



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

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

I. Purpose

Local governments¹ 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.²

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.³ In 2018, Congress addressed this concern by enacting the Brownfields Utilization,

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

² 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>.

³ 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).⁴ 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.⁵ The EPA’s enforcement discretion is limited to the unique circumstances of each case and does not protect against third-party suits.⁶ 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*.⁷

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),⁸ 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.

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

⁵ 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.

⁶ 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.

⁷ Office of Site Remediation Enforcement, March 2011.

⁸ 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.⁹

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”)¹⁰ 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;

⁹ 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>.

¹⁰ 2 C.F.R. 200.64.

(h) local public authority, including any public housing agency under the United States Housing Act of 1937;¹¹ (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.¹²

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

¹¹ 42 U.S.C. §§ 1437, *et seq.*

¹² 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.¹³

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).

¹³ 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)."¹⁴ 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."¹⁵ 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

¹⁴ 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>.

¹⁵ 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.¹⁶

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”¹⁷ 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);

¹⁶ 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.”

¹⁷ 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.¹⁸

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.¹⁹ 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.²⁰

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

¹⁸ See Common Elements Guidance, *supra* note 10, at 8.

¹⁹ 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>.

²⁰ 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).²¹

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.²²

²¹ 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.

²² 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.”²³ 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 site²⁴ in compliance with a state response program, subject to certain exceptions.²⁵ 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.²⁶

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.²⁷

²³ 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.

²⁴ 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.

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

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

²⁷ *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.”²⁸ 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.

²⁸ 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.²⁹

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) or Craig Boehr (202-564-5162 or 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.

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

APPENDIX A

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

³⁰ See Paragraph IV.A.2.c. above.

³¹ See Paragraph IV.A.2.d. above.

³² See Paragraph IV.A.2.b. above.

³³ 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
State and Local Government Acquisitions	<ul style="list-style-type: none"> • Process for Risk Evaluation, Property Analysis and Reuse Decisions for Local Governments Considering the Reuse of Contaminated Properties at https://www.epa.gov/land-revitalization/prepared (April 2016) • Policy on Interpreting CERCLA Provisions Addressing Lenders and Involuntary Acquisitions by Government Entities at https://www.epa.gov/enforcement/guidance-lenders-and-involuntary-acquisitions-government-entities (June 30, 1997) • Policy on CERCLA Enforcement Against Lenders and Government Entities that Acquire Property Involuntarily at https://www.federalregister.gov/documents/1995/12/11/95-29842/cercla-enforcement-against-lenders-and-government-entities-that-acquire-property-involuntarily (December 11, 1995) • Municipal Immunity from CERCLA Liability for Property Acquired through Involuntary State Action at https://www.epa.gov/enforcement/guidance-municipal-immunity-cercla-liability-property-acquired-through-involuntary-state (October 20, 1995) • Fact Sheet: The Effect of Superfund on Involuntary Acquisitions of Contaminated Property by Government Entities at https://www.epa.gov/enforcement/fact-sheet-effect-superfund-involuntary-acquisitions-contaminated-property-government (December 13, 1995)
Bona Fide Prospective Purchasers	<ul style="list-style-type: none"> • 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 https://www.epa.gov/enforcement/common-elements-guidance (July 29, 2019) • Enforcement Discretion Guidance Regarding the Affiliation Language of CERCLA’s Bona Fide Prospective and Contiguous Property Owner Liability Protections at https://www.epa.gov/enforcement/guidance-affiliation-language-cerclas-bfpp-and-cpo-liability-protections (September 21, 2011) • Interim Enforcement Discretion Policy Concerning “Windfall Liens” Under Section 107(r) of CERCLA at https://www.epa.gov/enforcement/interim-guidance-enforcement-discretion-concerning-windfall-liens-cercla-section-107r (July 16, 2003)
Third Parties and Innocent Landowners	<ul style="list-style-type: none"> • 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 https://www.epa.gov/enforcement/common-elements-guidance (July 29, 2019)
All Appropriate Inquiries	<ul style="list-style-type: none"> • All Appropriate Inquiries at https://www.epa.gov/brownfields/brownfields-all-appropriate-inquiries

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