International Municipal Lawyers Association
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Brownfields Panel Presentation
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Introduction:

I would like to thank Chuck Thompson of IMLA and our panel host Frank Grenard for inviting me to participate on the brownfields panel this afternoon. I am excited about the opportunity to share some of my experiences in this field. Since 1996, I have worked on brownfields redevelopments for the City of Chicago, which has a very active brownfields program. We have encountered a variety of brownfields development scenarios, and have learned some things about opportunities and pitfalls in this area that may be of interest to you.

The brownfields legal work that I and others in my division of the City of Chicago Law Department do supports the efforts of the Chicago Department of Environment and the Chicago Department of Housing and Economic Development. As we will see, the environmental side of brownfields (including the nature of the contamination and the extent of cleanup required) and the development side (the overall end use of the site as well as the particulars of the construction plan) are quite intertwined. Accordingly, effective--especially cost effective--brownfields redevelopment depends on the diligent combination of these areas of expertise throughout the process.

Brownfields remediation is a highly regulated undertaking, and one that also involves potential liability concerns that must be anticipated and managed. This requires the involvement of legal counsel from the earliest stages of a brownfield project—even before the acquisition of the property—to ensure that all opportunities are taken advantage of (such as possible cost recovery, arranging the most efficient means of acquisition, obtaining legal authority for performing pre-acquisition environmental site investigation, and ensuring that your municipal client qualifies for exemptions and defenses from liability, for example) and pitfalls avoided (such as lengthy regulatory delays and threatened environmental liability).

In my presentation, I will cover:
1. What are brownfields?
2. What are the harms they cause?
3. What are the benefits of brownfields redevelopment?

4. What special value does a local government bring to brownfields redevelopment?
5. An overview of the brownfields redevelopment process from a lawyer's perspective.
6. A discussion of liability for environmental cleanup costs and how it can be avoided.
7. Potential federal statutory changes to provide greater protections from liability for municipalities engaged in brownfields redevelopment.

1. What is a brownfield site?

Under the federal Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, a brownfields site is "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." CERCLA § 101(39)(A).

Brownfields are created by spills and releases of hazardous substances, dirty operations that took place before the advent of modern environmental regulations, leaking underground tanks, sloppy demolition, and illegal dumping on the property after it was abandoned, among many other sources.

In the usual scenario, these old industrial sites will have been abandoned, and if any ownership can be determined, it will likely be an insolvent or inactive business entity, with no assets. Brownfields are usually located in economically depressed neighborhoods where property values are already low; their presence depressing them even further.

Examples: In Chicago, the typical brownfield site is an abandoned building that is unsuitable for re-use, situated on ground that has been contaminated by years of poor environmental practices, and often subsequent illegal dumping on the unsecured vacant parcel. The presence of the abandoned building means that even before soil issues can be addressed, above-ground structures will have to be demolished (frequently involving environmental issues such as PCBs, asbestos or lead paint) in order to address subsurface issues such as soil contamination and leaking underground storage tanks.

Note: Demolitions are expensive, but they can sometimes be bid out for much less than expected due to the salvage value of metals in the building (assuming the scrappers haven't gotten to them yet).

2. What are the harms caused by brownfield sites?

Brownfields that lie idle can cause and perpetuate neighborhood blight, potentially impact a community's health and the environment, basic safety (due

to vacant land and unsound buildings), dampen economic development and job creation, and undermine the tax base.

3. What are the benefits of brownfields redevelopment?

Brownfields redevelopment spurs economic development and the creation of jobs close to labor sources, can play a crucial role in neighborhood revitalization, gets properties back on tax rolls, and enhances and protects public health and safety.

4. What unique value does a municipal government bring to brownfields redevelopment?

The typical brownfield is "upside down" in terms of the relationship of property value to cost of cleanup. That is, the value of the property cleaned up is less than the cost to clean it up. Therefore, especially in the current economic climate, there often is not much of an incentive for private parties to undertake brownfields cleanup and redevelopment on their own accord. Under these circumstances, local government can play a critical role in encouraging clean-up and redevelopment, or take on those tasks itself.

Through negotiated purchases or involuntary means including tax delinquency and foreclosures, and through the use of eminent domain, local governments can take control of brownfields in order to conduct site assessments, remediate environmental hazards, and otherwise prepare the property for development by the private sector or for public and community facilities.

In particular, local governments can acquire small contiguous parcels, clear often cloudy title, and consolidate those parcels into attractive redevelopment packages—large parcels of property (in Chicago that means 10 acres and more). Parcels of such size, available for redevelopment in urban areas, with good clear title, can be rather rare, so there can be considerable interest in these assembled sites despite environmental challenges.

Brownfields redevelopments can take substantial time that a local government can afford in a way that a private developer cannot. And local governments can attract developer interest in a brownfield site with low-cost land, tax reductions, assistance with financing, etc.

5. An overview of brownfields redevelopment (a lawyer's perspective)

A. The first step in starting a municipal brownfields program is to prioritize sites. In Chicago, our basic criteria for prioritizing candidate sites are (a) redevelopment potential; (b) ease of acquisition; (c) funding for acquisition; (d) preliminary assessment of complexity of clean-up; (e) liability issues; and (f) anticipated timing.

B. The second step (if it has not already occurred) is to conduct a site assessment / environmental investigation. These occur in 2 phases.

(1) The first phase (the Phase I or Environmental Site Assessment) does not involve actual environmental sampling, but reviews available history about the past ownership and uses of the site, and takes a look at the site to see if there are any overt signs of environmental problems. *See* City of Chicago form for Phase I Review Checklist and Phase I ESA Review Notes, attached.

(2) If based on the Phase I it appears that there may be environmental issues at the site, a Phase II will be required. This is a more rigorous level of investigation, involving taking samples for analysis. *See* City of Chicago form for Phase II Review Checklist and Phase II Review Notes, attached.

Note on extent of sampling: There are many items in the brownfields redevelopment process that can and should be economized. The environmental study of the site is not one of them. There are a multitude of potentially expensive risks involved in not knowing the site thoroughly, if your municipality decides to take it on. Of course, an environmental investigation can be phased, so those costs do not have to be incurred all at once.

Note on access to perform Phase II sampling: Your environmental engineers will need to have physical access to the site to perform Phase II sampling. This can be a real problem at an abandoned site where there is no owner you can deal with or get service on. In Illinois, there are statutory methods for a municipality to gain access to perform environmental sampling on abandoned properties through a court order under 65 ILCS 5/11-31-1(f). There is also authority to enter sites in environmental emergencies. Check your own state statutes for comparable authority.

Note on Phase II sampling and liability: As discussed in the subsequent liability section of this presentation, performing intrusive sampling--for example, taking soil cores or digging trenches—can potentially trigger "operator" liability for the person or entity doing it. Therefore, before the City of Chicago undertakes such activities on a site where we know the federal government has incurred cleanup costs, we contact USEPA, in writing, and get their sign-off, in writing, on our sampling plan, and invite them to join us on-site for the sampling activities, in writing. We don't want there to be any argument that the City's actions resulted in a release of hazardous substances on site, potentially making the City liable for previous cleanup costs. The same thing goes for demolition work or other invasive measures a local government undertakes on a brownfield site to make it safe.

C. Once a candidate site has been identified, ideally it still should not be acquired until you have a good idea of the costs your municipality will incur in cleaning it up, among other considerations. These costs cannot be known with any certainty until you have formulated a cleanup plan, and ideally your cleanup plan should be designed around a redevelopment plan that has been bought into by potential developer(s). This raises the following key concepts:

Key concept 1: How clean is clean?

In brownfields redevelopment, it is crucial to understand that, although the cost of a full dig and haul environmental cleanup--that is, where contaminated soil is excavated, hauled to a landfill, and then disposed of--can be quite high, that level of cleanup is often unnecessary.

Rather, cleanups can be designed around the planned end use of the property, minimizing the amount of material that must be taken offsite by using site-specific remediation objectives which protect human health and the environment. These site specific cleanup standards are based on site conditions and the intended future use of the property and a detailed consideration of potential exposure pathways for contaminants. For example, the site of a future manufacturing plant built on top of a concrete pad does not require the same level of cleanup as a property intended for single-family residential use.

Key concept 2: Integrating end use into cleanup strategy

The optimal approach is to have a redevelopment plan that is formulated in tandem with the cleanup plan, and which has been adjusted to minimize environmental cleanup costs. That is, based on the results of the environmental study of the site, you know where the areas of nonhazardous environmental contamination are located which can remain on site if they are covered with an engineered barrier (all the hazardous material and free product must be treated or taken off-site, but there will still be contaminated material that falls short of that threshold which will need to be addressed). A building pad, road or parking lot are among many examples of engineered barriers that can be used to cover this contaminated material (assuming it is geotechnically suitable) and avoid the costs of excavation, hauling and disposal, which are by far the largest drivers of site cleanup costs. Thus, the planned layout of the redevelopment can optimize the location of building structures to minimize cleanup costs, and the cleanup plan can be used to direct remediation to the locations where it is called for by the development plan.

The harder case is where the site is in such bad shape that there is no serious developer interest, and thus no real redevelopment plan, until there is some site preparation. In those cases, the clean-up can be staged, with multiple points where the cleanup plan can be modified to adjust to the end uses in which it turns out there is interest.

So don't let the estimates of complete cleanup put you off. With proper planning, those high end costs can be avoided. But in order to plan the cleanup, you will need a good idea of the end use.

Finally, as you formulate the cleanup / development plan, you will need to enter discussions with your state environmental protection agency's site remediation program. Developers will want to know that your proposed clean-up will ultimately satisfy regulators, and you will need to start getting the regulators' response to your cleanup proposals before you go too far down the road, as changes to the cleanup that the regulators may require will impact the contours of the redevelopment plan. Once the cleanup plan, development plan, and regulatory compliance are under control, you should have a pretty good idea of what your final cleanup costs will be. Which leads to the next step:

D. Develop a project financing plan. The City of Chicago, like most municipalities with brownfields programs, uses a mixture of municipal funds, federal loans, federal cost-sharing programs, and grants. I will leave the arcane area of municipal finance to the gurus.

However, there is another source of funding for brownfield cleanups with which the City has had considerable success. This is cost recovery from the prior owners or operators of a brownfields site who are responsible for the contamination and dumping. In this scenario, the City acquires the property, cleans it up, and then seeks to recover its costs from the people or entities who owned it before, the entities who hauled material to it, or who were otherwise involved in the operation and contamination of the site. In the case of haulers, we have negotiated "in kind" settlements, whereby they provide free or heavily discounted hauling to the City for the site cleanup project. Sometimes we have recovered substantial amounts—more than $5.5 million for the cleanup of a site located at 76th & Albany in Chicago in 39 separate actions.

Note on insurance: Often there are no viable entities to sue. However, even if they are out of business, they may have had insurance coverage which did not exclude environmental liability. Policies issued before 1984 typically do not have such exclusions. Therefore, if environmental contamination occurred on the site before 1984, you should explore whether there are any records, even of a defunct business, which indicate that they had liability insurance before 1984. This does not at all have to

be a full-blown policy—policy evidence can consist of as little as a bill or a ledger entry indicating payment of a policy premium and the policy number. Your litigation / settlement strategy is then to step into the shoes of the company with respect to its insurer, get those rights assigned to you, and then bring a claim under that liability insurance. There is good Illinois precedent for this in *Guillen v. Potomac Ins. Co. of Ill.*, 785 N.E.2d 1 (Ill. 2003). *Also see*, *Henkel Corp. v. Hartford Accident & Indem. Co.*, 62 P.3d 69 (Cal. 2003) regarding insurance assignment. Check your own state.

E. The next step in the brownfields redevelopment process is to acquire the land. This can occur through tax or lien foreclosure, eminent domain, voluntary purchase, or in settlement of litigation (for example, where the municipality sues a site owner over contamination or dumping on the sites, and acquires the site in settlement of its claims for cleanup cost damages). The method of acquisition and steps leading up to it can have a decisive effect on the level of potential liability your municipality is subject to, which will be discussed in a following section devoted to liability issues.

Note on systematic use of property screen: In any municipal acquisition of real estate, but especially those based on tax delinquency or abandonment and which involve parcels above a certain size (*i.e.*, not single family homes), your municipality should employ a property screening procedure, always. This forces people to evaluate potential costs and liabilities that the municipality may incur in acquiring a parcel of property, which can otherwise be overlooked in the drive to get a deal done. *See* sample City of Chicago Property Acquisition Screen Summary Sheet, attached.

F. Finally, the site cleanup can start. Brownfield remediations usually occur in the context of a state environmental protection agency's site remediation program, with the end result being a "No Further Remediation" determination for the site issued by the state agency. These determinations give developers comfort that they will not be taking on any environmental liabilities in developing the site, and are also usually required by banks as a condition of making loans to finance the redevelopment. *See* City of Chicago Model Timeline for Remediation Process and Site Remediation Program Schedule, attached.

A note on the use of cost cap and other forms of insurance to protect against cost overruns in brownfields redevelopment: On several occasions, I and others working on brownfield redevelopments for the City of Chicago have explored the use of environmental insurance to protect against budget-busting cost overruns in brownfields redevelopment. These overruns can result from incomplete knowledge of site conditions

when making initial cleanup cost estimates, the discovery of unforeseen contamination on the site, discovery of more contamination than expected, etc.

At the end of the day, we have not found cost cap or general environmental insurance to be a cost effective way of protecting against cleanup cost overruns. The most cost effective insurance device that we have encountered was actually employed by a developer who had taken on the cleanup of a City brownfield site, and who was also frustrated by the prohibitive cost of environmental cost cap insurance. The developer solved the problem by isolating the one or two things whose discovery could blow his budget, and obtained insurance targeted at that specific risk, and that risk alone, not at the overall cost of the cleanup. The end result was adequately affordable, and is a model we will use in the future.

There is another approach to managing cleanup cost overruns we have also used quite recently at a site with a history of unpleasant discoveries. To get the site cleaned up, the City has entered into a deal with a developer whereby the City has deposited funds into an escrow account to pay for the developer to do the work. Under the detailed escrow instructions, the developer can withdraw a set amount of funds from the account based on certifications by a professional engineer that certain work milestones had been achieved--all pursuant to a cleanup plan agreed to by the City and the developer, and approved by state regulators. If there are any funds remaining in the account at the end of the cleanup project, that will be developer profit. If however, the amount the City deposited into the escrow account is insufficient to pay for the cleanup, the developer is obligated to use its own funds to complete the cleanup and obtain the requisite regulatory approvals from the state environmental regulatory agency. This modifies the usual incentives in a cleanup project, where a municipality contracts out the cleanup to a contractor, who then makes its money based on the amount of work it can perform and bill. In this recent project, the profit is to be realized by coming in under estimated costs, so the incentives are much better for a cost-effective cleanup (the developer entered into a similar agreement with his contractor, who also stands to share in the escrow account overage if the project comes in under estimate). The project is running smoothly, and should finish ahead of schedule.

6. Liability and how to avoid it

When acquiring or doing work on brownfields sites, municipalities must be mindful of potential liability for environmental cleanup costs. You may assume that a local government with no involvement in the prior contamination coming onto an abandoned site and preparing it for redevelopment puts you on the side of the angels, but there is some thinking that you are actually disturbing a happy

ending—the site is capped and secured with a fence and a padlock, site contamination under control, with exposure pathways all neatly tied up and laid to rest. When you come out and start doing site prep work, you may not automatically be seen as the good guy.

The principal statute governing environmental liability is the federal Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.* State environmental liability statutes are generally modeled after CERCLA. CERCLA is a strict liability statute that holds potentially responsible parties ("PRPs") jointly and severally liable, without regard to fault, for cleanup costs incurred in response to the release or threatened release of hazardous substances. Under CERCLA § 107, a local government may be considered a PRP if it is the owner or operator of the contaminated property (among other criteria). Unless it qualifies for certain exemptions from or affirmative defenses to CERCLA liability, a local government that owns or operates a site where the USEPA or others have incurred environmental response costs can be liable. Therefore, ensuring that your municipal client qualifies for exemptions from and defenses to CERCLA liability is of vital importance.

But *see Burlington Northern & Santa Fe R.R. Co. v. U.S.*, 129 S.Ct. 1870 (2009) and *In re Methyl Tertiary Butyl Ether Products Liability Litigation*, 643 F.Supp.2d 461 (S.D.N.Y. 2009). Strict joint and several liability is not what it used to be. Courts sometimes find ways to soften the harsh impact of CERCLA liability.

CERCLA exemptions and defenses:

(A) Involuntary acquisition by a local government exemption. CERCLA § 101(20)(D).

This exemption provides that a unit of local government will not be considered an owner or operator of contaminated property (and thus exempt from potential CERCLA liability as a PRP) if it acquired ownership involuntarily, as long as it did not cause or contribute to the release of hazardous substances at the site. A non-exhaustive list of involuntary acquisitions includes bankruptcy, tax delinquency, abandonment, or "other circumstances in which the government entity involuntarily acquires title by virtue of its function as sovereign." *See* full text of provision, attached.

There are varying interpretations of what is meant by "involuntary acquisition." The federal government has recognized that tax foreclosure and other acquisitions by local government may include some affirmative actions, and that such acquisition can still be considered involuntary for purposes of CERCLA liability. *See* USEPA's March 2011 "CERCLA Liability and Local Government Acquisitions and Other Activities," EPA-330-F-11-003.

Note: This is the strongest level of protection from CERCLA liability a municipality can have. It is a statutory exemption from liability, and can be resolved on a motion to dismiss. The other CERCLA protections are only affirmative defenses, which must be proved by a preponderance of the evidence, and will therefore have to be litigated.

Note: The involuntary acquisition by a unit of local government exemption does not apply to eminent domain acquisitions (presumably), to voluntary purchases, or to acquisitions via litigation.

Note: There is no requirement for "all appropriate inquiries" for this exemption as is the case with the CERCLA defenses, but for reasons set forth earlier, a brownfield site should never be acquired without some environmental scrutiny.

(B) Bona fide prospective purchaser protection. CERCLA §§ 101(40) and 107(r)(1).

If a government voluntarily acquires a parcel of property knowing that it is contaminated, this is the primary protection. It is not an exemption, but a defense, which must be established by the preponderance of the evidence. *See* full text of provision, attached. The main criteria for qualifying for this defense are:

(i) the local government has to perform "all appropriate inquiries" prior to purchase of the property pursuant to CERCLA § 101(35)(B),
(ii) all contamination has to have occurred before local government acquisition,
(iii) the local government cannot be involved in the prior contamination, and
(iv) the local government must meet continuing obligations regarding hazardous substances on the property, including taking reasonable steps to prevent the release of hazardous substances. CERCLA § 101(40).

"All appropriate inquiries" means investigation of the previous ownership and uses of the property prior to acquisition. In other words, performing a Phase I, and if indicated a Phase II investigation, as described above. *See* 40 C.F.R. Part 312 for more details.

(C) Third party defense or innocent landowner liability defense. CERCLA §§ 107(b)(3), 101(35)(A).

CERCLA § 107(b)(3) provides a "third party" defense to CERCLA liability for any owner who can prove, by the preponderance of the evidence, that

the contamination was caused solely by the act or omission of a third party whose act or omission did not occur "in connection with a contractual relationship" with the owner. A deed transferring title is a contractual relationship unless (a) the local government made all appropriate inquiries and still not know or have reason to know that the property was contaminated or (b) acquired the site by escheat, or through any other involuntarily transfers or acquisition or through the exercise of eminent domain authority by purchase or condemnation." CERCLA § 101(35)(A). *See* full text of provision, attached. Some courts have recognized that a municipality's purchase of a site under threat of eminent domain qualifies for this defense. *Evansville Greenway & Remediation Trust v. Southern Ind. Gas & Elec. Co., Inc.*, 661 F.Supp.2d 989 (S.D. Ind., 2009).

(D) Conducting a cleanup in compliance with a state cleanup program enforcement bar. CERCLA § 128(b). *See* full text of provision, attached.

7. Proposed improvements to CERCLA to provide greater protections from liability for municipalities engaged in brownfields redevelopment

The National Brownfields Coalition has taken the lead in advocating amendments to CERCLA to strengthen protections from liability for local governments engaged in brownfields redevelopment. These amendments are supported by the National League of Cities, National Association of Counties, U.S. Conference of Mayors, Northeast-Midwest Institute, NALGEP and IMLA, the cities of New York, Los Angeles, Chicago, Cleveland, Dallas, Pittsburg, Phoenix, Baltimore, San Francisco, Portland, Charlotte, Des Moines, Duluth, Tacoma, and many others.

The focus of these efforts has been to broaden the exemption from liability provided by CERCLA § 101(20)(D). For reasons described earlier, an exemption is a much more useful and effective protection than the affirmative defenses provided in CERCLA. The first proposed revision would clarify that a unit of state or local government would not be liable under CERCLA as an owner or operator of a brownfield unless it caused or contributed to the release or threatened release of a hazardous substance from the facility:

> 101(20)(D) The term "owner or operator" does not include a unit of State or local government:
> i. which acquired ownership or control ~~involuntarily~~ through:
> a. bankruptcy, tax delinquency, abandonment~~,~~; or
> b. ~~other~~ circumstances in which the government involuntarily acquires title by virtue of its function as sovereign~~.~~; or
> ii. which owns or controls a Brownfield site, as defined by section 101(39), for the purpose of expansion, redevelopment, or reuse.

> 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 chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 107 of this title. Nothing in this paragraph (D) is intended to affect the liability of a State or local government under applicable state or local laws.

A second proposed CERCLA revision would clarify that units of state and/or local government which undertake public health- and safety-related work at CERCLA sites will not be liable under CERCLA, as long as there is no gross negligence or intentional misconduct involved. The "public health and safety" criterion is intended to expand the current exemption in §107(d)(2) for "actions taken in response to an emergency created by the release or threatened release of a hazardous substance" to a wider array of legitimate, but potentially less urgent, public concerns which may not involve hazardous substances:

> (d) Rendering care or advice
> (1) In general
> Except as provided in paragraph (2), no person shall be liable under this subchapter for costs or damages as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with the National Contingency Plan ("NCP") or at the direction of an onscene coordinator appointed under such plan, with respect to an incident creating a danger to public health or welfare or the environment as a result of any releases of a hazardous substance or the threat thereof. This paragraph shall not preclude liability for costs or damages as the result of negligence on the part of such person.
> (2) State and local governments
> No State or local government shall be liable under this subchapter for costs or damages as a result of actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person, or for costs or damages as a result of actions taken, including regulatory actions, in response to a threat to or endangerment of public health or safety at or arising from a facility. This paragraph shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the State or local government. For the purpose of the preceding sentence, reckless, willful, or wanton misconduct shall constitute gross negligence.
> (3) Savings provision

> This subsection shall not alter the liability of any person covered by the provisions of paragraph (1), (2), (3), or (4) of subsection (a) of this section with respect to the release or threatened release concerned.

Full copies of both proposed amendments are attached.

Attachments:

City of Chicago model checklist for Phase I environmental assessment
City of Chicago model checklist for Phase II environmental investigation
City of Chicago chart depicting timeline for brownfields redevelopment
Sample City of Chicago property acquisition screen summary sheet
CERCLA § 101(20)(D)
CERCLA §§ 101(40) and 107(r)(1)
CERCLA §§ 107(b)(3), 101(35)(A)
CERCLA § 128(b)
Text of proposed amendment to CERCLA § 101(20)(D)
Text of proposed amendment to CERCLA §107(d)(2)

Further reading:

National Association of Local Government Environmental Professionals (NALGEP), *Report of the Brownfield Acquisition Task Force*, 2006.

Northeast-Midwest Institute, *Mothballed Sites and Local Government Acquisition*, May 2008.

U. S. Environmental Protection Agency, *CERCLA Liability and Local Government Acquisitions and Other Activities*, EPA-330-F-11-003, March 2011.

U. S. Environmental Protection Agency, *Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability*, March 6, 2003.

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ATTACHMENTS

Phase I Review Checklist

Item	Yes	No	NA
Executive Summary			
Overview and property description			
RECs identified			
Recommendations			
1.0 Introduction			
1.1 Project Overview			
1.2 Property Description (acreage, PINs, adjacent property)			
1.3 Scope of Work			
1.4 Limitations			
2.0 Property Overview			
2.1 Property Location and Land Uses			
2.1.1 Property Location and Land Use			
2.1.2 Adjacent Property Location and Land Uses			
2.1.3 Utilities (water, sewer, power, etc.)			
2.2 Physical Setting			
2.2.1 Topography			
2.2.2 Geology/Hydrology			
2.2.3 Surface Water Bodies			
2.2.4 Wetlands			
2.2.5 Flood Maps			
3.0 Property Background/Operating History			
3.1 Interviews			
3.1.1 Current Owner/Occupant			
3.1.2 Past Owner/Occupant			
3.1.3 Adjacent Owners/Occupants (*if applicable)*			
3.2 Review of Aerial Photographs			
3.3 Review of Topographic Maps			
3.4 Review of Sanborn Maps			
3.5 Review of City Directories			
3.6 User-Provided Information			
3.6.1 Environmental Lien and Activity and Use Restriction Search Results *(Note: An actual search must have been performed either by the City [such as a title commitment] or by the Consultant as per the SOW)*			
3.6.2 Specialized of Actual Knowledge of User			
3.6.3 Relationship of the purchase price to fair market value (If requested to be included in report)			
4.0 Regulatory Review			
4.1 Database Search and Findings			
4.2 FOIA requests			

Phase I Review Checklist

4.2.1 City of Chicago					
4.2.2 IEPA					
4.2.3 USEPA					
4.2.4 OSFM					
4.2.5 Other					
Item			**Yes**	**No**	**NA**
5.0 Property Inspection (Both On-site and Off-site)	On-Site (5.1)		Off-Site (5.2)		
5.1 Property Reconnaissance	Yes	No	Yes	No	
5.1.1 Hazardous/Petroleum Products					
5.1.2 Tanks/Vents/Fill Pipes					
5.1.3 Building Foundations					
5.1.4 Odors/Staining					
5.1.5 Drums/Other Containers					
5.1.6 Debris					
5.1.7 ACM					
5.1.8 Transformers					
5.1.9 Stressed Vegetation					
5.1.10 Other					
5.3 Building Inspection					
6.0 Conclusions & Recommendations - See Executive Summary					
Tables:					
On-Site RECs, potential migration pathways, COCs, etc.					
Off-Site RECs, potential migration pathways, COCs, etc					
Figures:					
Property Location Map					
Property Map with Adjacent Properties, Identifying RECs					
PIN Map					
Appendices					
A. Aerial Photographs					
B. Topographic Maps					
C. Sanborn Maps					
D. City Directories					
E. Title Search					
F. Regulatory Database Information					
G. Interview Documentation					
H. FOIA Requests/Responses					
I. Photographs					
J. Addendum Information (late arriving FOIAs/updates)					
K. Consultant Qualifications					

Phase I ESA Review Notes

Site Name:
Department:
Date of Review:
Acreage:
Phase I Prepared By:

Significant Site and Area Reconnaissance: Structures present, site observations
Current Tenant/Site Use: Vacant, buildings, etc.
Significant Regulatory Database Findings: Onsite: Offsite:

Significant Historic Findings: Onsite: Offsite:
Significant Findings from Interviews and FOIA:
Recognized Environmental Conditions:

Phase II Review Checklist

Item	Yes	No	NA
Executive Summary			
Overview of activities conducted			
Brief property description			
Recognized Environmental Conditions			
Summary of Phase II Results (COCs, pathways, REC status)			
Conclusions and Recommendations			
1.0 Introduction			
Overview of activities conducted			
Property Location			
Property Description (acreage, PINs, adjacent property & RECs)			
Documents Reviewed			
Specific Tasks (# of borings, samples, gw flow, etc.)			
Limitations and Deviations			
2.0 Site Characterization			
2.1 Physical Setting			
2.1.1 Site Topography			
2.1.2 Site Geology/Hydrology			
2.1.3 Surface Water Bodies			
2.1.4 Wetlands			
2.1.5 Flood Maps			
2.2 Site History (historic uses from Phase I ESA)			
3.0 Site Investigation			
3.1 Site Specific Sampling Plan			
3.1.1 Borings (number, location, relationship to RECs)			
3.1.2 Monitoring Wells (number, location, relationship)			
3.1.3 Soils (number, location, analyses, rationale)			
3.1.4 Groundwater (number, location, analyses, rationale)			
3.1.5 Other Sampling (number, location, analyses, etc.)			
3.2 Analytical Results			
3.2.1 Soils (TACO Tier 1 Assessment)			
Ingestion			
Inhalation			
Construction Worker			
Soil Component of Groundwater Ingestion			

Phase II Review Checklist

Item	Yes	No	NA
3.2.2 Groundwater			
Class I GW Exceedences			
Class II GW Exceedences			
4.0 Conclusions & Recommendations			
Overview of what was done and why			
RECs (COCs, Delineation, Pathways, etc.)			
Recommendations			
5.0 Remediation Cost Estimate			
Tables:			
Site Specific Sampling Plan Summary			
Soil Ingestion Exceedences			
Soil Inhalation Exceedences			
Construction Worker Exceedences			
Soil Component of Groundwater Ingestion Exceedences			
Groundwater Class I/II Exceedences			
Figures:			
Site Location Map			
Site Features Map (property boundaries, RECs, PINs, structures)			
Boring, Monitoring Well and Sampling Locations			
Groundwater Contour Map			
Soil Ingestion Exceedences			
Soil Inhalation Exceedences			
Construction Worker Exceedences			
Soil Component of Groundwater Ingestion Exceedences			
Groundwater Class I Exceedences			
Groundwater Class II Exceedences			
Additional Figures as Neccessary			
Appendices			
Boring Logs			
Monitoring Well Construction Diagrams			
Analytical Data (including chain of custody forms and QA/QC)			
Photographs			
Field Logs			
Remediation Cost Estimate Calculations			

Phase II ESA Review Notes

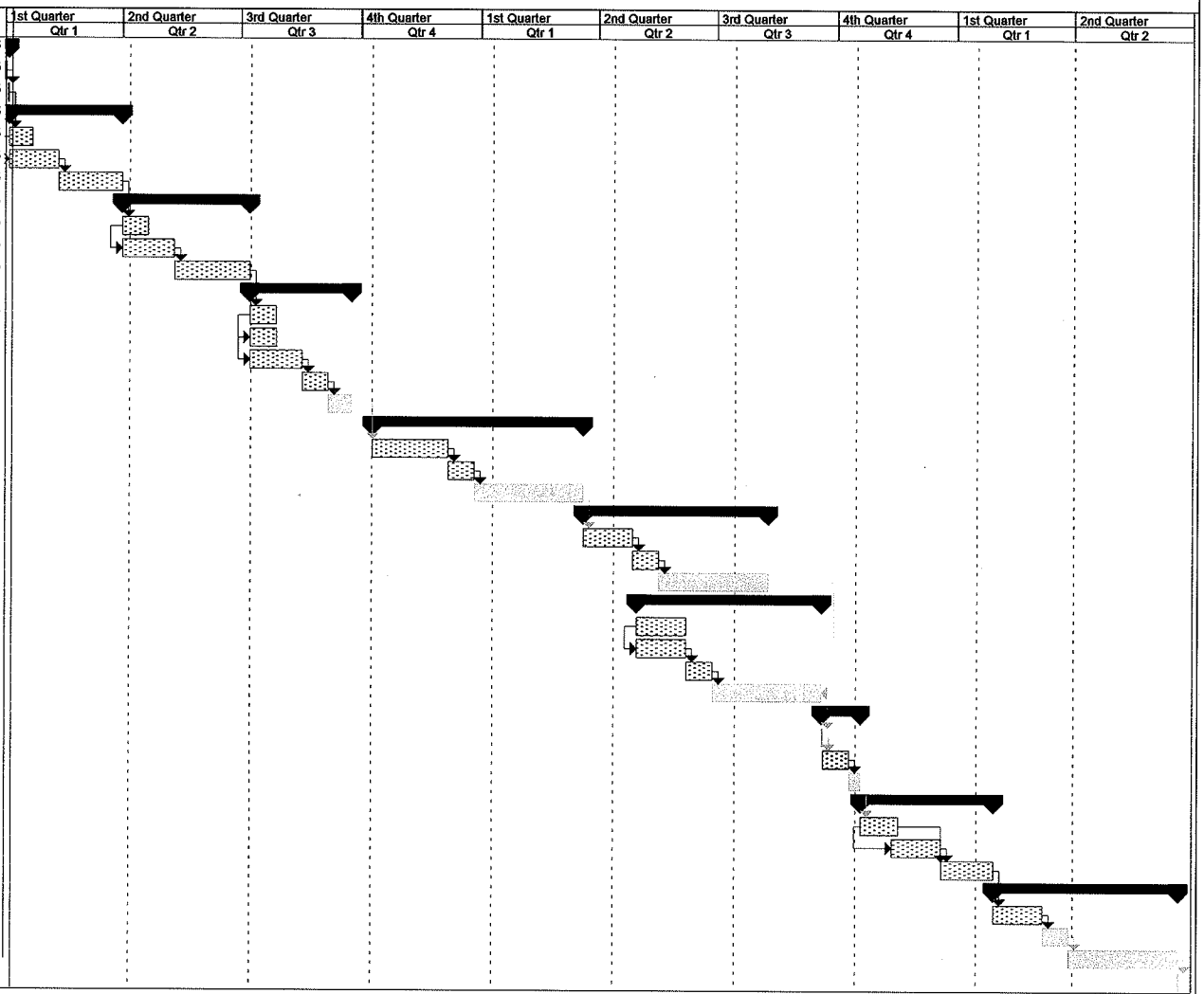
Site Name:
Department:
Date of Review:
Address:
Acreage:
Phase II Prepared By: Consultant X
Prepared Date:

Significant Site and Area Reconnaissance: Structures present, site observations
Recognized Environmental Conditions per Phase I ESA:
Soil Boring and Sampling Methodology (check QA/QC, including hold times):
Underground Storage Tanks:
Building Inspection Results (ACM, transformers, hazardous material, etc.):
Foundations (presence & delineation, cost for removal):
Fill materials (extent, depth, volume, cost for removal):
Free Product or Hazardous Waste Encountered?

Contaminants of Concern (per REC):						
REC	Res or I/C Ingestion	Res or I/C Inhalation	CW Ingestion	CW Inhalation	Soil Component of GW Ingestion	Delineated (horizontal and vertical)?
Soil						
	list by parameter	list by parameter	list by parameter	list by parameter	list by parameter	
Groundwater						
Recommendations:						

Remediation Process and SRP Schedule

ID	Task Name	Duration	Start
1	**Site Screening**	**2 days?**	**Sat 1/1/05**
2	DPD - provide PINS	1 day?	Sat 1/1/05
3	DOE - produce memo	1 day?	Mon 1/3/05
4	**Phase I**	**63 days**	**Tue 1/4/05**
5	DPD - funding/site coordination	14 days	Tue 1/4/05
6	DOE - procure consultant	28 days	Tue 1/4/05
7	DOE - prepare report	35 days	Fri 2/11/05
8	**Phase II**	**70 days**	**Fri 4/1/05**
9	DPD - funding/site coordination	14 days	Fri 4/1/05
10	DOE - procure consultant	28 days	Fri 4/1/05
11	DOE - investigation/prepare report	42 days	Wed 5/11/05
12	**IEPA SRP Enrollment**	**56 days**	**Fri 7/8/05**
13	DPD - funding/site coordination	14 days	Fri 7/8/05
14	Developer - provide site plan	14 days	Fri 7/8/05
15	DOE - procure consultant	28 days	Fri 7/8/05
16	DOE - prepare report	14 days	Wed 8/17/05
17	IEPA - assign project manager	14 days	Tue 9/6/05
18	**Comprehensive Site Investigation**	**116 days**	**Mon 10/10/05**
19	DOE - investigation/prepare report	42 days	Mon 10/10/05
20	Developer - review report	14 days	Wed 12/7/05
21	IEPA - review and approve report	60 days	Tue 12/27/05
22	**Remedial Objectives Report**	**102 days**	**Tue 3/21/06**
23	DOE - prepare report	28 days	Tue 3/21/06
24	Developer - review report	14 days	Fri 4/28/06
25	IEPA - review and approve report	60 days	Thu 5/18/06
26	**Remedial Action Plan Report**	**102 days?**	**Mon 5/1/06**
27	Developer - provide final site plan	28 days?	Mon 5/1/06
28	DOE - prepare report	28 days	Mon 5/1/06
29	Developer - review report	14 days	Thu 6/8/06
30	IEPA - review and approve report	60 days	Wed 6/28/06
31	**Draft NFR Letter**	**22 days**	**Wed 9/20/06**
32	IEPA - provide draft NFR letter	1 day	Wed 9/20/06
33	DOE/DPD/Developer review draft NFR letter	14 days	Thu 9/21/06
34	IEPA - finalize NFR letter	7 days	Wed 10/11/06
35	**Remedial Activities**	**72 days**	**Fri 10/20/06**
36	DPD - funding	21 days	Fri 10/20/06
37	DOE - procure consultant	28 days	Mon 11/13/06
38	DOE - conduct remediation	28 days	Thu 12/21/06
39	**Remedial Action Completion Report**	**102 days**	**Tue 1/30/07**
40	DOE - prepare report	28 days	Tue 1/30/07
41	Developer review	14 days	Fri 3/9/07
42	IEPA - review and approve report	60 days	Thu 3/29/07
43	Final NFR Letter	1 day	Thu 6/21/07



Project: Brownfields Process
Date: Mon 8/1/11

Task | Progress | Summary | External Tasks | Deadline
Split | Milestone | Project Summary | External Milestone

CITY OF CHICAGO
PROPERTY SCREEN RESULTS

Results Do Not Substitute for Environmental Site Assessments

Results Expire 1 Year from Completed Date

Compiled By: EDI
Verified By: Zachery Clayton
Completed Date: 4/20/2011

Project Name: 22nd and State property screen
Property Site Address(es): 2113 S STATE ST

PIN Number(s): 17-22-317-004-0000
17-22-317-006-0000
17-22-317-028-0000
17-22-317-029-0000

Database Search Summary (Place mark in box if records attached):

Database Searched	On-Site	Neighboring	Database Searched	On-Site	Neighboring
Chicago Department of Environment			**Illinois Environmental Protection Agency**		
Underground Storage Tanks (UST)		X	Site Remediation Program		
Complaints & Inspections	X	X	Leaking UST (LUST)		X
Enforcement		X	IRID		
Pollution Prevention			State Sites Unit		
Permits			**US Environmental Protection Agency**		
Manufactured Gas Plants			Enviromapper		
Brownfields			CERCLIS		

Environmental work anticipated to be conducted:

- [X] Environmental Site Assessment
- [X] Sampling Investigation
- [X] Site Clean-Up/Remediation
- [ ] **DO NOT ACQUIRE**

If anticipated work exceeds $250,000, project site is considered a high environmental liability and risk for acquisition. Anticipated work will incur...

- [X] Less than $250,000
- [ ] Equal to or greater than $250,000

Comments: This properties coul be impacted from urban fill and orphan USTs. Adjacent Leaking undeground storage tank could have a negative impact on the property. Clean-up costs would be dependent on final land use (i.e. a comprehensive NFR should be obtained if residential is planned).

CERCLA § 101(20)(D)

(D) 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. 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 chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title.

CERCLA § 101(40)

(40) **Bona fide prospective purchaser.—** The term "bona fide prospective purchaser" means a person (or a tenant of a person) that acquires ownership of a facility after January 11, 2002, and that establishes each of the following by a preponderance of the evidence:
(A) **Disposal prior to acquisition.—** All disposal of hazardous substances at the facility occurred before the person acquired the facility.
(B) **Inquiries.—**
(i) **In general.—** The person made all appropriate inquiries into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices in accordance with clauses (ii) and (iii).
(ii) **Standards and practices.—** The standards and practices referred to in clauses (ii) and (iv) of paragraph (35)(B) shall be considered to satisfy the requirements of this subparagraph.
(iii) **Residential use.—** In the case of property in residential or other similar use at the time of purchase by a nongovernmental or noncommercial entity, a facility inspection and title search that reveal no basis for further investigation shall be considered to satisfy the requirements of this subparagraph.
(C) **Notices.—** The person provides all legally required notices with respect to the discovery or release of any hazardous substances at the facility.
(D) **Care.—** The person exercises appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to—
(i) stop any continuing release;
(ii) prevent any threatened future release; and
(iii) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance.
(E) **Cooperation, assistance, and access.—** The person provides full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration at a vessel or facility (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response actions or natural resource restoration at the vessel or facility).
(F) **Institutional control.—** The person—
(i) is in compliance with any land use restrictions established or relied on in connection with the response action at a vessel or facility; and
(ii) does not impede the effectiveness or integrity of any institutional control employed at the vessel or facility in connection with a response action.
(G) **Requests; subpoenas.—** The person complies with any request for information or administrative subpoena issued by the President under this chapter.
(H) **No affiliation.—** The person is not—
(i) potentially liable, or affiliated with any other person that is potentially liable, for response costs at a facility through—
(I) any direct or indirect familial relationship; or

(II) any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by the instruments by which title to the facility is conveyed or financed or by a contract for the sale of goods or services); or
(ii) the result of a reorganization of a business entity that was potentially liable.
(41) **Eligible response site.—**
(A) **In general.—** The term "eligible response site" means a site that meets the definition of a brownfield site in subparagraphs (A) and (B) of paragraph (39), as modified by subparagraphs (B) and (C) of this paragraph.
(B) **Inclusions.—** The term "eligible response site" includes—
(i) notwithstanding paragraph (39)(B)(ix), a portion of a facility, for which portion assistance for response activity has been obtained under subtitle I of the Solid Waste Disposal Act (42 U.S.C. 6991 et seq.) from the Leaking Underground Storage Tank Trust Fund established under section 9508 of title 26; or
(ii) a site for which, notwithstanding the exclusions provided in subparagraph (C) or paragraph (39)(B), the President determines, on a site-by-site basis and after consultation with the State, that limitations on enforcement under section 9628 of this title at sites specified in clause (iv), (v), (vi) or (viii) of paragraph (39)(B) would be appropriate and will—
(I) protect human health and the environment; and
(II) promote economic development or facilitate the creation of, preservation of, or addition to a park, a greenway, undeveloped property, recreational property, or other property used for nonprofit purposes.
(C) **Exclusions.—** The term "eligible response site" does not include—
(i) a facility for which the President—
(I) conducts or has conducted a preliminary assessment or site inspection; and
(II) after consultation with the State, determines or has determined that the site obtains a preliminary score sufficient for possible listing on the National Priorities List, or that the site otherwise qualifies for listing on the National Priorities List; unless the President has made a determination that no further Federal action will be taken; or
(ii) facilities that the President determines warrant particular consideration as identified by regulation, such as sites posing a threat to a sole-source drinking water aquifer or a sensitive ecosystem.

CERCLA § 107(r)

(r) **Prospective purchaser and windfall lien**

(1) **Limitation on liability**

Notwithstanding subsection (a)(1) of this section, a bona fide prospective purchaser whose potential liability for a release or threatened release is based solely on the purchaser's being considered to be an owner or operator of a facility shall not be liable as long as the bona fide prospective purchaser does not impede the performance of a response action or natural resource restoration.

(2) **Lien**

If there are unrecovered response costs incurred by the United States at a facility for which an owner of the facility is not liable by reason of paragraph (1), and if each of the conditions described in paragraph (3) is met, the United States shall have a lien on the facility, or may by agreement with the owner, obtain from the owner a lien on any other property or other assurance of payment satisfactory to the Administrator, for the unrecovered response costs.

(3) **Conditions**

The conditions referred to in paragraph (2) are the following:

(A) **Response action**

A response action for which there are unrecovered costs of the United States is carried out at the facility.

(B) **Fair market value**

The response action increases the fair market value of the facility above the fair market value of the facility that existed before the response action was initiated.

(4) **Amount; duration**

A lien under paragraph (2)—

(A) shall be in an amount not to exceed the increase in fair market value of the property attributable to the response action at the time of a sale or other disposition of the property;

(B) shall arise at the time at which costs are first incurred by the United States with respect to a response action at the facility;

(C) shall be subject to the requirements of subsection (l)(3) of this section; and

(D) shall continue until the earlier of—

(i) satisfaction of the lien by sale or other means; or

(ii) notwithstanding any statute of limitations under section 9613 of this title, recovery of all response costs incurred at the facility.

CERCLA § 107(b)

(b) **Defenses**
There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—
(1) an act of God;
(2) an act of war;
(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or
(4) any combination of the foregoing paragraphs.

CERCLA § 101(35)(A)

(35) (A) The term "contractual relationship", for the purpose of section 9607(b)(3) of this title, includes, but is not limited to, land contracts, deeds, easements, leases, or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence:
(i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.
(ii) The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.
(iii) The defendant acquired the facility by inheritance or bequest.
In addition to establishing the foregoing, the defendant must establish that the defendant has satisfied the requirements of section 9607(b)(3)(a) and (b) of this title, provides full cooperation, assistance, and facility access to the persons that are authorized to conduct response actions at the facility (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action at the facility), is in compliance with any land use restrictions established or relied on in connection with the response action at a facility, and does not impede the effectiveness or integrity of any institutional control employed at the facility in connection with a response action.

CERCLA § 128(b)

(b) **Enforcement in cases of a release subject to State program**
(1) **Enforcement**
(A) **In general**
Except as provided in subparagraph (B) and subject to subparagraph (C), in the case of an eligible response site at which—
(i) there is a release or threatened release of a hazardous substance, pollutant, or contaminant; and
(ii) a person is conducting or has completed a response action regarding the specific release that is addressed by the response action that is in compliance with the State program that specifically governs response actions for the protection of public health and the environment,
the President may not use authority under this chapter to take an administrative or judicial enforcement action under section 9606(a) of this title or to take a judicial enforcement action to recover response costs under section 9607(a) of this title against the person regarding the specific release that is addressed by the response action.
(B) **Exceptions**
The President may bring an administrative or judicial enforcement action under this chapter during or after completion of a response action described in subparagraph (A) with respect to a release or threatened release at an eligible response site described in that subparagraph if—
(i) the State requests that the President provide assistance in the performance of a response action;
(ii) the Administrator determines that contamination has migrated or will migrate across a State line, resulting in the need for further response action to protect human health or the environment, or the President determines that contamination has migrated or is likely to migrate onto property subject to the jurisdiction, custody, or control of a department, agency, or instrumentality of the United States and may impact the authorized purposes of the Federal property;
(iii) after taking into consideration the response activities already taken, the Administrator determines that—
(I) a release or threatened release may present an imminent and substantial endangerment to public health or welfare or the environment; and
(II) additional response actions are likely to be necessary to address, prevent, limit, or mitigate the release or threatened release; or
(iv) the Administrator, after consultation with the State, determines that information, that on the earlier of the date on which cleanup was approved or completed, was not known by the State, as recorded in documents prepared or relied on in selecting or conducting the cleanup, has been discovered regarding the contamination or conditions at a facility such that the contamination or conditions at the facility present a threat requiring further remediation to protect public health or welfare or the environment. Consultation with the State shall not limit the ability of the Administrator to make this determination.

(C) **Public record**
The limitations on the authority of the President under subparagraph (A) apply only at sites in States that maintain, update not less than annually, and make available to the public a record of sites, by name and location, at which response actions have been completed in the previous year and are planned to be addressed under the State program that specifically governs response actions for the protection of public health and the environment in the upcoming year. The public record shall identify whether or not the site, on completion of the response action, will be suitable for unrestricted use and, if not, shall identify the institutional controls relied on in the remedy. Each State and tribe receiving financial assistance under subsection (a) of this section shall maintain and make available to the public a record of sites as provided in this paragraph.
(D) **EPA notification**
(i) In general In the case of an eligible response site at which there is a release or threatened release of a hazardous substance, pollutant, or contaminant and for which the Administrator intends to carry out an action that may be barred under subparagraph (A), the Administrator shall—
(I) notify the State of the action the Administrator intends to take; and
(II)
(aa) wait 48 hours for a reply from the State under clause (ii); or
(bb) if the State fails to reply to the notification or if the Administrator makes a determination under clause (iii), take immediate action under that clause.
(ii) State reply Not later than 48 hours after a State receives notice from the Administrator under clause (i), the State shall notify the Administrator if—
(I) the release at the eligible response site is or has been subject to a cleanup conducted under a State program; and
(II) the State is planning to abate the release or threatened release, any actions that are planned.
(iii) Immediate Federal action The Administrator may take action immediately after giving notification under clause (i) without waiting for a State reply under clause (ii) if the Administrator determines that one or more exceptions under subparagraph (B) are met.
(E) **Report to Congress**
Not later than 90 days after the date of initiation of any enforcement action by the President under clause (ii), (iii), or (iv) of subparagraph (B), the President shall submit to Congress a report describing the basis for the enforcement action, including specific references to the facts demonstrating that enforcement action is permitted under subparagraph (B).
(2) **Savings provision**
(A) **Costs incurred prior to limitations**
Nothing in paragraph (1) precludes the President from seeking to recover costs incurred prior to January 11, 2002, or during a period in which the limitations of paragraph (1)(A) were not applicable.
(B) **Effect on agreements between States and EPA**
Nothing in paragraph (1)—

(i) modifies or otherwise affects a memorandum of agreement, memorandum of understanding, or any similar agreement relating to this chapter between a State agency or an Indian tribe and the Administrator that is in effect on or before January 11, 2002 (which agreement shall remain in effect, subject to the terms of the agreement); or

(ii) limits the discretionary authority of the President to enter into or modify an agreement with a State, an Indian tribe, or any other person relating to the implementation by the President of statutory authorities.

(3) **Effective date**

This subsection applies only to response actions conducted after February 15, 2001.

Proposed Revisions to 42 U.S.C. § 9601(20)(d) / CERCLA § 101(20)(d)

Abstract: The purpose of the proposed revision is to clarify that a unit of state or local government should not be liable under CERCLA as an owner or operator of a brownfield unless it caused or contributed to the release or threatened release of a hazardous substance from the facility, although liability to third parties under state or local law would be unaffected.

> **101(20)(D)** The term "owner or operator" does not include a unit of State or local government:
> i. which acquired ownership or control ~~involuntarily~~ through:
> a. bankruptcy, tax delinquency, abandonment~~.~~; or
> b. ~~other~~ circumstances in which the government involuntarily acquires title by virtue of its function as sovereign~~.~~; or
> ii. which owns or controls a Brownfield site, as defined by section 101(39), for the purpose of expansion, redevelopment, or reuse.

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 chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 107 of this title. Nothing in this paragraph (D) is intended to affect the liability of a State or local government under applicable state or local laws.

Proposed Revisions to 42 U.S.C. § 9607(d)(2) / CERCLA § 107(d)(2)

Abstract: The purpose of the proposed revision is to clarify that units of state and/or local government which undertake public health- and safety-related work at CERCLA sites will not be liable under CERCLA, as long as there is no gross negligence or intentional misconduct involved. The "public health and safety" criterion is intended to expand the current exemption in §107(d)(2) for "actions taken in response to an emergency created by the release or threatened release of a hazardous substance" to a wider array of legitimate, but potentially less urgent, public concerns which may not involve hazardous substances.

(d) Rendering care or advice

(1) In general

Except as provided in paragraph (2), no person shall be liable under this subchapter for costs or damages as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with the National Contingency Plan ("NCP") or at the direction of an onscene coordinator appointed under such plan, with respect to an incident creating a danger to public health or welfare or the environment as a result of any releases of a hazardous substance or the threat thereof. This paragraph shall not preclude liability for costs or damages as the result of negligence on the part of such person.

(2) State and local governments

No State or local government shall be liable under this subchapter for costs or damages as a result of actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person, or for costs or damages as a result of actions taken, including regulatory actions, in response to a threat to or endangerment of public health or safety at or arising from a facility. This paragraph shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the State or local government. For the purpose of the preceding sentence, reckless, willful, or wanton misconduct shall constitute gross negligence.

(3) Savings provision

This subsection shall not alter the liability of any person covered by the provisions of paragraph (1), (2), (3), or (4) of subsection (a) of this section with respect to the release or threatened release concerned.