

October 20, 1995
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MEMORANDUM

SUBJECT: Municipal Immunity from CERCLA Liability for Property Acquired through Involuntary State Action

FROM: Jerry Clifford
Director
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TO: Gail C. Ginsberg
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Introduction

This memorandum responds to your request for a legal opinion from the Office of General Counsel regarding the liability of municipalities for property acquired through tax delinquency foreclosure, demolition lien foreclosure, escheat, abandonment, condemnation, or eminent domain. In light of the policy considerations raised in your memorandum, the Office of Site Remediation Enforcement has joined the Office of General Counsel in responding to your request. Because EPA and the Department of Justice (DOJ) recently issued the attached "Policy on CERCLA Enforcement Against Lenders and Government Entities that Acquire Property Involuntarily" ("Policy"), we are now able to provide a comprehensive response to the various legal and policy questions raised in your memorandum.

We understand that even where municipalities have the authority to acquire property, they are often reluctant to do so because of concerns about potential liability

under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq.* 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.

Lender Policy

EPA addressed involuntary acquisition of property by government entities in its Rule on Lender Liability Under CERCLA, 57 Fed. Reg. 18344 (1992) ("Rule"). In 1994, the Rule was vacated in Kelley v. EPA, 15 F.3d 1100 (D.C. Cir. 1994), as amended, cert. denied, 25 F.3d 1088 (D.C. Cir. 1994). However, as indicated in the Policy, EPA and DOJ will generally follow the approach of the vacated Lender Liability Rule as enforcement policy. Policy at p. 3. The 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. *Id.* We will therefore respond to your question about specific governmental activities by applying the provisions of CERCLA and considering the guidance provided by the Policy.¹

Exemption from Owner/Operator Liability under CERCLA

As you noted in your memorandum, Section 101(20)(D) of CERCLA, 42 U.S.C. § 9601(20)(D), exempts the following from the definition of "owner or operator":

[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.

Section 101(20)(D) of CERCLA further states that this exclusion does not apply to any state or local government that caused or contributed to the release or threatened release of a hazardous substance from the facility. Thus, acquiring property involuntarily does not categorically or permanently insulate a government entity from CERCLA

¹ The Policy does not restate the substance of EPA's CERCLA enforcement policy with respect to involuntary acquisitions by government entities. Instead, it endorses the interpretations and rationales announced in the Rule and its preamble. For your convenience, we have provided references to the Federal Register in which the Rule and preamble were published.

liability. A government entity should therefore ensure that it does not cause or contribute to the actual or potential release of a hazardous substance at a facility that it has acquired involuntarily.

Third-Party Defense to CERCLA Liability

Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3), provides a "third-party" defense to CERCLA liability for any person that can prove that the release or threat of release of a hazardous substance 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 defendant. For purposes of Section 107(b)(3), Section 101(35)(A) of CERCLA, 42 U.S.C. § 9601(35)(A), excludes from the definition of "contractual relationship" certain instruments where:

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.

Lender Policy's Definition of Involuntary Acquisition

Under the Policy, EPA has addressed the meaning of the above statutory elements in Sections 101(20)(D) and 101(35)(A) of CERCLA by providing non-exhaustive lists of categories and examples of involuntary acquisitions and transfers by government entities. (See 57 Fed. Reg. at 18385.) The Policy provides additional clarification by endorsing the following definition of "involuntary acquisition or transfer":

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.

(See 57 Fed. Reg. at 18372.)

Tax Delinquency Foreclosure and Abandonment

With respect to tax delinquency foreclosure and abandonment, Section 101(20)(D) of CERCLA specifically exempts from the definition of "owner or operator" any unit of state or local government which acquired ownership or control of a facility involuntarily

through tax delinquency or abandonment. Under the Policy, acquisition by the government as the result of tax delinquency or abandonment proceedings are two examples of involuntary acquisitions of property by the government. (See 57 Fed. Reg. at 18385.)

As you have noted, tax foreclosure and other acquisitions of property by government entities often require some affirmative action by the local government. Some of the acquisitions listed in the statute that are specifically identified as "involuntary" nevertheless require some volitional action by the government in order to perfect title to the property. (See 57 Fed. Reg. at 18372.) EPA has therefore concluded 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. (*Id.*) EPA has also concluded that the mere existence of governmental discretion with respect to the time or fact of acquisition cannot be deemed dispositive of whether an acquisition is "involuntary" within the meaning of CERCLA. (*Id.*) EPA consequently considers a municipality's acquisition of property through tax delinquency foreclosure or abandonment -- even if the acquisition requires some sort of discretionary, volitional action by the government -- generally to be "involuntary" for purposes of Sections 101(20)(D) and 101(35)(A) of CERCLA.

Condemnation and Eminent Domain

With respect to the issues of condemnation and eminent domain, 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.² 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.

² Unlike tax delinquency foreclosure and the four other municipal activities on which you seek guidance, eminent domain is not an activity or a procedure. Instead, it is a power that must be exercised before the CERCLA provisions at issue may apply. We will therefore respond to your question about eminent domain by addressing the exercise of eminent domain authority by purchase or condemnation.

Escheat

In Section 101(35)(A) of CERCLA and under the Policy, acquisition through escheat is listed specifically as an involuntary acquisition.³ Acquisitions through escheat that require some sort of discretionary, volitional action by the government will nonetheless be considered "involuntary" for purposes of Sections 101(35)(A) of CERCLA. Therefore, in EPA's view, a government entity that acquires property through escheat will have a third-party defense to liability under Section 107(b)(3) of CERCLA, provided other statutory elements of the defense are met.

EPA also considers a government entity that acquires property through escheat to be exempt from the definition of "owner or operator" under Section 101(20)(D) of CERCLA. Under a well-established principle of statutory construction, identical words used twice in the same statute are presumed to have the same meaning. (See 57 Fed. Reg. at 18380.) Applying this principle, EPA interprets Congress' use of "involuntary" in Sections 101(20)(D) and 101(35)(A) of CERCLA to refer to the same concept. (Id.) EPA therefore interprets involuntary acquisitions by government entities as used in those two sections to refer to the same types of acquisitions. (Id.) Because acquisition through escheat constitutes an involuntary acquisition under Section 101(35)(A) of CERCLA, EPA also considers it to be an involuntary acquisition for purposes of Section 101(20)(D) of CERCLA.

Demolition Lien Foreclosure

Demolition lien foreclosure is not mentioned in the statute or addressed under the Policy. To determine whether an acquisition through demolition lien foreclosure (or any other acquisition not addressed by the statute or the Policy) constitutes an involuntary acquisition, one should determine whether the definition of "involuntary acquisition" adopted by the Policy and quoted on page 3 above has been met. This determination requires an examination of materials including state or local law in the relevant jurisdiction as well as relevant case law. We encourage the Regions to attempt to make these determinations as they arise in their enforcement cases, and to seek the assistance of our Offices in site-specific situations as needed.

³ Escheat is the transfer of a deceased person's property to the government in the absence of any competent heirs to the property.

Conclusion

We hope that this response has clarified EPA's policy regarding enforcement of CERCLA against government entities that involuntarily acquire CERCLA facilities. Based partly on your questions, the Office of Site Remediation Enforcement is developing a fact sheet to answer common questions about the effect of CERCLA on government entities that involuntarily acquire contaminated property. Please contact Laura Bulatao of the Office of Site Remediation Enforcement at (703) 603-9005 if you have any questions about this memorandum or the draft fact sheet. You may also address any questions about this memorandum to Jonathan Baker of the Office of General Counsel at (202) 260-6542.

Attachment

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