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Brownfields Program

Local Government Liability Fact Sheet

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. However, concern about potential liability for the cleanup costs can be an impediment to redevelopment. A keystone of the SWRPC Brownfields Program is removing uncertainty of liability for local governments.

Local Government Involvement with Brownfields

Local governments are increasingly becoming involved in the acquisition, cleanup, reuse, and long-term protectiveness of contaminated properties. Common scenarios for government involvement include:

- Involuntarily acquiring property as a function of their governmental powers;
- Leasing of the property by the state or a municipality;
- Negotiating a purchase in a transaction similar to one negotiated between private parties;
- Responding to an emergency on contaminated property; or
- Implementing, monitoring, or enforcing institutional controls.

Local Government Liability

A local government may be found liable for contamination at a brownfields site if it:

- Currently owns or operates the property, or owned or operated the property at the time of disposal of hazardous substances;
- Arranged for hazardous substances to be disposed of or transported to the site for disposal; or
- Transported hazardous substances to the site.

Exemptions: There are two exemptions, the "Involuntary Acquisitions Exemption" and the "Emergency Response Exemption." These exemptions protect local governments who obtain property through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government entity involuntarily acquires title by virtue of its function as a sovereign, or who respond to an emergency created by a release or by a threat of release at a property not owned by the local government.

CERCLA (Superfund) Liability Protections

CERCLA contains several liability protections for private parties, states, and local governments that acquire property. These Superfund liability protections are:

- The bona fide prospective purchaser (BFPP) protection.
- The third party defense and innocent landowner protection.
- The contiguous property owner (CPO) protection.
- The enforcement bar when the local government complies with a state response program.

For further Resources: See the EPA State and Local Government Activities and Liability Protections webpage at: <http://www2.epa.gov/enforcement/state-and-local-government-activities-and-liability-protections>

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Bona Fide Prospective Purchaser (BFPP) Protection

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.

To obtain BFPP status, a local government must:

1. Perform all appropriate inquiries (AAI) prior to purchase of the property;
2. Dispose of hazardous substances before acquiring the property;
3. Have "no affiliation" with a liable or potentially liable party.

To maintain BFPP status, a local government must:

1. Comply with land use restrictions and any other institutional controls;
2. Take "reasonable steps" to prevent the release of hazardous substances;
3. Provide full cooperation, assistance, and access;
4. Comply with information requests and administrative subpoenas; and
5. Provide legally required notices.

*All local governments that may be liable at a site for which they are applying for funding must demonstrate that they qualify for one of the CERCLA liability protections.

Third Party Defense and Innocent Landowner Protection

CERCLA provides a "third party" affirmative defense to CERCLA liability for any owner, including local governments, that can prove 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." An entity asserting the CERCLA defense must show that:

- It exercised due care with respect to the contamination;
- It took precautions against foreseeable acts or omissions, and the consequences thereof by the third party that caused the contamination.

Innocent Landowner Protection is given to purchasers who acquire property without knowledge of contamination, 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," and inheritors of contaminated property.

The Enforcement Bar

CERCLA 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. This protection is known as the "enforcement bar." EPA has entered into non-binding Memoranda of Agreement with over 20 states, including New Hampshire, which clarify EPA enforcement intentions under CERCLA at sites addressed in compliance with state response programs. It is important to note that while this protection may prohibit EPA from taking an enforcement action; it does not preclude third party litigation.