



The Effect of Superfund on Involuntary Acquisitions of Contaminated Property by Government Entities

Office of Site Remediation Enforcement

Quick Reference Fact Sheet

Units of state, local, and federal government sometimes involuntarily acquire contaminated property as a result of performing their governmental duties. Government entities often wonder whether these acquisitions will result in Superfund liability. This fact sheet summarizes EPA's policy on Superfund enforcement against government entities that involuntarily acquire contaminated property. This fact sheet also describes some types of government actions that EPA believes qualify for a liability exemption or a defense to Superfund liability.

Introduction

EPA's Brownfields Economic Redevelopment Initiative is designed to help states, communities, and other stakeholders in economic redevelopment to work together in a timely manner to prevent, assess, safely clean up, and sustainably reuse brownfields. Brownfields are abandoned, idled, or under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination. Many municipalities and other government entities are eager for brownfields to be redeveloped, but often hesitate to take any steps at these facilities because they fear that they will incur Superfund liability.

This fact sheet answers common questions about the effect of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, commonly known as Superfund, and set forth at 42 United States Code beginning at Section 9601) on involuntary acquisitions by government entities. EPA hopes that this fact

sheet will facilitate government entities' plans for redevelopment of brownfields and the "brokerage" of those facilities to prospective purchasers.

What is an involuntary acquisition?

EPA considers an acquisition to be "involuntary" if it meets the following test:

- The government's interest in, and ultimate ownership of, the property exists only because **the actions of a non-governmental party give rise to the government's legal right to control or take title to the property.**

For example, 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.

Will a government entity that involuntarily acquires contaminated property be liable under CERCLA?

To protect certain parties from liability, CERCLA contains both liability exemptions and affirmative defenses to liability. A party who is exempt from CERCLA liability with respect to a specified act cannot be held liable under CERCLA for committing that act. A party who believes that he or she has an affirmative defense to CERCLA liability must prove so by a preponderance of the evidence.

After it involuntarily acquires contaminated property, a unit of state or local government will generally be exempt from CERCLA liability as an owner or operator. In addition, the unit of state or local government will have a somewhat redundant affirmative defense to CERCLA liability known as a "third-party" defense, provided other requirements for the defense, which are described below, are met. A federal government entity that involuntarily acquires contaminated property and meets the requirements described below will have a third-party defense to CERCLA liability.

The requirements for a third-party defense to CERCLA liability are the following:

- The contamination occurred before the government entity acquired the property;
- The government entity exercised due care with respect to the contamination (*e.g.*, did not cause, contribute to, or exacerbate the contamination); and
- The government entity took precautions against certain acts of the party that caused the contamination and against the consequences of those acts.

A government entity will not have a CERCLA liability exemption or defense if it has caused or contributed to the release or threatened release of contamination from the property. As a result, acquiring property involuntarily does not unconditionally or permanently insulate a government entity from CERCLA liability. Government entities should therefore ensure that they do not cause or contribute to the actual or potential release of hazardous substances at facilities that they have acquired involuntarily. For more information, see 42 U.S.C. 9601(20)(D), 9607(b)(3), and 9601(35)(A) and (D).

It is also important to note that the liability exemption and defense described above do not shield government entities from any potential liability that they may have as "generators" or "transporters" of hazardous substances under CERCLA. For additional information, see 42 U.S.C. 9607(a).

What are some examples of involuntary acquisitions?

CERCLA provides a non-exhaustive list of examples of involuntary acquisitions by government entities. These examples include **acquisitions following abandonment, bankruptcy, tax delinquency, escheat** (the transfer of a deceased person's property to the government when there are no competent heirs to the property), **and other circumstances in which the government involuntarily obtains title by virtue of its function as a sovereign.**

What is EPA's official policy regarding CERCLA enforcement against government entities that involuntarily acquire contaminated property?

In 1992, EPA issued its Rule on Lender Liability Under CERCLA ("Rule"), 57 *Federal Register* 18344 (April 29, 1992). The Rule included a discussion of involuntary acquisitions by government entities. In 1994, the Rule was invalidated by the court.

In September 1995, EPA and the U.S. Department of Justice (DOJ) issued their "Policy on CERCLA Enforcement Against Lenders and Government Entities that Acquire Property Involuntarily" ("Lender Policy"). In the document, EPA and DOJ reaffirm their intentions to follow the provisions of the Rule as enforcement policy. The Lender Policy advises EPA and DOJ personnel to consult both the Rule and its preamble while exercising their enforcement discretion with respect to government entities that acquire property involuntarily. Most of the relevant portions of the Rule and preamble have been summarized in this fact sheet.

Under the Lender Policy, EPA has expanded the examples listed in CERCLA by describing the following categories of involuntary acquisitions:

- Acquisitions made by government entities **acting as a conservator or receiver pursuant to a clear and direct statutory mandate or regulatory authority** (such as acquisition of the security interests or properties of failed private lending or depository institutions);
- Acquisitions by government entities through **foreclosure and its equivalents while administering a governmental loan, loan guarantee, or loan insurance program**; and
- Acquisitions by government entities **pursuant to seizure or forfeiture authority.**

Similar to the examples listed in CERCLA, EPA's list of categories of involuntary acquisitions is non-exhaustive. To determine whether an activity not listed in CERCLA or under the Lender Policy is an "involuntary acquisition," one should analyze whether the actions of a non-governmental party give rise to the government's legal right to control or take title to the property.

If a government entity takes some sort of voluntary action before acquiring the property, can the acquisition still be considered "involuntary"?

Yes. 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. For further discussion, see 57 *Fed. Reg.* 18372 and 18381.

Will a government entity that involuntarily acquires contaminated property be liable under CERCLA to potentially responsible parties and other non-federal entities?

If a unit of state or local government involuntarily acquires property through any of the means listed in CERCLA, it will be exempt from CERCLA liability as an owner or operator. In addition, any government entity will have a third-party defense to CERCLA liability if all relevant requirements for that defense are met (see above).

If a government entity acquires property through any other means, it appears likely — based on the way that courts have treated lender issues during the last few years — that a court would apply principles and rationale that are consistent with EPA and DOJ's Lender Policy. Analysis of these acquisitions may require an examination of case law and state or local laws.

If someone dies and leaves contaminated property to a government entity, is this considered an involuntary acquisition?

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).

Will a government entity that uses its power of eminent domain be liable under CERCLA?

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 (see above). For more information, see 42 U.S.C. 9607(b)(3) and 9601(35)(A).

Will parties that purchase contaminated property from government entities also be exempt from CERCLA liability?

No. Nothing in CERCLA allows non-governmental parties to be exempt from liability after they knowingly purchase contaminated property. However, EPA encourages prospective purchasers of contaminated property to contact their state environmental agencies to discuss these properties on a site-by-site basis. At sites where an EPA action has been taken, is ongoing, or is anticipated to be undertaken, various tools, including "prospective purchaser agreements," may be an option.

For Further Information

The Lender Policy was published in the *Federal Register* in Volume 60, Number 237, at pages 63517 to 63519 (December 11, 1995).

You may order copies of the Lender Policy from the National Technical Information Service (NTIS), U.S. Department of Commerce, 5285 Port Royal Rd., Springfield, VA 22161. Orders must reference NTIS accession number **PB95-234498**. For telephone orders or further information on placing an order, call NTIS at 703-487-4650 for regular service or 800-553-NTIS for rush service. For orders via e-mail/Internet, send to the following address:

orders@ntis.fedworld.gov

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