



# **SUPERFUND LIABILITY**

## **A Continuing Obstacle to Brownfields Redevelopment**



## **Report of the Brownfield Acquisition Task Force**



**About the National Association of Local Government Environmental Professionals (NALGEP)** Founded in 1993 by a group of local officials, NALGEP is the premier national organization representing local government professionals responsible for environmental compliance and the development and implementation of local environmental policy. NALGEP's membership includes more than 150 local government officials in communities located throughout the United States. NALGEP's membership communities range in size from the largest cities to the smallest towns. NALGEP's diverse membership includes environmental managers, solid waste coordinators, public works directors, brownfields directors, economic development officials, planning directors, and attorneys, all working on behalf of towns, cities, counties, and municipal associations. NALGEP brings together local environmental officials to network and share information on innovative environmental practices, conduct pioneering environmental policy projects, promote environmental training and education, and communicate the views of local environmental officials on national environmental issues. For more information about NALGEP, please visit: [www.nalgep.org](http://www.nalgep.org).

**About the Brownfield Communities Network** NALGEP launched the Brownfield Communities Network in 2004 to build connections among community leaders promoting the reuse of contaminated property. Guided by an Advisory Council of the nation's local brownfield leaders, the Network is working to harness the knowledge, expertise, and experience of the nation's leading brownfield communities and export it to their peers. The Brownfield Communities Network promotes brownfield cleanup and reuse by:

- providing a forum for communities to overcome barriers and share lessons learned regarding tools, strategies, resources, and partnerships;
- providing technical assistance and training to local communities and other stakeholders;
- showcasing examples of successful local brownfield programs and projects;
- developing new approaches to overcome obstacles to brownfield reuse; and
- communicating the views of local communities on state and national brownfield issues.

The Brownfield Acquisition Task Force is a working group of Brownfield Communities Network members who came together to discuss liability challenges for local governments. This is just one example of the Network's ongoing research initiatives. For more about the Brownfield Communities Network visit: [www.nalgep.org/issues/brownfields/](http://www.nalgep.org/issues/brownfields/).

**About this Report** This report was produced by NALGEP with support from the U.S. Environmental Protection Agency, Office of Brownfields Cleanup and Redevelopment, under Cooperative Agreement #83138801. The opinions expressed herein are those of the authors and do not necessarily reflect the views of EPA.

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Paul Connor • Sean Flynn

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## EXECUTIVE SUMMARY

Local governments throughout the country have long recognized the harm abandoned and underdeveloped brownfield properties can pose to their communities. Properties that lie idle because of fear of environmental contamination, unknown cleanup costs, and liability risks can cause and perpetuate neighborhood blight, with associated threats to a community's health, environment, and economic development.

Local government property acquisition authority is one of the key tools to facilitate the redevelopment of brownfields. Through voluntary sales or involuntary means including tax liens, foreclosures and the use of eminent domain, local governments can take control of brownfields in order to clear title, conduct site assessment, remediate environmental hazards, and otherwise prepare the property for development by the private sector or for public and community facilities.

Although property acquisition is a vital tool for facilitating the development of brownfields, many local governments have been dissuaded by fears of environmental liability. However, many state environmental laws have been amended over the past decade to provide liability exemptions for local governments that acquire lands for the purpose of facilitating cleanup and redevelopment. The primary federal environmental liability law, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), was also amended to include liability defenses and exemptions that may protect local governments that acquire brownfields. Nonetheless, a substantial number of local governments avoid acquiring brownfield sites because of fear of environmental liability.

In January 2005, NALGEP convened a task force of leading local officials and stakeholders to conduct research on the role local government property acquisition plays in brownfield

revitalization and to generate suggestions for how policy changes or technical assistance may aid local governments in these efforts. This report presents the following findings and recommendations:

## **FINDINGS**

1. The acquisition of brownfields by local governments is increasingly common and important.
2. Liability concerns continue to hamper local government acquisition of brownfield properties.
3. Development of some mothballed brownfields would not occur without eminent domain authority.
4. CERCLA's liability protections for involuntary acquisition of brownfields are complex and confusing.
5. Local governments need additional clarity on liability protections for acquisitions of brownfields.

## **RECOMMENDATIONS**

### **EPA Guidance and Enforcement Policies**

1. **Local governments need guidance on acquisition of property.** *Local governments should communicate their concerns about liability at local government led brownfield sites to EPA and work with them to develop the necessary guidance.*
2. **Local governments need additional tools to clarify liability.** *Fact sheets, model comfort letters, and other tools on municipal acquisition will assist in locally-led brownfield projects. Local governments should communicate their needs to EPA and work with them on the development of these tools.*

### **Legislative Clarifications**

3. **Statutory reform should protect those who acquire property.** *A unified and simplified liability exemption for local government brownfield ownership would lessen confusion and provide the certainty needed to clean up and redevelop brownfield sites.*
4. **The bona fide prospective purchaser protection should be applied retroactively.** *The development of a retroactive application of the bona fide prospective purchaser protection would benefit all parties, including localities, that seek to clean up and revitalize brownfields.*
5. **EPA should have the statutory authority to promulgate regulations on local government acquisition of property.** *With the ability to influence regulation, EPA could address many of the uncertainties and ambiguities in the current law.*

The fear of liability dissuades  
local governments  
and private entities  
from acquiring and redeveloping brownfields.



# 1

## BROWNFIELDS AND FEDERAL ENVIRONMENTAL LIABILITY

### BROWNFIELDS CONTINUE TO BE A BLIGHT ON OUR NEIGHBORHOODS

The Small Business Liability Relief and Brownfields Revitalization Act of 2002 defines a brownfield 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.*”<sup>1</sup> There are an estimated 450,000 to one-million brownfield sites in the United States.<sup>2</sup>

While some brownfields are large abandoned industrial properties left behind as industries shifted from manufacturing to service economies, others are small properties such as dry cleaners, salvage yards, and gas stations. The common denominator among many of these properties is that fear about the presence of environmental contamination and associated environmental liability and cleanup costs has a chilling effect on investment and redevelopment.

The presence of brownfields has been linked to a myriad of social and economic problems. The persistence of brownfields may undermine the local tax base (and associated tax-funded services), dampen job creation and economic growth, leave public transportation and infrastructure underutilized, cause blight, increase exposure to environmental contamination, and, by pushing development into outlying greenfields, promote urban sprawl.<sup>3</sup> The impacts of brownfields are particularly hard felt in areas of concentrated poverty and underdevelopment where attracting economic investment is often most challenging.

According to a 2005 survey of 216 cities by the U.S. Conference of Mayors, 121 cities reported having success in redeveloping brownfields.<sup>4</sup> The results of the survey indicate the benefits of developing brownfield sites would include the creation of over 213,000 new jobs, the ability to accommodate an additional 1.8 million residents without burdening existing infrastructure, and an increase to local tax revenues by up to \$1.1 billion annually.

1 See Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, § 211(a)(A), 115 Stat. 2356, 2361 (Jan. 11, 2002).

2 U.S. Government Accountability Office, *Brownfield Redevelopment – Stakeholders Report That EPA’s Program Helps to Redevelop Sites, but Additional Measures Could Complement Agency Efforts*, at 1 (December 2004) available at <http://www.gao.gov/new.items/d0594.pdf>.

3 See NALGEP, *Unlocking Brownfields: Keys to Community Revitalization*, at 16-18 (2005).

4 U.S. Conference of Mayors. *Recycling America’s Land: A National Report on Brownfields Redevelopment*, Vol. V, at 6 (May 2005).

## **LOCAL GOVERNMENTS ARE WORKING TOWARD REVITALIZATION**

Local governments are often best positioned to initiate the reuse of local property and revitalize brownfields. Accordingly, many federal and state programs direct brownfield development resources to local governments.<sup>5</sup>

Local governments play an increasingly vital role in “jump starting” the redevelopment of brownfields by formulating plans, conducting site assessments, and, where necessary, facilitating the cleanup of existing contamination. In many cases, the success of these efforts is contingent on local governments acquiring the brownfield. As local governments acquire brownfield properties to facilitate cleanup and redevelopment, their risk of incurring liability under Federal environmental laws is a continuing concern.

This is especially true for “mothballed” properties where the current property owner is unreachable, unwilling to discuss a property transfer, or reluctant to improve site conditions. In such circumstances, local governments must use eminent domain, tax foreclosures, or other involuntary means to take possession of the property to facilitate development.

## **LIABILITY UNDER CERCLA**

The prospective owner of any brownfield site, whether a local government or private developer, is concerned about potential environmental liability when assessing the risks and benefits of site acquisition. Often, the fear of such liability dissuades local governments and private entities from acquiring and redeveloping brownfields.

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund)<sup>6</sup> was enacted in 1980, in the wake of several well-publicized environmental disasters. The goal of CERCLA<sup>7</sup> was to clean up the nation’s most contaminated sites including those where parties who caused the contamination were no longer viable or could no longer be held accountable.

Under CERCLA, any “potentially responsible party” can be held liable for the costs of cleaning up and restoring a polluted site in an action brought by EPA, the state, or a private party. Section 107(a) of CERCLA defines four broad categories of parties that may be held liable for the costs:

1. the current owner and operator of the facility;
2. a person who owned or operated the facility at the time of disposal of hazardous substances;
3. any individual, corporation, or government who arranged for the disposal or treatment of hazardous substances; or
4. the transporter of the hazardous substances if that individual selected the disposal or treatment site.

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<sup>5</sup> See 42 U.S.C. § 9604(k) (2000).

<sup>6</sup> See 42 U.S.C. §§ 9601 — 9675 (2000).

<sup>7</sup> See 42 U.S.C. § 9601(35).

Courts have held that liability under CERCLA is generally strict,<sup>8</sup> joint and several,<sup>9</sup> and retroactive.<sup>10</sup> Thus, any current owner of contaminated property, that does not qualify for a land owner liability protection, is potentially liable for the entire cleanup cost associated with that property, regardless of whether that owner contributed to the contamination or owned the property at the time contamination occurred.

### CERCLA LIABILITY

**Strict:** Party may be liable without proof of negligence or bad faith.

**Joint and several:** Any one or more potentially responsible parties may be held responsible for the entire cost of cleanup.

**Retroactive:** Liability is imposed for contamination that occurred before current ownership and before the passage of CERCLA in 1980.

CERCLA liability does not require a minimum threshold concentration of a hazardous substance to expose a site owner to liability under CERCLA. Many property owners and prospective purchasers avoid investing in brownfield development because of the breadth of potential liability under CERCLA. This in turn increases the development pressure on outlying greenfields. A 2001 report found that 4.5 acres of greenfields are saved for every one acre of brownfields that is redeveloped.<sup>11</sup> In addition, owners frequently mothball brownfield properties, refusing to market them to prospective purchasers, out of fear that a subsequent landowner may bring a CERCLA enforcement action against the seller for any contamination found on site.

When a local government takes ownership of a site, it may be exposed to the same environmental liability risks faced by private entities. Thus, many local governments have refused to “even foreclose on abandoned industrial complexes in redevelopment zones because [of] the potential for staggering cleanup costs and liability claims once they take ownership.”<sup>12</sup>

### CERCLA Liability Protections

Congress has enacted several provisions of CERCLA that are intended to protect local governments when they acquire property. This section discusses four provisions of CERCLA that may, under the right circumstances, reduce or eliminate the liability of a local government when they acquire or clean up property.

8 See *United States v. Monsanto Co.*, 858 F.2d 160, 167-68 (4th Cir. 1988); *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1572 (5th Cir. 1988); *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986); *State of N.Y. v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985).

9 See *Monsanto*, 858 F.2d at 171-73; *United States v. Stringfellow*, 661 F. Supp. 1053, 1060 (C.D. Cal. 1987); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 810-11 (S.D. Ohio 1983).

10 See *Monsanto*, 858 F.2d at 173-75; *Northeastern Pharm. & Chem. Co.*, 810 F.2d at 732-34.

11 George Washington University, *Public Policies and Private Decisions Affecting the Redevelopment of Brownfields: An Analysis of Critical Factors, Relative Weights and Area Differentials*. (2001).

12 Deborah Cooney et al. *Revival of Contaminated Industrial Sites: Case Studies*, at 1 (Northeast-Midwest Institute 1992).

## Exemption for Involuntary Acquisitions by Local Governments

The definition of “owner or operator” in CERCLA provides an exemption from liability claims for a property that has been involuntarily acquired by a local government. Section 101(20)(D) of CERCLA states:<sup>13</sup>

The term ‘owner or operator’ does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign.

This exemption is limited to involuntary acquisitions and does not extend to any state or local government that caused or contributed to a release of a hazardous substance at the site. Because it is limited to involuntary acquisitions it does not require that a party perform “all appropriate inquiry” before becoming an owner or operator.

## Third-Party Defense

The third-party defense, as defined in section 107(b)(3) of CERCLA<sup>14</sup> states that there shall be no liability under CERCLA for “an act or omission of a third party other than an employee or agent of the defendant” or any person with a “contractual relationship” with the defendant. The defendant is required to prove that it exercised due care with respect to onsite hazardous substances and took precautions against foreseeable acts or omission by any third party responsible for contamination.

Section 101(35)(A)(ii) of CERCLA<sup>15</sup> elaborates on the third-party defense for “. . . a government entity which acquired the facility by escheat, or through any involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.”

This language offers an affirmative defense to governments that acquire property through eminent domain. While “all appropriate inquiry” is not required by Section 101(35)(A)(ii) before acquiring the property, the buyer must exercise due care with respect to hazardous substances on the property.

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<sup>13</sup> 42 U.S.C. § 9601(20)(D).

<sup>14</sup> *Id.* § 9607(b)(3).

<sup>15</sup> *Id.* § 9601(35)(A).

<sup>16</sup> *Id.* § 9607(r).

## Bona Fide Prospective Purchasers Land Owner Liability Protection

Section 107(r) of CERCLA,<sup>16</sup> added by the Small Business Liability Relief and Brownfields Revitalization Act of 2002 (brownfields amendments), provides a defense to liability that extends to certain purchasers of property known to contain hazardous materials.

The defense generally extends to entities, including local governments, if:

- potential liability “is based solely on the purchaser’s being considered to be an owner or operator of a facility” (i.e., did not generate or arrange for disposal or transportation of the hazardous substances at the property);
- the owner made all appropriate inquiries into the potential presence of hazardous substances on the property;
- the owner exercised appropriate care with respect to any hazardous substances on the property; and
- other statutory requirements are met.

A property acquired by a bona fide prospective purchaser (BFPP) may be subject to a windfall lien if EPA performs a response action that increases the fair market value of the property.<sup>17</sup>

The BFPP language is significant because a BFPP may acquire *property with knowledge* of contamination and, nonetheless, qualify for the liability benefits of this language.

## EPA Enforcement Bar for Eligible Response Sites

Section 128(b) of CERCLA<sup>18</sup> provides special protections from EPA enforcement actions against a person who is cleaning up a brownfield site. This provision prohibits EPA from bringing a CERCLA enforcement action to force the cleanup of a site or a judicial action to recover EPA’s cleanup costs at an eligible response site. Generally, an “eligible response site” is:

- a site that meets the definition of a brownfield in section 101(39) of CERCLA;<sup>19</sup> and
- is being addressed under a state cleanup program.

This provision limits EPA authority to take CERCLA enforcement actions against persons who are conducting or have conducted cleanups at eligible response sites in compliance with a state program that governs response actions for protection of human health and environment.

However, the protection granted by section 128(b)<sup>20</sup> is not absolute. EPA may bring an enforcement action at an eligible response site if:

- the state asks EPA to take a response action;
- the contamination migrates across a state line or onto Federal property; and
- the site presents an imminent and substantial endangerment to public health, welfare, or the environment and requires additional response actions.

Although section 128(b)<sup>21</sup> offers EPA leeway in taking action at a brownfield property, at the time of publishing, NALGEP is not aware of any instance where EPA took an enforcement action or response action, over the objections of a state, at a brownfield site being cleaned up under a state program.

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17 U.S. Environmental Protection Agency, *Interim Enforcement Discretion Policy Concerning “Windfall Liens” Under Section 107(r) under CERCLA*, at 8 (July 16, 2003).

18 42 U.S.C. § 9628(b).

19 *Id.* § 9601(39).

20 *Id.* § 9628(b).

21 *Id.*



## 2

# FINDINGS OF THE BROWNFIELD ACQUISITION TASK FORCE

NALGEP and its Brownfield Acquisition Task Force (Task Force), with the assistance of the International Municipal Lawyer's Association, conducted a series of meetings, conference calls, and personal interviews from January 2005 through March 2006. Participants included numerous local government officials and the professionals that assist them, regarding their experiences with acquisition and redevelopment of brownfields. NALGEP also completed an extensive literature review, the references to which are included at the end of this report.

Based on this research, the Task Force approved the following findings:

### **FINDING 1: The Acquisition of Brownfields by Local Governments is Increasingly Common and Important**

Local governments increasingly play a central role in speeding the development of brownfields by acquiring sites, performing environmental assessments and any necessary cleanup activities, and developing or brokering the properties to private developers.<sup>22</sup> In NALGEP's interviews with local government officials, approximately 85 percent of respondents reported that their locality has acquired at least one brownfield property. In several of these cases, the local government acquired the property by default, such as through a tax lien or the foreclosure of an abandoned property. But the *majority* of brownfield acquisitions reported to NALGEP by local governments were through voluntary purchases of the property to facilitate their development.

Local government officials reported in interviews and meetings that most brownfields that are acquired by local governments are ultimately destined for redevelopment and ownership by the private sector. The interviews also made clear that local government acquisition of

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<sup>22</sup> Over the past decade, hundreds of communities across the nation have established local brownfields programs. In addition, 49 states have instituted voluntary cleanup programs and other brownfield development incentives to help local governments acquire and develop brownfields. (See *Unlocking Brownfields: Keys to Community Revitalization* at 4, 142).

brownfields can facilitate private sector development by attracting financing, removing uncertainty, and assembling land for development.

The most important impact of the acquisition and improvement of these blighted properties and concurrent infrastructure improvements, was to signal to the market that the Central Industrial District was still a viable place of business. And the market responded in a robust manner.

—Andrew Bracker, City of Kansas City, MO

Local government ownership of brownfield sites has helped hundreds of communities attract state, Federal, and private development resources. Over 600 communities around the country have received grants and revolving loan funds from EPA’s Brownfield Program, grants primarily awarded to local government entities. Eligibility for these funds is restricted to nonprofit organizations, local governments, and other government entities.<sup>23</sup> In addition, many state programs target brownfield resources to local governments. Therefore, a strong local government role in coordinating brownfield revitalization is often instrumental in attracting public and private financing for projects.

A strong local government role in coordinating brownfield revitalization is often instrumental in attracting public and private financing for projects.

Local government ownership of brownfield properties is often a key step toward removing the legal and environmental uncertainty that dissuades private sector investment. Where a site has been abandoned, local government ownership may be necessary to clear chains of title and other legal ambiguities. The performance of environmental assessments may resolve uncertainty about potential environmental hazards and expedite investment by bona fide prospective purchasers.

Local governments acquire brownfields to combine parcels and create large tracts of land which the private sector is more likely to develop. This practice is particularly important to promote larger mixed-use developments that integrate housing, transportation, and commercial facilities in sustainable development designs.

## **FINDING 2: Liability Concerns Continue to Hamper Local Government Acquisition of Brownfield Properties**

Despite the high and increasing numbers of local governments that voluntarily acquire brownfields to facilitate their development, many localities are dissuaded from playing an active role in brownfield development out of concern about Federal environmental liability. In NALGEP’s interviews, several local governments stated that they never voluntarily acquire brownfield properties because of liability concerns. About a quarter of the respondents stated that they have avoided the acquisition of at least one brownfield property in the last five years due to liability fears.

<sup>23</sup> For a complete list of eligible entities, see Proposal Guidelines for Brownfields Assessment, Revolving Loan Fund, and Cleanup Grants, Section III – Eligibility Information, available at <http://www.epa.gov/oswer/docs/grants/epa-oswer-obcr-07-01.pdf>.

Many local governments explained that liability concerns continue to hamper local government acquisitions of brownfields despite the passage of the bona fide prospective purchaser protection in the 2002 brownfields amendments. It is time-consuming and confusing to wade through the applicable laws, regulations, and EPA guidance materials, resulting in a reluctance to deal with brownfields, especially in small communities that lack in-house environmental law expertise.



Retha S. Hicks, the Clerk-Treasurer for Winona Lake, IN (population 3,987), described the difficulty of interpreting what she described as a “quagmire of regulations” on CERCLA’s potential applicability to a brownfield acquisition. For her small town, the cost of hiring outside counsel to navigate the regulations was too great and, as a result, the effort to acquire a local brownfield property was nearly abandoned. Like many small towns across the country, Winona Lake did not have the expertise or resources to make complex evaluations of CERCLA liability. The Town is now working with EPA to resolve concerns about liability so the project can move forward.

Even in large cities, the time and expense of ensuring that an acquisition does not expose a municipality to liability enters the cost-benefit calculus. Ellen Walkowiak, Economic Development Coordinator for the City of Des Moines, IA explained:

If the long run outcome is attractive, [liability] issues would not stop the City from moving forward. However, the City’s action would depend on the end use of a parcel—tax base, jobs created, etc. If the outcome is “nice but not critical,” the City will be more careful... It is important to consider the risk to reward ratio when addressing liability.

The Baltimore [Maryland] Development Corporation has encountered numerous instances when the acquisition of brownfields “have been either slowed down or dropped because of liability concerns, including concerns about the threat of EPA action.” Evans Paull, when he was with the Corporation, explained that “there is NOT a blanket policy against acquisition of contaminated sites – there is an implicit agreement and understanding that Baltimore has few uncontaminated industrial sites and that acquisition and redevelopment activities will necessarily involve some level of environmental risk and exposure to liability.” On the other hand, Paull stated that “the City, [with] its concerns usually expressed through the Law Department, is very reluctant to acquire or be an active participant in projects where the risk is particularly high.”

Many states have responded to local government concerns about liability with broad exemptions or defenses under state environmental liability laws for local government brownfield development. The State of Wisconsin, for example, provides local governments with liability protection under its state cleanup law if the local government acquired the property through tax delinquency proceedings, escheat, condemnation proceedings, or if the property was acquired “for the purpose of slum clearance or blight elimination” or to “further the economic development purposes” of a non-profit economic development corporation.<sup>24</sup> Warren Kraft, City Attorney for Oshkosh, WI, described the liability exemptions for local governments in Wisconsin’s law as instrumental in encouraging the City to take title to an abandoned gas station and work with neighborhood groups in creating a plan to redevelop the property.

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24 Wisc. Stat. § 292.11 (2006).

### **FINDING 3: Development of Some Mothballed Brownfields Would Not Occur Without Eminent Domain Authority**

The Brownfield Acquisition Task Force conducted its work in the midst of a national debate on the use of eminent domain by local governments, spurred by the Supreme Court’s decision in *Kelo v. City of New London*.<sup>25</sup> To date, federal legislative reactions to that debate have protected local governments’ use of eminent domain to acquire brownfields.<sup>26</sup> As discussed earlier in this report, Congress also recognized the need for local governments to use eminent domain to acquire brownfields in its provision of defenses and exemptions to CERCLA liability for involuntary acquisitions.

In interviews and meetings conducted by NALGEP, local government officials raised serious concerns about the potential restrictions on their ability to use traditional governmental authority to require transfers of property to the government in return for just compensation. The officials reported that the majority of brownfield acquisitions are accomplished through voluntary purchase of the property. There are situations, however, when a local government must acquire a brownfield to protect the health and safety of a community or to complete a needed public development project and a negotiated sale cannot be accomplished. This is particularly true at “mothballed” properties where the current site owner is unreachable, unwilling to discuss a property transfer, and reluctant to improve the unhealthy and blighted conditions at the site. In such circumstances, local governments must use eminent domain, tax foreclosures, or other involuntary means to take possession of the property to facilitate its development.

...local government officials raised serious concerns about the potential restrictions on their ability to use traditional governmental authority to require transfers of property...

In discussions and interviews with local officials, 63 percent of respondents reported they had used eminent domain on at least one occasion to acquire a brownfield property. Local governments explained that the option of eminent domain authority is particularly important in situations that are common to brownfield development:

- the properties are abandoned and the owners cannot be found or contacted to pursue sales negotiations;
- the sites have flaws in the chain of title that prevent a clear transfer to a subsequent purchaser;
- the owners of the brownfield sites are unwilling to transfer the property or will not allow access for site inspections, for fear of later being held liable for cleanup costs under CERCLA;
- the owners of the properties are large corporate entities headquartered in other jurisdictions and unmotivated to dispose of real estate assets; and
- the acquisition of the land is necessary (e.g., to complete a public development project or because the existence of the land is a threat to the health, safety or development objectives of a community) and the owner, knowing that there is no alternative to acquisition of the land, refuses to sell except for an exorbitant price or unreasonable sale condition (e.g., requiring the local government to assume all liability).

Although a large percentage of local governments reported that the existence of eminent domain authority is a necessary tool to facilitate brownfield redevelopment, the actual use

<sup>25</sup> 546 U.S. 469 (2005).

<sup>26</sup> See Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act, 2006., Pub. L. No. 109-115, § 726, 119 Stat. 2396, 2494-95 (Nov. 30, 2005) (mandating that eminent domain for projects using federal funds be used only for projects serving a “public use,” and providing that “projects for the removal of an immediate threat to public health and safety or brownfield as defined in the Small Business Liability Relief and Brownfield Revitalization Act (Public Law 107-118) shall be considered a public use for purposes of eminent domain”).

of this authority in a litigated condemnation of property is rare. It is far more common for local governments to assert their intention to use eminent domain, but to ultimately acquire the land through a negotiated sale. Without the ability to assert an intention to acquire the property through eminent domain, however, many landowners would not enter negotiations for the sale or would demand unreasonable terms of sale.

The use of eminent domain provides a tax benefit to the landowner. Section 1033(a) of the federal tax code<sup>27</sup> provides for the nonrecognition of gain realized by an “involuntary conversion” of property, including a sale to the government under “threat or imminence” of eminent domain authority.<sup>28</sup> A threat of condemnation is generally held by the tax courts to exist “if the taxpayer might reasonably believe from representations of government agents and from surrounding circumstances that condemnation was likely to take place if he did not sell his property.”<sup>29</sup> Thus, for example:

The City [of Des Moines] acquires property under threat of eminent domain about ten times per year. This is done because it is more beneficial to the owner under the tax code. This situation is more common than a truly adversarial situation.

—Ellen Walkowiak, *City of Des Moines, IA*

The CERCLA defense for involuntary acquisitions of property seems to apply both where a local government asserts its eminent domain authority to prompt a sale and where it fully litigates a condemnation of property. However, as discussed below, neither the courts nor EPA has provided local governments with clear guidance on this question.

#### **FINDING 4: CERCLA’s Liability Protections for Involuntary Acquisition of Brownfields Are Complex and Confusing**



Many liability concerns of local governments could potentially be assuaged through clarifications of the provisions in CERCLA applicable to “involuntary acquisitions” of properties. These provisions are important because (1) unlike the bona fide prospective purchaser language, the provisions for involuntary acquisitions apply to property regardless of when it was acquired; and (2) involuntary acquisitions qualify for an *exemption* from liability that relieves the local government of the affirmative burden to prove a defense.

A large number of properties are acquired by governments through eminent domain, however, the language of CERCLA and its interpretation by courts and EPA, have left governments confused as to the meaning and applicability of the protections.

CERCLA contains two key provisions that directly address the liability of local governments when they purchase property. Unfortunately, the two provisions are inconsistent, ambiguous, and confusing.

27 I.R.C. § 1033(a).

28 The taxpayer may generally purchase a new property within two years and any gain is recognized only to the extent that the amount realized in the involuntary conversion exceeds the cost of a comparable replacement property. *Id.*

29 *Rainier Cos. v. Comm’r of Internal Revenue*, 61 T.C. 68, 76 (1973), *rev’d on other grounds*, 538 F.2d 338 (9th Cir. 1975).

Section 101(20)(D) of CERCLA<sup>30</sup> provides an *exemption* from liability for property acquired “involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign.” Elsewhere, section 101(35)(A)(ii)<sup>31</sup> also uses the term “involuntary” in defining an *affirmative defense* for government acquisitions by “escheat, or through any other involuntary transfer or acquisition.” It is not clear whether the two sections must be interpreted in conjunction, such that the use of eminent domain would also qualify for the exemption outlined in section 101(20)(D) of CERCLA.

The term “involuntary acquisition” is not defined in the statute. It is not clear whether it refers to a government acquisition that would be involuntary from the seller’s perspective.<sup>32</sup>

Over the past 15 years, EPA has published at least six separate documents that provide guidance on involuntary acquisition protections in CERCLA. These documents have their genesis in the analysis provided by EPA in the preamble to its Lender Liability Rule (1992).<sup>33</sup>

In the Lender Liability Rule, EPA explained that the “statute’s use of the term ‘involuntary’ in both sections [101(35)(A)(ii) and 101(20)(D)] . . . refer[s] to the same types of acquisitions.”<sup>34</sup> The use of eminent domain is included in this analysis and EPA concludes that an acquisition “is ‘involuntary’ if the facility is acquired . . . [‘]through the exercise of eminent domain authority by purchase or condemnation.”<sup>35</sup> EPA further explained that the government’s exercise of some volitional act would not render an acquisition “voluntary” for purposes of this defense.<sup>36</sup>

The section’s clear implication is that the use of eminent domain authority, including by purchase, qualifies local governments for the exemption from liability. EPA’s failure to explicitly reach this conclusion has generated confusion. Furthermore, one federal district court has adopted a contrary interpretation, holding that “other manners of involuntary acquisition expressly mentioned in §101(20)(D) are distinguishable from eminent domain.”<sup>37</sup>

The interpretation of the eminent domain clause is also susceptible to ambiguous interpretation “by purchase or condemnation.” One court held that “the words ‘by purchase or condemnation’ encompass purchases and do not limit the [section 101(35)(A)(ii)] defense to the result of a judicial proceeding.”<sup>38</sup> But a separate court held that the section 101(35)(A)(ii) defense is not applicable where a city “asserted its eminent domain power” but purchased land without completing a judicial proceeding.<sup>39</sup>

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30 42 U.S.C. § 9601(20)(D).

31 *Id.* § 9601(35)(A)(ii).

32 See I.R.C. § 1033(a) (defining an “involuntary conversion” as including sale under “threat or imminence” of eminent domain authority), or lack of will or volitional action on the part of the government-buyer.

33 National Oil and Hazardous Substances Pollution Contingency Plan; Lender Liability Under CERCLA, 57 Fed. Reg. 18,344 (April 29, 1992) (to codified at 40 C.F.R. pt. 300).

34 *Id.* at 18,348.

35 *Id.*

36 *Id.* at 18,372 (explaining that a government need not be “passive” in the acquisition of property); see also Memorandum from Office of Site Remediation Enforcement and Office of General Counsel to Regional Counsel, Mun. Immunity from CERCLA Liab. for Prop. Acquired through Involuntary State Action, at 4 (Oct. 20, 1995) (explaining that an involuntary acquisition may include “some type of discretionary, affirmative action”).

37 *City of Wichita v. Aero Holdings, Inc.*, 177 F. Supp. 2d 1153, 1168 (D. Kan. 2000).

38 *City of Emeryville v. Elementis Pigments, Inc.*, 2001 WL 964230, \*8 (N.D. Cal.).

39 *City of Toledo v. Beazer Materials & Servs., Inc.*, 923 F. Supp. 1013, 1020 (N.D. Ohio 1996).

“Brownfield development can be stymied because of the unknowns of brownfield acquisitions. The EPA policy and several other policies have caused a City [I have worked with] to pause before acquiring a brownfield property.”

—Richard G. Opper, Opper & Varco LLP

In its 1995 fact sheet on involuntary acquisitions, EPA only stated that if a government entity “acquires property through the exercise of eminent domain . . . it will have a third party defense.”<sup>40</sup> The report did not mention the section 101(20)(D) exemption in the same discussion.

In the Preamble to the 1992 Lender Liability Rule, EPA has stated that:<sup>41</sup>

EPA interprets the term “involuntary acquisition or transfer” under CERCLA to denote any acquisition or transfer in which the *government’s interest* in, and ultimate ownership of, a specific asset *exists only because the conduct of a non-governmental party*—as in the case of abandonment or escheat—gives rise to a statutory or common law right to property on behalf of the government.

It is not clear when eminent domain authority “exists only because [of] the conduct of a non-governmental party.” The confusion is further aggravated by EPA’s 1995 Memorandum to Regional Counsel which states that “a government entity that *involuntarily* acquires a facility through the exercise of eminent domain authority by purchase or condemnation will have a third party defense.”<sup>42</sup> The latest guidance, issued in 1997, muddied the waters still further by providing direction on involuntary acquisitions that does not mention eminent domain authority at all.

EPA’s many different statements on involuntary acquisitions have left local governments confused, particularly with regard to the protections afforded when exercising eminent domain authority.

## **FINDING 5: Local Governments Need Additional Clarity on Liability Protections for Acquisitions of Brownfields**

As discussed above, CERCLA includes a host of liability exemptions and defenses that may protect local governments in acquiring brownfields to facilitate their clean up and redevelopment. But the language and organization of the protections is a confusing patchwork that is not well understood by many governments. Moreover, in some cases, a blighted brownfields property that is not likely to be revitalized by the private sector alone can only be dealt with through a local government that is willing to use its authorities – potentially including eminent domain – to free up these mothballed sites. This makes CERCLA’s provisions on municipal involuntary acquisition critical to local brownfields progress. In NALGEP’s interviews, *all* of the participants agreed that it would be helpful to have more guidance from federal enforcement officials on the definition of liability protections for government acquisition of brownfields and on their enforcement policies with respect to potentially contaminated land acquired by municipalities to facilitate brownfield development.

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<sup>40</sup> Office of Site Remediation Enforcement, U.S. Environmental Protection Agency, *The Effect of Superfund on Involuntary Acquisitions of Contaminated Property by Government Entities* (Quick Reference Fact Sheet), at 3 (Dec. 1995).

<sup>41</sup> 57 Fed. Reg. at 18,372 (emphasis added).

<sup>42</sup> Memorandum from the Office of Site Remediation Enforcement and Office of General Counsel to Regional Counsel, *Supra* at 4 (emphasis added).



# 3

## PROFILES OF BROWNFIELDS AQUISITIONS

### OVERCOMING LIABILITY IN BALTIMORE, MD

#### **Allied-Signal (now Honeywell)**

This 27-acre site, located downtown, on the waterfront near Baltimore’s famed Inner Harbor, was heavily contaminated with chromium from Allied Chemical’s manufacturing operation which closed in 1985. Allied-Signal carried out a \$100 million cleanup/containment remediation. In 2002, a partnership between Struever Brothers, Eccles & Rouse and H & S Bakeries took control of the property. The site’s master plan called for the construction of 1.8-million square feet of mixed-use space and a number of internal streets. While these streets were originally proposed to be constructed by the developer, the plans were turned over to the City. The City Law Department was opposed to the City having any ownership or right-of-way of land that had been the subject of the cleanup. They feared that in the future, if the containment remedy failed or if there were toxic tort lawsuits, the City could be the only deep pocket left in the chain of title to be held accountable. The Law Department’s point of view prevailed. The developer eventually figured out a way to develop the property with all private streets. The project was slowed significantly but currently plans are proceeding for the first major building on the site.



#### **Ainsworth Paint**

This two-acre property was abandoned by Ainsworth Paint in 1988. In 1995, EPA removed some above-ground drums, but the record is unclear as to whether any sub-surface testing and subsequent cleanup occurred. Adjacent property owners still assume the property is contaminated and believe their own properties have been affected as well. Under Ainsworth ownership, the property has remained vacant and is now complicated by tax arrears. In 2003, the Baltimore Development Corporation decided to attempt acquisition by eminent domain. Liability concerns were immediately raised by the City Law Department. However, steps leading toward acquisition are continually re-evaluated. Under a recent amendment to Maryland Law, access for site testing is allowed for properties that are designated for acquisition by eminent domain. The plan is for Ainsworth to designate the property for acquisition, carry out site testing, and then evaluate the City’s potential liability before

proceeding. The City remains concerned about liability even though they may qualify for an affirmative defense because a defense provides fewer assurances to the City than a clear exemption for acquisition of a brownfield.

### **Fairfield Oil Terminals**

The Fairfield industrial area was the subject of a 2000 Master Plan and then a 2003 Urban Renewal Plan. Four of the largest vacant sites, Amoco (40 acres), Chevron (43 acres), Conoco (17 acres), and TOSCO (20 acres) were essentially unused and all were suspected to have significant contamination. The Baltimore Development Corporation discussed designating these properties for acquisition by eminent domain. It was assumed that the City's Law Department would oppose City acquisition. Funding constraints were also considered. The Baltimore Development Corporation initially decided not to propose to acquire these properties because of the uncertainty regarding liability. Later one of the four properties, Conoco, was added to the City's acquisition list since it was contiguous to another property the City was acquiring. However, the City did not proceed with this acquisition, as the site was purchased by a private party and is undergoing redevelopment as a trucking facility. Of the other three properties, the Chevron site has been developed with a temporary use; the other two remain vacant, but the Amoco site is now controlled by a developer.



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### **SUCCESSFUL LOCAL GOVERNMENT ACQUISITIONS OF BROWNFIELDS Baraboo, WI**

Government acquisition of contaminated property has led to the infusion of money from tourism and private investment to the City of Baraboo, Wisconsin. The City acquired 12-acres of land, much of which was contaminated due to its use as a rail and repair yard for over a century. The Baraboo City Council approved measures to condemn the property so that the City could obtain liability protection under State and Federal laws providing defenses to environmental liability for "involuntary acquisitions" of property by local governments. The condemnation process allowed the City to assemble sufficient parcels of land to create a new 66,000-square foot City Service Center for public agencies and six acres of green space.

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### **Chicago, IL**

The City of Chicago, Illinois is using environmental liens to acquire abandoned sites and contaminated properties for brownfield redevelopment. To do this the City cleans up abandoned, contaminated properties and then forecloses in consideration for cleanup costs. Through this

innovative tool, Chicago has great success redeveloping neglected and underutilized parts of the City, thereby creating jobs and improving the local economy.

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### **Emeryville, CA\***

An economic decline in the 1980s left the area that is now Bay Street in Emeryville, California, blighted with acres of contaminated land from an insecticide plant, pigment plant, and steel drum cleaning operation. The prior industrial users were unwilling to redevelop the site due to anticipated cleanup costs. The Emeryville Redevelopment Agency initiated redevelopment through eminent domain. According to local officials, “[w]ithout the ability to use eminent domain, this site would continue to be a blight on the community, instead of the attractive urban village it is today that provides new opportunities for living, work and entertainment.” The development project on the formerly contaminated land provided 400,000-square feet of new retail and entertainment using a main street, open air design. The project created over 900 jobs and 375 residential units, 20 percent of which are affordable to those with very low-incomes.

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*\* Any use or reproduction of this case study must be approved by the Emeryville Redevelopment Agency.*

### **Fayetteville, NC**

Downtown Fayetteville, North Carolina, located just a few miles from Pope Air Force Base and neighboring Fort Bragg Army Base, is experiencing a renaissance. Fort Bragg is known for being home to the 82nd Airborne Division, XVIII Airborne Corps, and U.S. Army Special Operations Command. Since 1990, the City of Fayetteville has been focused on redeveloping its downtown area, particularly along the infamous Hay Street, that was lined with strip clubs, seedy bars, and abandoned properties. An early step in this redevelopment was to move city hall to Hay Street. Continuing transformation took place as the City used its eminent domain authority to condemn the infamous “Rick’s Lounge” strip club and replace it with a new police headquarters. Next, the City created a visioning plan for the area and dedicated nearly \$20 million in public funds to implement it. Hay Street is now center of the new downtown and includes the five-acre Airborne and Special Operations Museum (ASOM), which recently celebrated its one millionth visitor. In a small number of cases the use of eminent domain was necessary to overcome the intransigence of local property owners who could have prevented the establishment of the museum. The museum development has sparked approximately \$200 million in private investment in the immediate area. Upcoming projects in the downtown also include new office, retail, and housing developments; a sports and entertainment facility; and a veteran’s park.

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## **Glen Cove, NY**

The City of Glen Cove, New York has exercised its ability to acquire brownfields in its EPA Brownfields Showcase project along its waterfront. The redevelopment project is planned to bring up to \$1 billion in new businesses, coastal greenspace and recreational spaces, and affordable housing units to an area where 13 percent of households have annual incomes below \$15,000. The use of eminent domain was necessary for the acquisition and assessment of two neighboring brownfield properties that are known to be or potentially contaminated with low-level radioactive waste from an ammunitions factory previously located there. One of the owners of a scrap yard property refused to allow the City to perform an environmental site assessment to determine hazards on the property before an eminent domain action was filed. A city attorney working on the project explained, “[t]he use [of] eminent domain is the most important tool for an economic development official. Without it, we simply could not help communities overcome the fear and resistance of a few that can block economic development and environmental cleanup in poor communities from ever happening.”

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## **Kansas City, MO**

In the Central Industrial District, the oldest industrial area of the Kansas City, Missouri region where the Kansas and Missouri Rivers meet, blight, fear of contamination, and chronic infrastructure problems threatened to drive away remaining businesses and private investment in the late 1990s. Efforts to retain a leading business were frustrated by a private owner’s refusal to maintain a large, crumbling bakery building in violation of City codes, which later led to a catastrophic fire, devastating the West 8th Street area. The owner refused to cooperate with City officials who planned to use local funds to acquire the ruins, and local, state, and Federal funds to clean up and prepare the area for development. Ultimately, the Lewis & Clark Redevelopment Area Project succeeded in purchasing and redeveloping the properties because the threat of the City’s eminent domain powers facilitated a negotiated purchase of the bakery building along with several other properties. Improvements to the area have led to over \$100 million in private investment and the creation or retention of over 1,500 jobs.

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## **South Central Los Angeles, CA**

Concerned Citizens of South Central Los Angeles, a community-based organization, has partnered with the Los Angeles Community Redevelopment Agency (CRA/LA) in a project to redevelop a key parcel in the “Goodyear Tract,” a large industrial area that has experienced serious blight for decades. Concerned Citizens had attempted to buy the multi-parcel brownfields site, but was unable to break through legal and procedural barriers. Under a development agreement with CRA/LA, the Agency has agreed to assist with the project and is using eminent domain authority to assemble the site. The existing scrap metal operator and used car businesses will be relocated. Concerned Citizens will develop the site into a badly needed shopping center containing the community’s first grocery store, a location for computer training classes, and much more.

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# 4

## THE BROWNFIELD ACQUISITION TASK FORCE RECOMMENDATIONS

### EPA GUIDANCE AND ENFORCEMENT POLICIES

The Task Force recognizes that EPA focuses its enforcement efforts on the most severely contaminated waste sites and, therefore, the great majority of brownfields “will never require EPA’s attention under CERCLA, RCRA, or any other federal law.”<sup>43</sup> Nevertheless, CERCLA liability continues to cause fear and uncertainty that dissuades brownfield investment activities. EPA guidance on this topic would send a strong signal to the marketplace and would serve as persuasive guidance to the courts.

### RECOMMENDATION 1: Local Governments Need Guidance on Acquisition of Property

*Local governments should communicate their concerns about liability at local government led brownfield sites to EPA and work with them to develop the necessary guidance.*

EPA could reduce confusion over the application of CERCLA liability protections and reduce fears about liability and uncertainty through an enforcement guideline specifically pertaining to local government acquisitions of brownfields.

As described earlier in this report, there is currently a patchwork of liability defenses and exemptions that extend various levels of protection to local government owners of brownfields. These include the bona fide prospective purchaser limitation, the restriction on EPA enforcement at eligible response sites, and the liability exemption and defense for governments that acquire property involuntarily or through the exercise of eminent domain authority by purchase or condemnation.

Read together, the various defenses and exemptions seek to provide local governments with certainty about CERCLA liability in cases where the government did not cause or contribute to contamination on the property and is acting responsibly in the assessment and care of any

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<sup>43</sup> Office of Enforcement and Compliance, U.S. Environmental Protection Agency, *Brownfields Handbook: How to Manage Federal Environmental Liability Risks*, at 10 (Nov. 2002).

contamination, particularly at sites that meet the definition of a brownfield. These basic elements should form the basis for an EPA enforcement guideline for government ownership of brownfields.

An enforcement discretion guideline could assist local governments by reinforcing EPA's general practice of not taking enforcement action where:

- a. a unit of state or local government, including a public development authority, is the current owner or operator of the property;
- b. the property is a brownfield, as defined by section 101(39) of CERCLA;<sup>44</sup>
- c. the current owner or operator did not cause or contribute to contamination at the property; and
- d. the current owner or operator exercises due care with respect to any known contamination at the site.

## **RECOMMENDATION 2: Local Governments Need Additional Tools To Clarify Liability**

*Fact sheets, model comfort letters, and other tools on municipal acquisition will assist in locally-led brownfield projects and local governments should work with EPA on the development of these tools.*

EPA issues comfort letters to help parties understand the likelihood for EPA involvement at a particular site. For this purpose, it has created a number of model letters for use by its regional offices. EPA has found that comfort letters have proved effective at quelling property owners' concerns that they may be held liable for hazardous contamination they did not cause.<sup>45</sup>

Existing model letters address such issues as whether EPA has planned any action for a certain site or has listed it on the National Priorities List (NPL) or in the Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS) of potential hazardous waste sites. EPA also has a model letter for parties or sites covered by an EPA policy, statute, or regulation.<sup>46</sup>

Some local governments have reported difficulties obtaining comfort letters under the involuntary acquisition protections in CERCLA. To assist EPA Regional Offices in issuing comfort letters where local governments acquire brownfields, local governments should work with EPA to create a model comfort letter describing CERCLA's protections and EPA's enforcement policies in this area.

In addition to comfort letters, local officials need clear and concise guidance documents on property acquisition. Local governments should work with EPA to revise, simplify, and consolidate the existing fact sheets and guidance on government acquisitions of brownfields.

EPA's existing guidances on acquisitions of potentially contaminated properties are over a decade old, and, as described above, are confusing and contradictory. These guidance documents do not adequately discuss the protections for local governments that acquire properties through eminent domain. Nor do they adequately explain the defenses and protections available in acquiring brownfields.

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44 42 U.S.C. § 9601(39).

45 Office of Enforcement and Compliance, U.S. Environmental Protection Agency, *Brownfields Handbook: How to Manage Federal Environmental Liability Risks*, at 185 (Nov. 2002).

46 *Id.* at 191-98.

Revised fact sheets and guidelines should:

- address available liability protections for local governments;
- provide clear guidance on whether acquisition by eminent domain authority is an “involuntary acquisition” for purposes of the section 101(20)(D)<sup>47</sup> exemption from the definition of “owner or operator”; and
- provide clear guidance as to the exercise of eminent domain authority “by purchase” where a local government asserts eminent domain authority to acquire the property.

## LEGISLATIVE CLARIFICATIONS

Two key provisions in CERCLA directly address the liability of local governments when they purchase property. Unfortunately, the two provisions are inconsistent, ambiguous, and confusing. The Task Force developed recommended policy changes that would aid local governments in their efforts to cleanup and redevelop brownfield sites. Local officials should work closely with their federal partners to develop and implement these recommendations.

### **RECOMMENDATION 3: Statutory Reform Should Protect Those Who Acquire Property**

*A unified and simplified liability exemption for local government brownfield ownership would lessen confusion and provide the certainty needed to cleanup and redevelop brownfield sites.*

The current statutory protections for government acquisition of brownfields are complex, confusing, and incomplete. Although new EPA policy for local governments may lessen confusion, an enforcement guideline will not protect local governments from third party actions. Ultimately, statutory reform is needed to provide local governments with the certainty that will encourage cleanup and redevelopment of brownfields.

Statutory reform is needed to provide local governments with the certainty that will encourage cleanup and redevelopment of brownfields.

The Task Force identified two approaches to statutory language that would clarify the liability of local governments when they acquire property that is, or may be, contaminated. The first approach would exempt a local government from CERCLA liability where the local government:

- a. owns a brownfield, as defined by section 101(39);<sup>48</sup>
- b. did not cause or contribute to contamination on the property; and
- c. exercises due care with respect to any known contamination at the site.

This exemption is limited to brownfield properties and it would protect local governments from Federal, state, and third party actions.

The second approach would amend section 101(20)(D) of CERCLA<sup>49</sup> to include language (shown in bold text on the next page) which would clarify that the acquisition of property by eminent domain would fall within this exemption.

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<sup>47</sup> 42 U.S.C. § 9601(20)(D).

<sup>48</sup> *Id.* § 9601(39).

<sup>49</sup> *Id.*

“The term ‘owner or operator’ does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, **through the exercise of eminent domain authority by purchase or condemnation**, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign.”

This approach would clarify a significant ambiguity in section 101(20)(D), and it could be used at any Superfund site. This varies from the first approach recommended by the Task Force, which applied only to brownfield properties.

#### **RECOMMENDATION 4: The Bona Fide Prospective Purchaser Protection Should Be Applied Retroactively**

*The development of a retroactive application of the bona fide prospective purchaser protection would benefit all parties, including localities, that seek to clean up and revitalize brownfields.*

The addition of the bona fide prospective purchaser (BFPP) protection to CERCLA in the 2002 brownfields amendments is the most significant liability exemption enacted to encourage brownfield development. For the first time, Congress allowed liability protection for entities that acquired property *with* prior knowledge of contamination. This is particularly important for brownfield development since potential purchasers almost always perform all appropriate inquiry prior to acquisition and therefore discover any contamination of the property.



However, there is a significant problem with the BFPP language – it only applies to properties purchased after the date of the 2002 brownfields amendments. Although grant funding has been extended retroactively to properties purchased before this date,<sup>50</sup> liability protection has not. The BFPP protection would be significantly strengthened by extending its protections to *all* properties, regardless of the date acquired.

#### **RECOMMENDATION 5: EPA Should Have Statutory Authority to Promulgate Regulations on Local Government Acquisition of Property**

*With the ability to influence regulation, EPA could address many of the uncertainties and ambiguities in the current law.*

It is unrealistic to expect legislation to anticipate all possible scenarios in which a local government may be liable for cleaning up and redeveloping brownfields. Statutory reform is needed to grant EPA clear authority to draft regulations on the acquisition by local governments of contaminated property. This authority would enable EPA to clarify ambiguities without Congressional action.

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50 Safe, Accountable, Flexible, Efficient, Transportation Equity Act-A Legacy for Users, Pub. L. No. 109-59, § 1956, 119 Stat. 1144, 1515 (2005).

51 *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (holding that courts must defer to reasonable agency interpretations of statutes for which they have clear authority to interpret from Congress, even if those agency interpretations follow court interpretations).

As discussed above, courts have issued rulings on the interpretation of the involuntary acquisition protections that conflict with other court opinions or with EPA's interpretations of the same provisions. Under the recent *Brand X* decision by the U.S. Supreme Court,<sup>51</sup> EPA may be empowered to resolve present and future conflicts in the courts through regulations. EPA currently does not "have authority to, by regulation, define liability for a class of potential defendants" under CERCLA.<sup>52</sup> Granting EPA clear authority to promulgate regulations on the definition of involuntary acquisitions would help to resolve ambiguities in the law.

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47 *Kelley v. EPA*, 15 F.3d 1100, 1107 (D.C. Cir. 1994).



## **APPENDIX A: EPA GUIDANCE ON INVOLUNTARY ACQUISITIONS**

In preparing this report, NALGEP reviewed existing EPA guidances on government acquisitions of potentially contaminated land. As discussed above, much of that guidance has failed to clarify the protections outlined in CERCLA, particularly the involuntary acquisition provisions that apply to government acquisition of properties. This Appendix summarizes the main EPA guidance documents on involuntary acquisitions issued over the past 15 years. Visit <http://www.epa.gov/compliance/cleanup/> to find EPA copies of these documents.

### **LENDER LIABILITY RULE (1992)**

EPA's most important statements on interpreting involuntary acquisition protections in CERCLA emanate from the Lender Liability Rule (1992).<sup>53</sup>

The main purpose of the Lender Liability Rule is to define the range of permissible actions that may be taken with respect to potentially contaminated property without incurring liability under CERCLA. The rule also included provisions defining the scope of the involuntary acquisition protections in sections 101(20)(D) and 101(35)(A)(ii).

The portion of the final rule that addressed involuntary acquisitions states:

- (a) Governmental ownership or control of property by involuntary acquisitions or involuntary transfers within the meaning of CERCLA section 101(20)(D) or section 101(35)(A)(ii) includes, but is not limited to:
  - (1) Acquisitions by or transfers to the government in its capacity as a sovereign, including transfers or acquisitions pursuant to abandonment proceedings, or as the result of tax delinquency, or escheat, or other circumstances in which the government involuntarily obtains ownership or control of property by virtue of its function as sovereign;
  - (2) Acquisitions by or transfers to a government entity or its agent (including governmental lending and credit institutions, loan guarantors, loan insurers, and financial regulatory entities which acquire security interests or properties of failed

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<sup>53</sup> National Oil and Hazardous Substances Pollution Contingency Plan; Lender Liability Under CERCLA, 57 Fed. Reg. 18,344 (Apr. 29, 1992).

private lending or depository institutions) acting as a conservator or receiver pursuant to a clear and direct statutory mandate or regulatory authority;

- (3) Acquisitions or transfers of assets through foreclosure and its equivalents (as defined in 40 CFR 300.1100(d)(1)) or other means by a Federal, state, or local government entity in the course of administering a governmental loan or loan guarantee or loan insurance program; and
- (4) Acquisitions by or transfers to a government entity pursuant to seizure or forfeiture authority.<sup>54</sup>

The regulations are notable in several respects:

- the concept of involuntary acquisition is clearly defined as referring to the same types of acquisitions in both the section 101(20)(D) exemption and the innocent landowner defense defined in section 101(35)(A)(ii);
- they include a definition of involuntary acquisition for both sections, i.e. “circumstances in which the government involuntarily obtains ownership or control of property by virtue of its function as sovereign;”
- the examples of involuntary acquisition are expanded to cover scenarios where the government clearly does have discretion and must act affirmatively to gain title, namely “through foreclosure and its equivalents” and “transfers to a government entity pursuant to seizure or forfeiture authority;” and
- the regulations fail to comment on whether the exercise of eminent domain is an example of involuntary acquisition that qualifies for the section 101(20)(D) exemption as well as the innocent landowner defense defined by section 101(35)(A)(ii).

The preamble preceding the Rule defines an acquisition as “‘involuntary’ if the facility is acquired . . . [‘]through the exercise of eminent domain authority by purchase or condemnation.”<sup>55</sup> It further states the “statute’s use of the term ‘involuntary’ in both sections [101(35)(A)(ii) and 101(20)(D)] refer to the same types of acquisitions,”<sup>56</sup> rejecting submissions by commentators that the reference to eminent domain in section 101(35)(A)(ii) refers to a “voluntary” acquisition by government, distinguished from the reference to “escheat, or through any other involuntary transfer or acquisition” in the same section.<sup>57</sup> Thus, the clear implication is that exercise of eminent domain qualifies a local government for both the section 101(20)(D) exemption from the definition of “owner or operator” and the third party defense defined by section 101(35)(A)(ii).

The preamble language adopts a definition of the term “involuntary” in CERCLA that is somewhat at odds with the affirmation that the exercise of eminent domain is an involuntary acquisition. It stated:

EPA interprets the term “involuntary acquisition or transfer” under CERCLA to denote any acquisition or transfer in which *the government’s interest in, and ultimate ownership of, a specific asset exists only because the conduct of a non-governmental party*—as in the case of abandonment or escheat—gives rise to a statutory or common law right to property on behalf of the government.<sup>58</sup>

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54 40 C.F.R. § 300.1105.

55 57 Fed. Reg. at 18,348.

56 *Id.*

57 *Id.*

58 *Id.* at 18,372 (emphasis added).

The preamble does not explain how the exercise of eminent domain meets this definition. It nonetheless makes clear that the exercise of volitional action by government, as is necessary in eminent domain cases, does not render an acquisition “voluntary” for purposes of the defense:

In this respect, it is important to recognize that some of the forms of acquisitions listed in the statute that are specifically identified as “involuntary” nevertheless require some volitional action by the government entity in order to perfect title to the property (such as acquisition by foreclosure or by a tax delinquency). Therefore, it is not necessary for the government entity to be completely “passive” in order for the transfer to be considered “involuntary” for purposes of CERCLA. . . . The general phrase “or any other involuntary transfer or acquisition” does not require that the government entity acquiring the property to do so in a completely passive fashion. Therefore, the mere existence of governmental discretion with respect to the time or fact of acquisition cannot be deemed dispositive of whether an acquisition or transfer is “involuntary” within the meaning of CERCLA.<sup>59</sup>

The preamble subsequently explains: “acquisition by exercise of the government’s eminent domain authority—an inherently sovereign function—so often requires some overt, volitional act to complete or effect the transfer, such as a condemnation action.”<sup>60</sup>

While the preamble makes clear that the government can take affirmative action to acquire property and still be subject to the involuntary acquisition protections, it also explains that property being “acquired by virtue of the government’s function as sovereign is not necessarily dispositive.”<sup>61</sup> It discussed “the clear terms of sections 101(20)(D) and 101(35)(A)(ii) require that the acquisition must be involuntary as well. . . . Reading the definition of ‘involuntary’ to cover every instance of governmental ownership as ownership by virtue of its function as sovereign would render . . . other section[s] [of CERCLA] meaningless.”<sup>62</sup>

### **CERCLA ENFORCEMENT AGAINST LENDERS AND GOVERNMENT ENTITIES THAT ACQUIRE PROPERTY INVOLUNTARILY (1995)**

In 1994, the District of Columbia Circuit Court struck down the Lender Liability Rule, finding that EPA lacked sufficient Congressional authority.<sup>63</sup> After the District of Columbia Circuit Court ruling, EPA adopted the rule as an enforcement discretion guideline in 1995.<sup>64</sup>

### **MEMORANDUM TO REGIONAL COUNSEL, MUNICIPAL IMMUNITY FROM CERCLA LIABILITY FOR PROPERTY ACQUIRED THROUGH INVOLUNTARY STATE ACTION (OCT. 20, 1995)**

An October 20, 1995 memorandum from EPA’s Office of General Counsel responded to a request from a regional counsel for an opinion on municipalities’ liability for property acquired through tax delinquency, foreclosure, demolition lien foreclosure, escheat, abandonment and condemnation, or eminent domain.

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 18,381.

<sup>61</sup> *Id.* at 18,381 & n.18.

<sup>62</sup> *Id.*

<sup>63</sup> *Kelley v. EPA, supra.*

<sup>64</sup> CERCLA Enforcement Against Lenders and Government Entities That Acquire Property Involuntarily, 60 Fed. Reg. 63,517 (Dec. 11, 1995).

The memorandum's introduction expressed an understanding "that even where municipalities have authority to acquire property, they are often reluctant to do so because of concerns about potential liability under the [CERCLA]." It added, "We hope that this response will clarify some of the issues related to involuntary acquisition of property by municipalities and facilitate municipalities' plans for redevelopment and 'brokerage' of brownfield sites to prospective purchasers."<sup>65</sup>

The memo is largely based on statements from the preamble to the Lender Liability Rule (1992). It adopts the Preamble's definition of an involuntary acquisition as one in which "the government's interest in, and ultimate ownership of, a specific asset exists only because of the conduct of a non-governmental party."<sup>66</sup> And it repeats that "it is not necessary for the government entity to be completely 'passive' in order for the acquisition to be considered 'involuntary' for purposes of CERCLA."<sup>67</sup>

The memorandum's discussion of eminent domain and condemnation is brief, stating in relevant part:

Section 101(35)(A) of CERCLA specifically excludes from the definition of "contractual relationship" certain instruments where a government entity acquired the facility through the exercise of eminent domain authority by purchase or condemnation. Thus, *a government entity that involuntarily acquires a facility through the exercise of eminent domain authority by purchase or condemnation will have a third-party defense* to liability under section 107(b)(3) of CERCLA, provided other statutory elements of the defense are met. As indicated above, EPA generally considers this defense to be available even if the government's exercise of eminent domain authority includes some type of discretionary, affirmative action.<sup>68</sup>

The memorandum is the only instance when EPA suggests that the use of eminent domain authority qualifies for the defense in section 101(35)(A)(ii) defense only if it "involuntarily acquires a facility through the exercise of eminent domain." It does not explain what an involuntary exercise of eminent domain is or how its statement squares with the analysis in the Lender Liability Rule that suggests that the inclusion of eminent domain in section 101(35)(A)(ii) was meant as an example of an involuntary acquisition. The memorandum contains no guidance on whether the use of eminent domain is subject to the exemption in section 101(20)(D).

## **THE EFFECT OF SUPERFUND ON INVOLUNTARY ACQUISITIONS OF CONTAMINATED PROPERTY BY GOVERNMENT ENTITIES (QUICK REFERENCE FACT SHEET DECEMBER 1995)**

A "quick reference fact sheet" released by the Office of Enforcement and Compliance Assurance in December 1995 largely tracks the language and analysis contained in the memo to regional counsel released the same month.

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<sup>65</sup> Memorandum from Office of Site Remediation Enforcement to Regional Counsel, Mun. Immunity from CERCLA Liab. for Prop. Acquired through Involuntary State Action, at 1-2 (Oct. 20, 1995).

<sup>66</sup> *Id.* at 3.

<sup>67</sup> *Id.* at 4.

<sup>68</sup> *Id.* (emphasis added) (footnote omitted).

The fact sheet repeats EPA's definition of "involuntary" as 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." It explains:

For example, a government's acquisition of property for which a citizen failed to pay taxes is an involuntary acquisition because the citizen's tax delinquency gives rise to the government's legal right to take title to the property.<sup>69</sup>

It also repeats EPA's analysis that an action can be involuntary if a government "takes some sort of voluntary action before acquiring the property."<sup>70</sup> But, confusingly, it states that a third party bequeathing property to the government upon that individual's death does *not* create an involuntary acquisition by the government, despite such an action's apparent compliance with the definition of an involuntary acquisition.<sup>71</sup>

The fact sheet's discussion of the protection afforded when a government uses eminent domain is limited to a single sentence:

After a government entity acquires property through the exercise of eminent domain (the government's power to take private property for public use) by purchase or condemnation, it will have a third-party defense to CERCLA liability if all requirements for that defense are met.

## **ASSET CONSERVATION, LENDER LIABILITY, AND DEPOSIT INSURANCE PROTECTION ACT, PUB. L. NO. 104-208, 110 STAT. 3009-462 (1996)**

On September 30, 1996, Congress passed the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act, 110 Stat. 3009-462 (1996). The new statute gave broad liability protection to lending institutions and validated the portion of the Lender Liability Rule (1992) that addressed acquisitions by government entities.

## **REINSTATEMENT OF 40 C.F.R. § 300.1105 (JUNE 26, 1997)**

Following the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act, 110 Stat. 3009-462 (1996), the text of 40 C.F.R. § 300.1105 was reinstated in the Code of Federal Regulations. 40 C.F.R. § 300.1105 currently states:

§ 300.1105 Involuntary acquisition of property by the government.

(a) Governmental ownership or control of property by involuntary acquisitions or involuntary transfers within the meaning of CERCLA section 101(20)(D) or section 101(35)(A)(ii) includes, but is not limited to:

(1) Acquisitions by or transfers to the government in its capacity as a sovereign, including transfers or acquisitions pursuant to abandonment

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<sup>69</sup> Fact sheet at 1.

<sup>70</sup> The fact sheet at 3 explains: Involuntary acquisitions, including the examples listed in CERCLA, generally require some sort of discretionary, volitional action by the government. A government entity need not be completely "passive" in order for the acquisition to be considered "involuntary" for purposes of CERCLA.

<sup>71</sup> In response to the question "If someone dies and leaves contaminated property to a government entity, is this considered an involuntary acquisition?" the fact sheet at 3 states:

No, this type of property transfer is not considered an involuntary acquisition under CERCLA. However, CERCLA provides a third-party defense for parties that acquire property by inheritance or bequest (a gift given through a will). Thus, a government entity that acquires property in this manner will have a third-party defense to CERCLA liability if all relevant requirements of that defense are met and the government entity has not caused or contributed to the release or threatened release of contamination from the property (see above). For more information, see 42 U.S.C. 9607(b)(3) and 9601(35)(A) and (D).

proceedings, or as the result of tax delinquency, or escheat, or other circumstances in which the government involuntarily obtains ownership or control of property by virtue of its function as sovereign;

- (2) Acquisitions by or transfers to a government entity or its agent (including governmental lending and credit institutions, loan guarantors, loan insurers, and financial regulatory entities which acquire security interests or properties of failed private lending or depository institutions) acting as a conservator or receiver pursuant to a clear and direct statutory mandate or regulatory authority;
  - (3) Acquisitions or transfers of assets through foreclosure and its equivalents (as defined in 40. C.F.R. § 300.1100(d)(1)) or other means by a Federal, state, or local government entity in the course of administering a governmental loan or loan guarantee or loan insurance program; and
  - (4) Acquisitions by or transfers to a government entity pursuant to seizure or forfeiture authority.
- (b) Nothing in this section or in CERCLA section 101(20)(D) or section 101(35)(A)(ii) affects the applicability of 40. C.F.R. § 300.1100 to any security interest, property, or asset acquired pursuant to an involuntary acquisition or transfer, as described in this section.

### **POLICY ON INTERPRETING CERCLA PROVISIONS ADDRESSING LENDERS AND INVOLUNTARY ACQUISITIONS BY GOVERNMENT ENTITIES, 62 FED. REG. 36,423 (JULY 7, 1997)**

Following the reinstatement of 40 C.F.R. § 300.1105, EPA published a policy memorandum that “set[] forth the policy of the U.S. Environmental Protection Agency (EPA) for interpreting the provisions of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) that address (1) lenders and (2) government entities that acquire property involuntarily.”<sup>72</sup>

The memorandum explains:

Regarding the exemption for government entities that acquire property involuntarily and the “third-party” defense potentially available to those entities, neither the legislative history of CERCLA §§ 101(20)(D) and 101(35)(A) nor the case law provided sufficient explanation of when a property acquisition or transfer is considered involuntary. Thus, in the [1992 Lender Liability] Rule, EPA also clarified the language of these sections by providing examples of involuntary acquisitions by government entities.<sup>73</sup>

The memorandum explains that, after the decision in *Kelley v. EPA*, 15 F.3d 1100 (D.C. Cir. 1994), EPA and U.S. Department of Justice (DOJ) issued their 1995 Enforcement Policy adopting the Lender Liability Rule and preamble as an enforcement guidance.<sup>74</sup> It then explains that as a result of the Asset Conservation Act, validating the section of the 1992

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<sup>72</sup> Policy on Interpreting CERCLA Provisions Addressing Lenders and Involuntary Acquisitions by Government Entities, 62 Fed. Reg. 36,423, 36,424 (July 7, 1997).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 36,425.

Lender Liability Rule applying to involuntary acquisitions, “EPA and DOJ have withdrawn their 1995 Enforcement Policy, and EPA is now issuing the policy statement below to provide guidance on interpreting CERCLA’s lender and involuntary acquisition provisions.”<sup>75</sup>

The section of the policy memorandum pertaining to government involuntary acquisitions states:

B. Involuntary Acquisitions by Government Entities

As noted above, Section 2504 of the Asset Conservation Act validated the portion of the CERCLA Lender Liability Rule that addresses involuntary acquisitions by government entities. 40 CFR 300.1105 is therefore legally applicable to the interpretation of CERCLA §§101(20)(D) and 101(35)(A), the provisions that address involuntary acquisitions by government entities. Similar to the preamble to any valid regulation, the preamble to the CERCLA Lender Liability Rule will be looked to as authoritative guidance on the meaning of the portion of the Rule addressing involuntary acquisitions. For example, when interpreting the meaning of “involuntary acquisition or transfer,” EPA will consult the following definition contained in the preamble:

[A]ny acquisition or transfer in which the government’s interest in, and ultimate ownership of, a specific asset exists only because the conduct of a non-governmental party--as in the case of abandonment or escheat--gives rise to a statutory or common law right to property on behalf of the government.<sup>76</sup>

The policy memorandum does not contain direct references to the use of eminent domain by local governments.

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 36,425.

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