: “[p]ublic use shall not be construed to include economic development that primarily benefits private entities: Provided further, That any use of funds for mass transit, railroad, airport, seaport or highway projects, as well as utility projects which benefit or serve the general public (including energy-related, communication-related, water-related and wastewater-related infrastructure), other structures designated for use by the general public or which have other common-carrier or public-utility functions that serve the general public and are subject to regulation and oversight by the government, and projects for the removal of an immediate threat to public health and safety or brownfields as defined in the Small Business Liability Relief and Brownfields Revitalization Act (Pub. L. No. 107–118, 115 Stat. 2356 (2002)) shall be considered a public use for purposes of eminent domain.”

<sup>17</sup> See Common Elements Guidance, *supra* note 10, at 5.

- Complying with land use restrictions and not impeding the effectiveness or integrity of institutional controls (discussed further in Paragraph V.C. below);
- Exercising appropriate care by taking “reasonable steps” to prevent the release of hazardous substances. These obligations are site-specific but may include stopping continuing releases, preventing threatened future releases, and/or limiting exposure to earlier hazardous substance releases. Institutional controls may play a critical role in complying with reasonable steps;
- Providing full cooperation, assistance, and access to persons authorized to conduct response actions or natural resource restoration;
- Complying with information requests and administrative subpoenas; and
- Providing legally required notices.

To remain protected from CERCLA liability for the existing contamination while it owns the property, a local government must maintain its BFPP status for as long as the potential for liability exists. Potential liability depends on the site-specific factors including the nature and extent of the hazardous substances, the potential for exposure leading to unacceptable human health and/or ecological risk, and the nature and timing of any response action that the EPA or other parties have performed or may perform in the future. Also, it is important to note that a local government may become liable for any disposals after acquisition.<sup>18</sup>

BFPPs that continue to meet the criteria in CERCLA §§ 101(40) and 107(r) are not liable as owners or operators for CERCLA response costs, but the property they acquire may be subject to a windfall lien when an EPA response action has increased the fair market value of the property.<sup>19</sup> The United States, after spending taxpayer money for cleanup at a property, may place a windfall lien on the property for the lesser of the unrecovered response costs or the increase in fair market value at the property attributable to the Superfund cleanup.<sup>20</sup>

Consistent with the discussion above in Paragraph IV.A.2.b., the EPA generally intends to exercise its enforcement discretion regarding certain intergovernmental transfers of property. If a government entity transferring a property has fulfilled the requirements to achieve and maintain BFPP status pursuant to CERCLA §§ 101(40) and 107(r), the EPA generally intends to treat the

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<sup>18</sup> See Common Elements Guidance, *supra* note 10, at 8.

<sup>19</sup> CERCLA contains two sections under which federal liens arise. This document only discusses windfall liens under CERCLA § 107(r), 42 U.S.C. § 9607(r), and does not discuss liens for unrecovered response costs under CERCLA § 107(l), 42 U.S.C. § 9607(l). For more information on CERCLA § 107(l) liens, please see *Use of Federal Superfund Liens to Secure Response Costs* (May 8, 2002), available on the Agency’s website at: <https://www.epa.gov/enforcement/guidance-using-federal-superfund-liens-secure-response-costs>.

<sup>20</sup> The windfall lien provision is found in CERCLA § 107(r), 42 U.S.C. § 9607(r). The EPA anticipates that there may be situations where a site has a windfall lien and a BFPP wants to satisfy any existing or potential windfall lien before or close to the time of acquisition. The EPA and the Department of Justice jointly issued the *Interim Enforcement Discretion Policy Concerning “Windfall Liens” Under Section 107(r) of CERCLA* (July 16, 2003), available at <https://www.epa.gov/enforcement/interim-guidance-enforcement-discretion-concerning-windfall-liens-cercla-section-107r> which includes a model agreement to facilitate resolution of windfall liens. The policy also provides guidance on how the EPA intends to perfect specific windfall liens and when the EPA may or may not seek to foreclose on windfall liens.

government transferee as within the scope of the BFPP liability protection, even if the transferee does not perform AAI prior to the transfer. In this scenario, the transferee must still achieve and maintain BFPP status pursuant to CERCLA §§ 101(40) and 107(r).<sup>21</sup>

### **C. Third Party and Innocent Landowner Defenses**

CERCLA § 107(b)(3) provides a “third party” affirmative defense to CERCLA liability for any owner, including a local government, that can prove, by a preponderance of the evidence, that the contamination was caused solely by an act or omission of a third party whose act or omission did not occur “in connection with a contractual relationship.” An entity asserting CERCLA § 107(b)(3) status also must show that it exercised due care with respect to the contamination and that it took precautions against foreseeable acts or omissions, and the consequences thereof, by the third party that caused the contamination.

CERCLA’s third-party defense also includes an “innocent landowner defense” as an exclusion to the definition of a “contractual relationship” in Section 101(35). The “innocent landowner defense” applies to entities that meet the criteria set forth in CERCLA §§ 101(35) and 107(b)(3). CERCLA § 101(35)(A) sets forth a definition of innocent landowner that includes “a government which acquired the facility by escheat, or through any other involuntary transfers or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.” Although the EPA generally intends to exercise its enforcement discretion to treat local governments that acquire property through escheat or eminent domain under certain circumstances (discussed in Paragraph IV.A. above) as exempt under Section 101(20)(D), Section 101(35)(A)(ii) provides an additional liability protection through an affirmative defense for these types of acquisitions, provided other requirements, including the exercise of due care, are satisfied.

Consistent with the discussion above in Paragraphs IV.A.2.b. and IV.B., the EPA generally intends to exercise its enforcement discretion regarding certain intergovernmental transfers of property. If a government entity transferring a property has fulfilled the requirements to achieve and maintain the innocent landowner defense pursuant to CERCLA §§ 101(35) and 107(b)(3), the EPA generally intends to treat the government transferee as within the scope of the innocent landowner defense, even if the transferee does not perform AAI prior to the transfer. In this scenario, the transferee must still achieve and maintain innocent landowner status pursuant to CERCLA §§ 101(35) and 107(b)(3).

For more information on qualifying for the BFPP and innocent landowner protections, please see the EPA’s Common Elements Guidance.<sup>22</sup>

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<sup>21</sup> There may be other circumstances that are similar to transfers between government entities where a liability protection may apply. For instance, a redevelopment authority that has achieved and maintained BFPP protection for a specific property may merge with a separate government entity to create a new redevelopment authority or community development agency. The EPA may exercise its enforcement discretion to not require the new authority to perform AAI at the property prior to the merger, if the new entity continues to meet its other BFPP obligations.

<sup>22</sup> Common Elements Guidance, *supra* note 10.

## V. OTHER CONSIDERATIONS

Local governments that become involved in the cleanup and redevelopment of contaminated properties subject to CERCLA should be familiar with a number of additional considerations discussed below. For example, CERCLA includes liability protections that may apply to other cleanup-related activities by local governments. In addition, CERCLA includes cleanup funding resources that local governments may be eligible for. Finally, local governments may have responsibilities for ensuring the effectiveness of institutional controls during and after cleanup-related activities. These additional CERCLA considerations are discussed below.

### A. CERCLA § 128(b) Enforcement Bar

The EPA recognizes that “[t]he vast majority of contaminated sites across the Nation will not be cleaned up by the Superfund program. Instead, most sites will be cleaned up under State authority.”<sup>23</sup> Using these authorities, state response programs play a critical role in the assessment and cleanup of many of the contaminated properties typically acquired by local governments. CERCLA § 128(b) was enacted in 2002 to address the potential CERCLA liability concerns of parties that conduct cleanups of certain properties in compliance with state response programs. Section 128(b) provides a liability protection known as the “enforcement bar” to parties that are conducting or have completed a cleanup of an eligible response site<sup>24</sup> in compliance with a state response program, subject to certain exceptions.<sup>25</sup> As a result, a local government that is conducting or has completed a cleanup of an eligible response site in compliance with a state response program may be protected from certain federal enforcement actions. It is important to note that although CERCLA § 128(b) may limit the EPA’s ability to take an enforcement action, it does not preclude third-party litigation. For more information about state cleanup programs, please see the Agency’s State and Tribal Brownfields Response Program: State Voluntary Cleanup Programs website.<sup>26</sup>

### B. Disposal of Municipal Solid Waste at Contaminated Properties

CERCLA § 107(p) provides a qualified exemption from CERCLA liability for certain residential, small business, and non-profit generators of municipal waste disposed at sites on CERCLA’s NPL. However, this exemption does not apply to local governments that owned the site or operated at the site. For more information on the municipal solid waste exemption and the EPA’s guidance on the exemption, please see the Agency’s website.<sup>27</sup>

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<sup>23</sup> See legislative history for the CERCLA amendments contained in the Small Business Liability Relief and Brownfields Revitalization Act (Pub. L. No. 107-118, 115 Stat. 2356). S. Rep. No. 107-2 (2001) at 15.

<sup>24</sup> An “eligible response site” as defined in CERCLA § 101(41), 42 U.S.C. § 9601(41), generally is a site that meets the definition of a “brownfield site” in CERCLA § 101(39), 42 U.S.C. § 9601(39), but is subject to certain additional inclusions and exclusions.

<sup>25</sup> For a complete description of the enforcement bar requirements and exceptions, see CERCLA § 128(b), 42 U.S.C. § 9628(b).

<sup>26</sup> Available on the Agency’s website at <https://www.epa.gov/brownfields/state-and-tribal-brownfield-response-programs>.

<sup>27</sup> *Interim Guidance on the Municipal Solid Waste Exemption under CERCLA Section 107(p)* (Office of Site Remediation Enforcement, August 23, 2003) on the Agency’s website at <https://www.epa.gov/enforcement/interim-guidance-municipal-solid-waste-exemption-under-superfund>.

### **C. Liability Protection for Emergency Response at Contaminated Property**

Local governmental entities, especially fire, health, and public safety departments, are often the first responders to emergencies and other dangerous situations at contaminated properties in their communities. So as not to interfere with these activities, CERCLA § 107(d)(2) provides that state or local governments will not be liable for “costs or damages as a result of actions taken in response to an emergency created by a release or threatened release of a hazardous substance by or from property owned by another party.”

In addition, CERCLA § 123 authorizes the EPA to reimburse non-liable local governments for the costs of temporary emergency measures taken in response to releases within their jurisdiction. These temporary measures must be “necessary to prevent or mitigate injury to human health or the environment associated with the release or threatened release of any hazardous substance, pollutant, or contaminant.” This reimbursement option is intended to give financial assistance to government entities that do not have a budget allocated for emergency response and cannot otherwise adequately respond to emergencies. The amount of the reimbursement may not exceed \$25,000 for a single response.

### **D. Institutional Controls**

When contamination remains on a property during or after cleanup activities, institutional controls (ICs) may be used in combination with engineered controls to ensure protection of human health and the environment. The EPA’s IC guidance on “planning, implementing, maintaining, and enforcing” (PIME) describes ICs as “non-engineered instruments, such as administrative and legal controls, that help to minimize the potential for exposure to contamination and/or protect the integrity of a response action. . . . [and] are designed to work by limiting land and/or resource use or by providing information that helps modify or guide human behavior at a site.”<sup>28</sup> The EPA typically uses ICs whenever contamination remains on-site in a manner that precludes unlimited use and unrestricted exposure at the property. ICs are often needed both before and after completion of the remedial action.

Regardless of whether a local government asserts BFPP status, a local government also may have a direct role in implementing, monitoring, ensuring compliance with, and enforcing certain ICs. For example, a local government may help to ensure IC effectiveness through its direct access to relevant public records, regulation of zoning and the issuance of building permits, or use of its legal authority to implement or enforce ICs. A local government may work proactively with developers, prospective buyers and tenants, and other parties to ensure that IC requirements are understood and properly integrated into the planning and future reuse of the property.

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<sup>28</sup> See *A Guide to Planning, Implementing, Maintaining, and Enforcing Institutional Controls at Contaminated Sites* (“PIME Guidance”) (Office of Enforcement and Compliance Assurance, December 2012) available on the Agency’s website at <https://semspub.epa.gov/work/HQ/175446.pdf>.

If ICs are already in place on a particular property, it is important for local governments to understand the obligations that the ICs impose and to consider how those obligations might be viewed by future owners, developers, and property users. In some situations, the EPA or the state may be willing to modify existing ICs to facilitate the appropriate reuse of the property as long as the engineered controls component of the cleanup remains protective of human health and the environment and will not be compromised. For more information about IC issues, visit the EPA's collection of Superfund and Institutional Controls documents at the Agency's website.<sup>29</sup>

### CATEGORIES OF INSTITUTIONAL CONTROLS

- Proprietary Controls (e.g., easement, real covenant, statutory covenant)
- Governmental Controls (e.g., zoning, building permit, land use ordinance)
- Enforcement and Permit Tools (e.g., consent decree, permit, order)
- Informational Devices (e.g., deed notice, government advisory, state registry)

## VI. Contact Information

If you have any questions about this guidance, please contact Matthew Sander (202-564-7233 or [sander.matthew@epa.gov](mailto:sander.matthew@epa.gov)) or Craig Boehr (202-564-5162 or [boehr.craig@epa.gov](mailto:boehr.craig@epa.gov)) in the EPA's Office of Site Remediation Enforcement.

*Disclaimer: This memorandum is intended solely for the guidance of EPA employees. It is not a rule and does not alter liabilities or limit or expand obligation under any federal, state, tribal, or local law. It is not intended to and does not create any substantive or procedural rights for any person at law or equity. The extent to which the EPA applies the memorandum will depend on the facts of each case.*

cc: Susan Parker Bodine, Assistant Administrator, Office of Enforcement and Compliance Assurance  
Lawrence E. Starfield, Principal Deputy Assistant Administrator, Office of Enforcement and Compliance Assurance  
Peter Wright, Assistant Administrator, Office of Land and Emergency Management  
Barry Breen, Principal Deputy Assistant Administrator, Office of Land and Emergency Management  
Steven Cook, Deputy Assistant Administrator, Office of Land and Emergency Management  
David R. Lloyd, Director, Office of Brownfields and Land Revitalization  
Dana Stalcup, Acting Director, Office of Superfund Remediation and Technology Innovation  
Reggie Cheatham, Director, Office of Emergency Management  
John Michaud, Associate General Counsel, Office of General Counsel  
Thomas A. Mariani, Jr., DOJ Environment and Natural Resources Division

<sup>29</sup> See <https://www.epa.gov/superfund/superfund-institutional-controls-guidance-and-policy>.

**APPENDIX A**

| <b>Potential CERCLA Liability Protections for Local Governments</b>                | <b>Methods of Property Acquisition</b> |                   |                 |                       |                 |                 |                               |                    |                      |
|--|--|-------------------|-----------------|-----------------------|-----------------|-----------------|-------------------------------|--------------------|----------------------|
|  | <b>Tax Lien, Delinquency and</b>       | <b>Bankruptcy</b> | <b>Escheat</b>  | <b>Eminent Domain</b> | <b>Transfer</b> | <b>Purchase</b> | <b>Inheritance or Bequest</b> | <b>Abandonment</b> | <b>Gift/Donation</b> |
| <b>State and Local Government Acquisitions</b><br><i>§ 101(20)(D)</i>              | ●                                      | ●                 | ● <sup>30</sup> | ● <sup>31</sup>       | ● <sup>32</sup> |                 |                               | ●                  |                      |
| <b>Bona Fide Prospective Purchasers</b><br><i>§§ 101(40) and 107(r)(1)</i>         | ●                                      | ●                 | ●               | ●                     | ●               | ●               | ●                             | ●                  | ●                    |
| <b>Third Parties and Innocent Landowners</b><br><i>§§ 107(b)(3) and 101(35)(A)</i> |  |                   | ●               | ●                     |                 | ● <sup>33</sup> | ●                             |                    |                      |

<sup>30</sup> See Paragraph IV.A.2.c. above.

<sup>31</sup> See Paragraph IV.A.2.d. above.

<sup>32</sup> See Paragraph IV.A.2.b. above.

<sup>33</sup> Entities that acquire property and had no knowledge of the contamination at the time of purchase may be eligible for the "innocent landowner" defense to Superfund liability if they conducted AAI prior to purchase and complied with other pre- and post-purchase requirements.

## APPENDIX B

| Subject  | Relevant EPA Documents, Guidance, and Webpages  |
|--|---|
| <b>State and Local Government Acquisitions</b> | <ul style="list-style-type: none"> <li>• Process for Risk Evaluation, Property Analysis and Reuse Decisions for Local Governments Considering the Reuse of Contaminated Properties at <a href="https://www.epa.gov/land-revitalization/prepared">https://www.epa.gov/land-revitalization/prepared</a> (April 2016)</li> <li>• Policy on Interpreting CERCLA Provisions Addressing Lenders and Involuntary Acquisitions by Government Entities at <a href="https://www.epa.gov/enforcement/guidance-lenders-and-involuntary-acquisitions-government-entities">https://www.epa.gov/enforcement/guidance-lenders-and-involuntary-acquisitions-government-entities</a> (June 30, 1997)</li> <li>• Policy on CERCLA Enforcement Against Lenders and Government Entities that Acquire Property Involuntarily at <a href="https://www.federalregister.gov/documents/1995/12/11/95-29842/cercla-enforcement-against-lenders-and-government-entities-that-acquire-property-involuntarily">https://www.federalregister.gov/documents/1995/12/11/95-29842/cercla-enforcement-against-lenders-and-government-entities-that-acquire-property-involuntarily</a> (December 11, 1995)</li> <li>• Municipal Immunity from CERCLA Liability for Property Acquired through Involuntary State Action at <a href="https://www.epa.gov/enforcement/guidance-municipal-immunity-cercla-liability-property-acquired-through-involuntary-state">https://www.epa.gov/enforcement/guidance-municipal-immunity-cercla-liability-property-acquired-through-involuntary-state</a> (October 20, 1995)</li> <li>• Fact Sheet: The Effect of Superfund on Involuntary Acquisitions of Contaminated Property by Government Entities at <a href="https://www.epa.gov/enforcement/fact-sheet-effect-superfund-involuntary-acquisitions-contaminated-property-government">https://www.epa.gov/enforcement/fact-sheet-effect-superfund-involuntary-acquisitions-contaminated-property-government</a> (December 13, 1995)</li> </ul> |
| <b>Bona Fide Prospective Purchasers</b>        | <ul style="list-style-type: none"> <li>• Enforcement Discretion Guidance Regarding Statutory Criteria for Those Who May Qualify as CERCLA Bona Fide Prospective Purchasers, Contiguous Property Owners, or Innocent Landowners (“Common Elements”) at <a href="https://www.epa.gov/enforcement/common-elements-guidance">https://www.epa.gov/enforcement/common-elements-guidance</a> (July 29, 2019)</li> <li>• Enforcement Discretion Guidance Regarding the Affiliation Language of CERCLA’s Bona Fide Prospective and Contiguous Property Owner Liability Protections at <a href="https://www.epa.gov/enforcement/guidance-affiliation-language-cerclas-bfpp-and-cpo-liability-protections">https://www.epa.gov/enforcement/guidance-affiliation-language-cerclas-bfpp-and-cpo-liability-protections</a> (September 21, 2011)</li> <li>• Interim Enforcement Discretion Policy Concerning “Windfall Liens” Under Section 107(r) of CERCLA at <a href="https://www.epa.gov/enforcement/interim-guidance-enforcement-discretion-concerning-windfall-liens-cercla-section-107r">https://www.epa.gov/enforcement/interim-guidance-enforcement-discretion-concerning-windfall-liens-cercla-section-107r</a> (July 16, 2003)</li> </ul>   |
| <b>Third Parties and Innocent Landowners</b>   | <ul style="list-style-type: none"> <li>• Enforcement Discretion Guidance Regarding Statutory Criteria for Those Who May Qualify as CERCLA Bona Fide Prospective Purchasers, Contiguous Property Owners, or Innocent Landowners (“Common Elements”) at <a href="https://www.epa.gov/enforcement/common-elements-guidance">https://www.epa.gov/enforcement/common-elements-guidance</a> (July 29, 2019)</li> </ul>  |
| <b>All Appropriate Inquiries</b>               | <ul style="list-style-type: none"> <li>• All Appropriate Inquiries at <a href="https://www.epa.gov/brownfields/brownfields-all-appropriate-inquiries">https://www.epa.gov/brownfields/brownfields-all-appropriate-inquiries</a></li> </ul>  |

| Subject                             | Relevant EPA Documents, Guidance, and Webpages   |
|-------------------------------------|--|
| <b>Institutional Controls</b>       | <ul style="list-style-type: none"> <li>• Advanced Monitoring Technologies and Approaches to Support Long-Term Stewardship at <a href="https://www.epa.gov/enforcement/use-advanced-monitoring-technologies-and-approaches-support-long-term-stewardship">https://www.epa.gov/enforcement/use-advanced-monitoring-technologies-and-approaches-support-long-term-stewardship</a> (July 20, 2018)</li> <li>• Institutional Controls: A Guide to Planning, Implementing, Maintaining, and Enforcing Institutional Controls at Contaminated Sites at <a href="https://www.epa.gov/fedfac/institutional-controls-guide-planning-implementing-maintaining-and-enforcing-institutional">https://www.epa.gov/fedfac/institutional-controls-guide-planning-implementing-maintaining-and-enforcing-institutional</a> (December 2012)</li> <li>• Institutional Controls: A Guide to Preparing Institutional Control Implementation and Assurance Plans at Contaminated Sites at <a href="https://www.epa.gov/fedfac/institutional-controls-guide-preparing-institutional-control-implementation-and-assurance">https://www.epa.gov/fedfac/institutional-controls-guide-preparing-institutional-control-implementation-and-assurance</a> (December 2012)</li> <li>• Institutional Controls: A Citizen's Guide to Understanding Institutional Controls at Superfund, Brownfields, Federal Facilities, Underground Storage Tank, and Resource Conservation and Recovery Act Cleanups at <a href="https://www.epa.gov/fedfac/citizens-guide-understanding-institutional-controls-superfund-brownfields-federal-facilities">https://www.epa.gov/fedfac/citizens-guide-understanding-institutional-controls-superfund-brownfields-federal-facilities</a> (March 1, 2005)</li> <li>• Institutional Controls: A Site Manager's Guide to Identifying, Evaluating and Selecting Institutional Controls at Superfund and RCRA Corrective Action Cleanups at <a href="https://www.epa.gov/fedfac/institutional-controls-site-managers-guide-identifying-evaluating-and-selecting-institutional">https://www.epa.gov/fedfac/institutional-controls-site-managers-guide-identifying-evaluating-and-selecting-institutional</a> (September 2000)</li> </ul> |
| <b>State VCPs and MOAs</b>          | <ul style="list-style-type: none"> <li>• State voluntary cleanup programs and Memoranda of Agreement at <a href="https://www.epa.gov/enforcement/state-response-programs">https://www.epa.gov/enforcement/state-response-programs</a></li> </ul>   |
| <b>Other Relevant EPA Web pages</b> | <ul style="list-style-type: none"> <li>• Revitalization Handbook at <a href="https://www.epa.gov/enforcement/revitalization-handbook">https://www.epa.gov/enforcement/revitalization-handbook</a></li> <li>• Superfund Enforcement at <a href="https://www.epa.gov/enforcement/superfund-enforcement">https://www.epa.gov/enforcement/superfund-enforcement</a></li> <li>• Addressing Liability Concerns to Support Cleanup and Reuse of Contaminated Lands at <a href="https://www.epa.gov/enforcement/addressing-liability-concerns-support-cleanup-and-reuse-contaminated-lands">https://www.epa.gov/enforcement/addressing-liability-concerns-support-cleanup-and-reuse-contaminated-lands</a></li> <li>• State and local Government Activities and Liability Protections at <a href="https://www.epa.gov/enforcement/state-and-local-government-activities-and-liability-protections">https://www.epa.gov/enforcement/state-and-local-government-activities-and-liability-protections</a></li> <li>• Land Revitalization at <a href="https://www.epa.gov/land-revitalization">https://www.epa.gov/land-revitalization</a></li> </ul>  |



# Top 10 Questions to Ask When Buying a Superfund Site

Office of Enforcement and Compliance Assurance  
Office of Site Remediation Enforcement

Office of Solid Waste and Emergency Response  
Office of Superfund Remediation and Technology Innovation

The purpose of this document is to provide answers to some of the questions that a prospective purchaser may have when considering whether to purchase property at a privately owned Superfund site.

The U.S. Environmental Protection Agency (EPA) supports the reuse of Superfund sites and believes this document may be useful in clarifying some of the opportunities and issues associated with their reuse. For purposes of this document, a Superfund site is defined as any property on EPA's National Priorities List (NPL) where a hazardous substance has been released into the environment or has come to be located on or under. Thus, even if a property is not the source of the release of the contamination, it can be part of a Superfund site.<sup>1</sup>



## Information for Prospective Purchasers of Federally-Owned Superfund Sites

This document does not address the unique considerations associated with the purchase and transfer of real property on federally-owned Superfund sites (also known as federal facilities). While many of the questions and answers in this document are a useful starting point for prospective purchasers of property on federal facilities, Superfund cleanups at federal facilities are governed by CERCLA § 120 which has requirements specific to these facilities. For example, federal facility agreements between EPA and the current federal owner are required to address the clean up of these properties. A number of landowner liability issues unique to federal facilities are raised in the context of transfers of federal property and have been addressed by EPA guidance. While they warrant additional considerations, federal facilities are continuing to be cleaned up and purchased by local governments and developers and put back into reuse. Additional information on EPA's efforts to clean up federal facilities and make them available for reuse is available at <http://www.epa.gov/swefrr/>.

<sup>1</sup> The Superfund program and the authority to clean up Superfund sites was created by the federal Superfund law which is officially known as the *Comprehensive Environmental Response, Compensation, and Liability Act* ("CERCLA"), 42 U.S.C. § 9601, *et seq.*

*Disclaimer:* This document is provided solely as general information to highlight certain aspects of a more comprehensive program. It does not provide legal advice, have any legally binding effect, or expressly or implicitly create, expand, or limit any legal rights, obligations, responsibilities, expectations, or benefits for any person. This document is not intended as a substitute for reading the statute or the guidance documents described above. It is the prospective purchaser's sole responsibility to ensure that its proposed use does not interfere with or impede the site's cleanup or protectiveness. EPA does not offer any guarantees or warranties as to the compatibility of a proposed use with the cleanup. It is also the purchaser's sole responsibility to maintain liability protection status as a bona fide prospective purchaser.

The 2002 Superfund liability protections<sup>2</sup> are designed to be self-implementing, meaning that a prospective purchaser does not need to obtain approval from EPA prior to purchasing a Superfund site where an EPA cleanup or enforcement action is ongoing or has been completed. However, EPA strongly recommends that prospective purchasers contact the appropriate EPA Regional office<sup>3</sup> prior to purchasing a Superfund site or a property within a site to discuss the cleanup status of the site and other site-related issues.

## ***1. WHY IS IT A GOOD IDEA TO BUY A PROPERTY WITHIN A SUPERFUND SITE?***

**LOCATION, location, location.** Many Superfund sites have advantageous and desirable locations. Some federal, state, and local government agencies offer grants, loans, and tax incentives to encourage development and revitalization of contaminated and formerly contaminated properties and surrounding areas.<sup>4</sup>

Superfund sites throughout the country have been transformed into major shopping centers, business parks, residential subdivisions, and recreational facilities. Many more Superfund sites are being revitalized for use by small businesses. A large number of Superfund sites are suitable for revitalization even while cleanup on the property progresses. (See <http://www.epa.gov/superfund/programs/recycle/> for more information on revitalization of Superfund sites). Integrating the reuse of a Superfund site into the cleanup can often occur smoothly, which minimizes future surprises regarding undiscovered contamination.



A series of manufacturers at the Industri-Plex Superfund site in Woburn, Massachusetts once produced chemicals, insecticides, munitions, and glue products made from raw and chrome-tanned animal hides. A unique public/private partnership has redeveloped the site into a Regional Transportation Center, a major commercial and retail district, and a wetland preserve.

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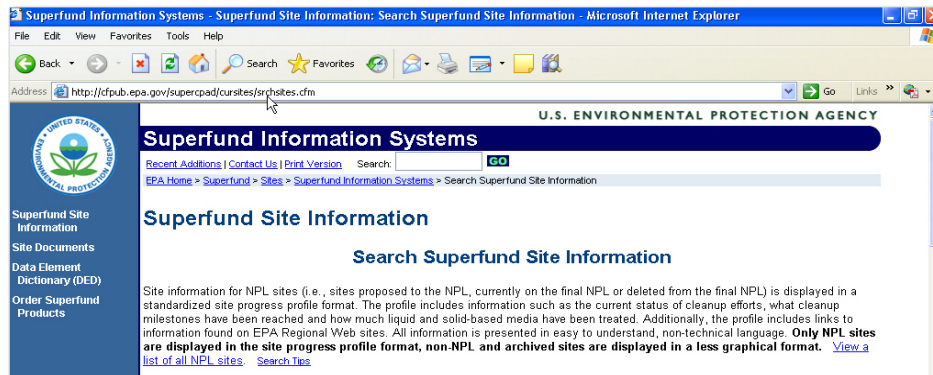
<sup>2</sup> The 2002 Superfund liability protections were created by the *Small Business Liability Relief and Brownfields Revitalization Act*, Pub. L. 107-118, also known as the “Brownfields Amendments,” which amended CERCLA.

<sup>3</sup> Information on contacting EPA’s Regional offices is available on EPA’s Web site at <http://www.epa.gov/epahome/wherewelive.htm#regiontext>

<sup>4</sup> Superfund sites are not eligible for grant funding under the Brownfields Amendments to CERCLA.

## 2. HOW DO I FIND INFORMATION ON A SITE'S CLEANUP STATUS AND IF IT IS SAFE FOR REUSE?

EPA's Regional contacts and internet sites will provide site-specific information. Much information is available online. For example, fact sheets describing a site's history, current cleanup status, and who to contact for more information are available on EPA's Superfund Web site at <http://cfpub.epa.gov/supercpad/cursites/srchsites.cfm>.



The vast majority of Superfund sites are protective of human health and the environment for certain types of reuse activities after they are cleaned up. However, not all site cleanups are protective for all uses. Superfund cleanups may be designed to accommodate specific future uses. For example, a property cleaned up to accommodate commercial/industrial uses may be protective for uses such as manufacturing, shopping or office complexes but not for residential use. Many sites will have use restrictions to protect the public and environment by limiting the site's future uses to activities that will not disturb the site's engineered cleanup. In some cases, Superfund sites, or portions of the sites, are protective enough such that site revitalization for certain uses can occur in conjunction with the cleanup. Integrating cleanup and reuse can introduce economic efficiencies and enable the property to be reused in a timely and appropriate manner throughout the cleanup process.

EPA also offers many tools to help facilitate the reuse of Superfund sites including:

- comfort/status letters<sup>5</sup>;
- site-specific reuse fact sheets;
- Ready for Reuse Determinations<sup>6</sup>;
- performance measures which indicate which sites or parts of sites are ready for their anticipated use; and
- bona fide prospective purchaser "doing work" agreements. (See Question 10 for additional information on these tools.)

Some EPA Regional offices have developed prospective purchaser inquiry procedures and schedule conference calls or meetings with prospective purchasers to answer questions and discuss whether the proposed use of the site is compatible with an ongoing cleanup, any current or future property use restrictions on the site, resolution of potential liens, and other matters.

<sup>5</sup> A comfort/status letter is intended to combat the stigma and concerns about cleanup liability at contaminated sites by clarifying the cleanup status and likelihood of EPA involvement at a site. See Question 10 for more information on the use of comfort/status letters..

<sup>6</sup> A Ready for Reuse (RfR) Determination is an environmental status report documenting that EPA has made a technical determination, in consultation with States, Tribes, and local governments, that all or a portion of the property at a Superfund can support specified types of uses and remain protective of human health and the environment. The guidance is available on EPA's Web site at <http://www.epa.gov/superfund/programs/recycle/pdf/rfrguidance.pdf>

### ***3. HOW DO I IDENTIFY ALL OF THE PARTIES I HAVE TO DEAL WITH TO BUY THE SITE OR A PROPERTY WITHIN THE SITE AND HOW IS EPA INVOLVED?***

**THERE is no simple solution to identify all of the parties associated with a Superfund site but the process begins with the current owner.** As with the purchase of any property, negotiations to buy a Superfund site begin with the current owner who can be identified through property title or tax records. EPA rarely owns the site being cleaned up. Generally, EPA's Regional offices may assist in addressing the following questions:

- What is the current status of a site's cleanup and what are EPA's future anticipated actions?
- Is the proposed redevelopment compatible with a site's cleanup and with the existing and potential future property use restrictions? **Note:** EPA does not offer guarantees of compatibility.
- Is the prospective purchaser aware of the applicable landowner liability protections under Superfund?
- How can EPA work with the prospective purchaser to settle or resolve any EPA liens?<sup>7</sup>

EPA is willing to work with prospective purchasers to clarify a property's cleanup status and potential liability issues including the existence and satisfaction of EPA liens and property use restrictions. States also have cleanup programs and prospective purchasers should contact the appropriate state environmental agency to make certain they are aware of planned or ongoing state-lead cleanup actions at the property.



Alcyon Lake in Pitman, New Jersey, had been severely contaminated by the nearby Lipari Landfill. EPA teamed with the state, local government, and community to develop a cleanup plan that allowed for the expansion of the park and accelerated cleanup of the lake.

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<sup>7</sup> See Question 8 for more information on EPA liens.

#### **4. IF I BUY THE PROPERTY, WILL I BE RESPONSIBLE FOR PAST OR FUTURE CLEANUP COSTS?**

**In most cases, a prospective purchaser will not be responsible for past or future Superfund cleanup costs for existing contamination that is present on the property when the site is purchased.**

##### **Criteria for Managing Liability as a BFPP**

- All disposal of hazardous substances occurred before acquisition
- The person made all appropriate inquiries about the property before acquisition
- The person provided all legally required notices with respect to discovery or release of any hazardous substances at the facility
- The person exercises appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to prevent releases
- The person provides full cooperation and access to EPA
- The person complies with land use restrictions in connection with the response action and does not impede the effectiveness of institutional controls
- The person complies with requests for information and subpoenas
- The person is not potentially liable or affiliated with a potentially responsible party.

New purchasers are protected from owner or operator liability under the Superfund law so long as the new purchaser meets the definition of a “bona fide prospective purchaser” (BFPP)<sup>8</sup>.

This BFPP provision states that a purchaser who acquires a Superfund site or other contaminated property after January 11, 2002, and who complies with statutory criteria, will not incur federal Superfund liability as an owner of the property. (*See* text box “Criteria for Managing Liability as a BFPP” on this page.)

To remain protected from Superfund liability for the existing contamination at the site, a new purchaser must achieve and maintain BFPP status for as long as potential liability exists.

Potential liability exists for as long as contamination remains on the property and/or the statute of limitations on cost recovery actions is in effect.

Although a BFPP is not personally liable, the property itself could be subject to a lien as a result of EPA incurring costs to clean up the site (*See* Question 8 below).

Some of the criteria for obtaining BFPP status must be satisfied prior to acquiring a site or property within the site. Other criteria for maintaining BFPP status are ongoing obligations that must be met after purchase of the property.

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<sup>8</sup> 42 U.S.C. § 9601(40).

One example of a threshold criterion that must be satisfied prior to purchase is that a BFPP must perform “all appropriate inquiries” (AAI) concerning environmental conditions at the site. The final rule for AAI, which sets forth standards for satisfying the criterion, became effective on November 1, 2006. Information on how to comply with the AAI regulation is available on EPA’s Web site at <http://www.epa.gov/brownfields/regneg.htm>. (See text box “Criteria for All Appropriate Inquiry”.)

It is important to note that new purchasers who have achieved BFPP status could become liable for cleaning up contamination if they interfere with the existing cleanup, exacerbate existing contamination, or cause a new release of contamination.

EPA is willing to discuss potential liability issues, including qualifications for BFPP status, with prospective purchasers and their lenders. Please note that EPA cannot give prospective purchasers legal advice. Legal advice must be sought from private legal counsel, but EPA can explain the available liability protections.

#### Criteria for All Appropriate Inquiry

- Site inquiry by environmental professional
- Interviews with past/present owners
- Review of historical sources of information
- Search for recorded cleanup liens
- Review of federal, state and local records
- Visual inspection of site
- Specialized knowledge of BFPP
- Relationship of purchase price to value of property
- Commonly known/reasonably ascertainable information
- Obviousness of presence of contamination

Although a purchaser who achieves and maintains BFPP status is not responsible for existing contamination, situations may arise where the purchaser may nonetheless want to voluntarily clean up a site, rather than wait for the potentially responsible party or the government to do it.

When appropriate, EPA will enter into an agreement with a BFPP willing to perform a cleanup action at a site. EPA has developed a model agreement for BFPPs that is available on EPA’s Web site at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/bfpp-ra-mem.pdf>.

There are many reasons why a BFPP may want to perform a cleanup:

- **Faster Cleanup:** a BFPP may be able to clean up a site more quickly;
- **Better Coordination:** a BFPP may be better able to coordinate cleanup activities into its reuse and/or redevelopment plans;
- **Purchasing Incentives:** a BFPP may be able to negotiate a lower purchase price from the seller by undertaking cleanup work that the seller would otherwise be responsible for;
- **Windfall Lien Settlements:** a BFPP may be able to settle a windfall lien by agreeing to perform all or part of a necessary cleanup; and/or
- **Cost Recovery:** a BFPP performing a cleanup action may be entitled to cost recovery from responsible parties under appropriate circumstances.

## 5. *DO I NEED A DOCUMENT FROM EPA CONFIRMING THAT I HAVE BFPP STATUS?*

**No, the BFPP provision is self-implementing.** This means that a prospective purchaser may achieve, and after the purchase, maintain BFPP status without obtaining approval or oversight from EPA. In appropriate circumstances, however, EPA may issue a comfort/status letter to prospective purchasers or their lenders to describe:

- the cleanup status of a site;
- anticipated future cleanup actions overseen by EPA, if any;
- the available liability protection provisions;
- the site-specific reasonable steps a purchaser should take with respect to the appropriate care criteria; and
- the status of any EPA liens.

EPA recommends that prospective purchasers contact the appropriate EPA Regional office prior to purchase of a Superfund site to discuss the cleanup status of the site and other site-related issues. EPA Regional Superfund Redevelopment Initiative contact information is available on EPA's Superfund Web site at <http://www.epa.gov/superfund/programs/recycle/contact/redevelopment.html>. In addition, EPA strongly encourages prospective purchasers to contact the state environmental protection agency where the site is located to discuss potential state issues such as liability and additional cleanup.



Once contaminated with coal tar and creosote, the Reilly Tar & Chemical site in St. Louis Park, Minnesota now boasts a park, a residential development, and a pond that provides wildlife habitats.

## ***6. AS THE PROPERTY OWNER, WILL I BE RESPONSIBLE FOR ONGOING OR FUTURE CLEANUP ACTIONS AT THE SITE?***

**NO, a property owner with BFPP status generally will not be responsible for the ongoing or future cleanup actions, beyond resolving any applicable liens.** However, certain responsibilities associated with BFPP status may involve actions to prevent or mitigate releases of contamination. For example, in certain circumstances, BFPPs may need to take reasonable steps to stop continuing releases, prevent threatened future releases, and prevent or limit human, environmental, or natural resource exposure to earlier releases of contamination.

Examples of reasonable steps to fulfill appropriate care obligations could include, but may not be limited to, actions such as:

- providing notice of contamination to appropriate governmental officials;
- assessing threats after the discovery of contamination;
- restricting site access by erecting and maintaining signs and perimeter fences;
- segregating and containing deteriorating drums;
- identifying unknown materials in deteriorating drums; or
- maintaining and repairing existing on-site hazardous waste containment systems.

EPA has issued guidance, questions and answers, and a sample comfort/status letter on appropriate care and reasonable steps that are available on EPA's Web site at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf>.

A FAQs fact sheet addressing reasonable steps is available on EPA's Web site at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-ref.pdf>.



At the Avtex Fibers Superfund site in Front Royal, Virginia, EPA served in an advisory capacity to the local Economic Development Authority (EDA), the U.S. Soccer Foundation, and FMC Corporation as site stakeholders worked together to build four soccer fields on the site. September 2006 marked the opening of the Skyline Soccerplex. The EDA is continuing with redevelopment efforts for a commercial/industrial park and a nature conservation area.

**7. ARE THERE LIMITATIONS ON HOW I CAN USE THE SITE AND, IF SO, HOW CAN I FIND OUT WHETHER ANY PROPERTY USE RESTRICTIONS ARE IN EFFECT AND WHAT THEY ARE?**

**THERE may be limits on uses of the site or properties within the site.** The statutory criteria for maintaining BFPP status include not impeding the integrity or effectiveness of institutional controls (ICs) and complying with all land use restrictions. Accordingly, prospective purchasers must determine whether any temporary, permanent, or future use restrictions (such as ICs) are or will be placed on the site during cleanup or post-cleanup, whether these are short or long-term use restrictions, and how these use restrictions may affect their plans for the property.

In some cases, BFPPs may be asked to implement appropriate property use restrictions after purchasing the property. Prospective purchasers must also determine if engineered controls, such as a clay cap or monitoring wells, limit what they can do at the site property.

EPA encourages BFPPs to inquire about property restrictions before they purchase the site. Prospective purchasers can find out whether any use restrictions may apply to the site property now, or in the future, by contacting EPA's Regional office, the state environmental agency and/or the local government, and by talking to the current property owner. If a BFPP purchases a site before EPA has made a final cleanup decision, EPA may be unable to predict what property use restrictions may need to be implemented in the future. Prospective purchasers can also find out information on use restrictions in effect by performing all appropriate inquiries. (See Question 4 for more information on all appropriate inquiries.)



Davie Landfill in Broward County, Florida has been redeveloped into Vista View Park, which includes walking, horseback riding, and bike trails; a picnic area; and a catch-and-release fishing pond.

To ensure that BFPP liability protection is maintained, it is important that all the property use restrictions are implemented and followed and that the BFPP's use of the site does not adversely affect or impede the cleanup.

Enforcement of property use restrictions established as part of a cleanup (*e.g.*, restricting site property for commercial uses only) is normally overseen by the state or local government. Where contamination is left in place above unrestricted use levels, EPA (or the state) is required by law to conduct periodic reviews (at least every five years) to examine how the cleanup is functioning and whether it remains protective.

## **8. DOES EPA USE LIENS THAT COULD AFFECT ME IF I ACQUIRE A SITE OR PROPERTY WITHIN A SITE AND HOW CAN I RESOLVE OR SETTLE AN EPA LIEN?**

### **EPA uses two types of liens that may affect site property: Superfund liens and windfall liens.**

A Superfund lien entitles EPA to recover cleanup costs that EPA has incurred from the property owner. A windfall lien is potentially applicable to a site property if the owner is a BFPP. The windfall lien is designed to prevent an entity from realizing an unfair windfall from the purchase of a property that has been cleaned up using taxpayer dollars. EPA's potential cost recovery under a windfall lien is limited to the increase in fair market value of the property attributable to the cleanup or the United States' unrecovered response costs, whichever is less. BFPPs should contact their EPA Regional office regarding the existence of a lien or EPA's future intentions to perfect a lien on the property.



The MDI Site in Houston, Texas is located two miles east of downtown and is near an environmental justice community. EPA and the U.S. Department of Justice worked with the bankruptcy trustee to ensure that the purchaser of the site committed to perform the on-site cleanup work. This was the first settlement in which a BFPP agreed to perform the cleanup work at a Superfund site.

Both of these liens can be released or waived upon satisfaction before the purchase of the site. The satisfaction amount may be negotiated with EPA and would be embodied in a settlement agreement.

EPA may seek cash consideration, performance of work, or a combination of such consideration in connection with the lien releases and waivers. Because EPA liens affect the total value of the property, lien settlement negotiations need to include EPA, the current property owner, and the BFPP. Often the liens can be resolved or settled concurrently because both the Superfund lien and the windfall lien draw from the same available equity in a property. In addition, EPA may also issue a comfort/status letter to prospective purchasers or their lenders to describe the status of any EPA liens.

EPA has issued guidance, a model settlement document, and a sample comfort/status letter on windfall liens that are available on EPA's Web site at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-windfall-lien.pdf>.

EPA also has issued guidance and model notice letter on the timing and administrative procedures for EPA filing notice of a windfall lien on a property after acquisition by a BFPP that is available on EPA's Web site at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/wf-admin-mem.pdf>.

A FAQs fact sheet on windfall liens is available on EPA's Web site at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-windfall-lien-faq.pdf>.

## ***9. COULD I ENCOUNTER PROBLEMS WHEN I TRY TO GET FINANCING TO BUY A SITE OR BORROW FOR IMPROVEMENTS AND HOW CAN EPA HELP?***

**CHANGES to the federal Superfund law addressed many lender concerns, but prospective purchasers might still experience problems.** In the past, lenders were reluctant to provide financing for the purchase of Superfund sites because of concerns about:

- lender liability;
- potential liability of the owner affecting the owner's ability to repay the loan; and
- the impact of the contamination on the value of the site property that secures the loan.

These concerns are diminishing. A 1996 amendment to the federal Superfund law protects lenders from federal Superfund liability when the lenders comply with certain statutory requirements. In particular, the lenders may not participate in the management of the facility.

Use of environmental insurance policies is increasingly alleviating lenders' concerns about financial risks at Superfund sites. The passage of time and increased reuse of brownfields and Superfund sites are demonstrating to lenders the significant financial value that these properties have and the potentially low risks of financing their purchase and redevelopment.

In addition, the Brownfield Amendments to the federal Superfund law, which provide for BFPP status for new buyers, may provide assurance to lenders because these borrowers will not be liable and will not affect their ability to repay the lender.

EPA has many tools to help alleviate lenders' concerns about financing contaminated properties, including guidance documents, comfort/status letters, BFPP doing work agreements, and Ready for Reuse Determinations. EPA's willingness to work with buyers and their lenders makes the acquisition of Superfund properties more feasible than ever before.

## ***10. WHAT CAN EPA DO TO HELP A PROSPECTIVE PURCHASER DECIDE, AND CONVINCe LENDERS, TENANTS, AND OTHERS, THAT BUYING A SUPERFUND SITE IS A GOOD IDEA?***

**EPA has tools that can be used to demonstrate that buying or using a Superfund site can be a great opportunity.** Some of these tools include:

- **Comfort/Status Letters:** EPA may issue comfort/status letters to address the following:
  - status of the site;
  - future anticipated actions at the site;
  - available liability protections;
  - reasonable steps that a purchaser should take to stop any on-going releases and prevent future releases at sites where EPA has this information; and
  - the status of EPA liens.



- **Ready for Reuse (RfR) Determinations:** EPA may issue an RfR Determination to affirm that a site's conditions are protective of human health and the environment for specific types of uses.
- **BFPP "Doing Work" Agreements:** EPA may enter into a settlement agreement with a BFPP who wishes to perform part or all of a cleanup. The agreement provides for EPA oversight and may satisfy part or all of any windfall lien.
- **Lien Settlements:** EPA is willing to enter into negotiations and settlement agreements to resolve lien issues and facilitate reuse.
- **Discussions:** EPA Regional staff is often available to talk with or meet with prospective purchasers, sellers, lenders, and other stakeholders to discuss the issues critical to the successful purchase and reuse of a Superfund site. Providing examples of other Superfund sites that were successfully redeveloped and are now in reuse can also reassure local citizens and stakeholders about revitalization opportunities.
- **Site Reuse Fact Sheets:** EPA's Superfund Redevelopment Initiative Web site at <http://www.epa.gov/superfund/programs/recycle/> provides summary information about Superfund sites that have been reused. Detailed fact sheets for some sites are also available and may include data on economic impacts and environmental and social benefits resulting from the reuse of Superfund sites.
- **Partial Deletions:** While total cleanup of a site may take many years, many sites on EPA's national priorities list (NPL) include portions that have been cleaned up and may be available for productive use. These portions may be partially deleted from the NPL if EPA makes a determination that no further cleanup work is required, the state concurs, and necessary institutional controls are in place. Any person, including individuals, businesses, entities, states, local governments, and other federal agencies, may submit a petition requesting a partial deletion. EPA will evaluate the request and make a determination whether to proceed. A partial deletion of a portion of a Superfund site from the NPL can help to increase the site's marketability. **Please note:** EPA Superfund liens may still apply to the deleted parcel.

**Sites in Reuse**  
**Cascade Park Gasification Plant Superfund Site**  
 Intersection of Gadsden & Blithman, Tallahassee, Florida 32301

*View from the site looking southwest toward downtown Tallahassee (left); remedial activities begin at the Cascade Park site with a ground-breaking ceremony on November 15, 2005 (center); the former St. Augustine Branch crosses the site (right).*

Site size: Approximately 7.8 acres  
 Planned Site Reuses: Recreation and open space

**INTRODUCTION**  
 The remediation of the Cascade Park Gasification Plant Superfund site has become a key component of an ecological and cultural heritage planning effort in Florida's capital city. With ongoing consultation and support for site remediation from EPA Region 4 and the City of Tallahassee, Leon County, Blueprint 2000, and a group of local stakeholders have developed a conceptual revitalization plan for the Cascade Park site.

The Cascade Park site occupies a culturally and ecologically significant place in the history of Tallahassee. Located south of the state capitol building, the site is named for a scenic waterfall along St. Augustine Branch. In 1823, the City of Tallahassee's founders discovered the cascade and were inspired to select a nearby site as the location for Florida's capital. Historically, the Cascade Park site was also the location of an important community recreation field and gathering place for Tallahassee's residents.

Today, the City of Tallahassee is planning a new recreational park system, which aims to preserve the city's natural resources and to celebrate the Cascade Park site's cultural heritage. The city and Blueprint 2000, a local, non-profit Intergovernmental Agency, have developed a community wide plan, linking recreational trails, community gathering places, public parks and recreation management facilities. The city's Capital Cascade Trail Master Plan incorporates the reuse of the Cascade Park site, illustrating how remediation and community winning processes can combine to transform abandoned industrial sites into valuable community resources.

**SITE HISTORY**  
 From the early 1900s until the mid-1950s, the City of Tallahassee operated a manufacturing gas plant (MGP) on the southeastern edge of the Cascade Park site, near the intersection of Gadsden and Blithman Streets. The plant converted coal reserves into gas to provide lighting and heating fuel for the city's residents. Certain waste products associated with this process were released at the site, and municipal solid wastes were deposited in a city-owned landfill on the southern portion of the site. Industrial MGP operations ended at the Cascade Park site in the 1950s.

Historically, the northeastern portion of the Cascade Park site was used for recreational purposes. In 1926, the Centennial Field athletic park was constructed to celebrate Tallahassee's 100th anniversary. Throughout the mid-twentieth century, Centennial Field was the home of several little league baseball and football teams, a minor league baseball franchise, and various Florida State University teams. Since the closure of Centennial Field in 1975, the Cascade Park site has remained vacant.

EPA Region 4 Reuse Fact Sheets June 2007

The Site Reuse Fact Sheet for the Cascade Park Gasification Site in Tallahassee, Florida addresses the site's history, cleanup status, infrastructure upgrades, and how city residents will be able to enjoy a new public park and trail system when the cleanup is complete.

More information on partial deletions is available on EPA's Superfund Web site at <http://www.epa.gov/superfund/cleanup/postconstruction/deletion.htm>.

Information about many of these tools can also be found on EPA's Landowner Liability Protections Web page at <http://www.epa.gov/compliance/cleanup/revitalization/landowner.html>.

# 2229 Main Street Property Lien Status<sup>1</sup>

| Property Encumbrances * | Lien Holder  | Contact | Date Issued | Amount          |
|-------------------------|--|---------|-------------|-----------------|
| Mortgage**              | Atlantic Savings Bank  |         | 10/2/1974   | \$1,225,000.00  |
| Mortgage                | The Massachusetts Industrial Finance Agency, State Street Bank and Trust Company |         | 11/15/1983  | \$4,062,000.00  |
| Mortgage                | The Industrial Finance Agency, State Street Bank and Trust Company               |         | 6/27/1985   | \$1,000,000.00  |
| Mortgage                | Citizens Bank of Massachusetts   |         | 9/3/2001    | \$9,700,000.00  |
| Federal Tax Lien        | The United States Department of the Treasurer Internal Revenue Service           |         | 5/4/2005    | \$8,336.02      |
| USDOJ Lien              | United States Department of Justice Environmental Enforcement Section            |         | 9/29/2009   | \$23,100,000.00 |
| Tax Liens               | The Town of Concord Office of the Collector of Taxes                             |         | 7/14/2010   | \$335,755.23    |

1. Note: All Information unofficial and to be confirmed by Town Counsel

\* Property encumbrance types, lien holders, dates and amounts sourced from Title Report dated 4/7/2011

\*\*Note: A 2011 title report clarifies that the 1974 mortgage lien is unenforceable, because it is over 35 years old and has not been extended on the record.