Kevin Murray

Partner
801.799.5919
Salt Lake City
krmurray@hollandhart.com

Recent EPA Guidance Spells Out Superfund Liability Protections Available to Local Governments

Insight — 09/23/2020

State and local governments are in a unique position when it comes to facilitating the cleanup and redevelopment of contaminated properties within their jurisdictions and can play a vital role in revitalizing neighborhoods blighted by Brownfields. However, potential liability under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) has historically been a real concern. Congress amended CERCLA as part of the Brownfields Utilization, Investment, and Local Development Act of 2018 (the BUILD Act) to help address the liability concerns of municipalities, yet several important unanswered issues left local governments cautious and hesitant. On June 15, 2020, the Environmental Protection Agency (EPA) issued new guidance[1] to clarify the circumstances under which a local government may be eligible for liability protection under CERCLA.

CERCLA Overview

CERCLA was enacted to enable the federal government to "assess and/or clean up contaminated sites and provide[] authority for responding to releases or threatened releases of hazardous substances."[2] It established a comprehensive liability scheme to help ensure potentially responsible parties pay for cleanups instead of the general public by providing strict, joint and several liability. Under CERLA § 107(a) potentially responsible parties may include the following four categories of persons—any one of which could include a state or local government, depending on the circumstances:

- The owner or operator of the facility;
- Any person who owned or operated any facility at the time of disposal of any hazardous substance;
- Any person who arranged for the disposal or treatment, or transport for the disposal or treatment, of a hazardous substance at any facility; or
- Any person who accepted any hazardous substance for transport to a disposal or treatment facility that such person selected.

Even where a local government may fall into one of these four categories, CERCLA includes liability protections. CERCLA exempts qualifying local governmental entities from the definition of "owner or operator"; provides liability protection to bona-fide prospective purchasers (BFPPs) and innocent landowners (ILOs); and provides a third-party defense when one can prove the contamination was caused solely by a third party.

Collectively, these exemptions are referred to as landowner liability protections. CERCLA's landowner liability protections may apply to local government acquisitions of contaminated property, depending on the circumstances. Prior to the BUILD Act, the local government exemption required the property to have been acquired involuntarily.[3] Understandably, these protections left some state and local governments feeling vulnerable to liability because of a lack of clarity about the application of the exemption. In addition, there are complexities to a state or local government relationships to a given impacted property within its jurisdiction that do not apply with other landowners, lessees, or developers.

To better address local governments' liability-related concerns, Congress enacted the BUILD Act, amending CERCLA's liability protection for local governments by removing the requirement that the contaminated properties must have been acquired involuntarily and adding another category of exempt acquisitions. As amended, CERCLA § 101(20)(D) states,

> "[t]he term 'owner or operator' does not include a unit of [s]tate or local government which acquired ownership or control through seizure or otherwise in connection with law enforcement activity, or through bankruptcy, tax delinquency, abandonment or other circumstances in which the government acquires title by virtue of its function as sovereign."

This exemption does not apply where the state or local government has caused or contributed to the release or threatened release of a hazardous substance.

The BUILD Act better defined the types of acquisitions for which liability protection is available to local governments. However, it left several important questions unanswered. For example, what qualifies as a "unit of state or local government," and what acts do state and local governments perform "by virtue of [their] function as a sovereign?"

2020 Guidance

EPA issued the 2020 Guidance in order to "assist local governments by clarifying when [EPA] will exercise its enforcement discretion on a number of acquisition-related issues...."[4] The 2020 Guidance defines EPA's interpretation of two terms the BUILD Act left undefined, "unit of state or local government" and "by virtue of its function as sovereign."

> 1. "Unit of State or Local Government"
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> The BUILD Act left this term undefined making it difficult for some governmental entities to determine whether they qualify for liability protection under CERCLA as a unit of state or local government. The 2020 Guidance clarifies EPA's interpretation of this phrase.
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> EPA intends to treat any entity that meets the definition of "local government" in the Uniform Administrative Requirements, Cost

Principles, and Audit Requirements for Federal Awards, 2 C.F.R. Part 200, as a "unit of state or local government" under CERCLA § 101(20)(D).[5] This includes the following entities: "(a) county; (b) borough; (c) municipality; (d) city; (e) town; (f) township; (g) parish; (h) local public authority, including any public housing agency under the United States Housing Act of 1937;11 (i) special district; (j) school district; (k) intrastate district; (l) council of governments, whether or not incorporated as a nonprofit corporation under state law; and (m) any other agency or instrumentality of a multi-regional or multi-intrastate local government."[6]

EPA further intends to treat redevelopment authorities, land banks, and community development agencies as "unit[s] of state or local government" under Section 101(20)(D).[7]

2. "By Virtue of its Function as Sovereign"

Likewise, the 2020 Guidance defines what EPA considers acquisitions by virtue of a function as a sovereign. EPA intends to exercise its enforcement discretion "only when a local government acquires title to a property via a function that can only be effectively performed by governments using a mechanism only available to governments."[8] Common governmental acquisitions that may fall into this category include:

- Tax delinquency and tax lien foreclosures;
- Some transfers between governmental units;
- Tax increment financing transactions;
- Escheat;
- Eminent domain authority for a public use;
- Holding an unexercised right of way;
- Demolition lien foreclosure;
- Foreclosure while administering a government loan, loan guarantee, or loan insurance program; and
- Acting as a conservator or receiver under a clear and statutory mandate or regulatory authority.[9]

Sometimes local governments acquire property through other mechanisms such as purchase, inheritance, bequest, gift, or donation. The 2020 Guidance makes clear that Section 101(20)(D) protection does not apply to these types of acquisition. The BUILD Act removed the "involuntarily" requirement from CERCLA § 101(20)(D), however, voluntary acquisition methods such as these are not solely available to a local government by virtue of its function as a sovereign. As such, "EPA does not intend to exercise its enforcement discretion under CERCLA for acquisitions of title to property by local governments through purchase, inheritance, bequest, gift, or donation."[10] A local government entity that acquires contaminated property through one of these methods must rely on other liability protections such as BFPP, ILO, or third party affirmative defenses.

Occasionally, title to property will be transferred from one governmental entity to another. In this scenario, "EPA generally intends to treat the transferee of an intergovernmental property transfer as having acquired the title 'by virtue of its function as sovereign.' under CERCLA § 101(20)(D) in certain circumstances."[11] However, EPA will not exercise its enforcement discretion when either governmental entity would otherwise be liable under CERCLA.

The 2020 Guidance provides much needed clarity on how EPA intends to use its enforcement discretion for local government acquisitions. Because of the increased clarity and better-defined constraints provided in the Guidance, state and local governments are now better situated to facilitate cleanup and redevelopment of contaminated properties. As with any other party, state and local governments should assess the property prior to acquisition by performing "all appropriate inquiries." Liability risk can be further mitigated by taking the necessary steps beforehand to qualify for other forms of liability protection provided for under CERCLA, including the BFPP and ILO protections.

While the 2020 Guidance provides more certainty, this remains a complex area of law. Municipalities are advised to consult a qualified environmental attorney with CERCLA expertise to help navigate CERCLA's complex liability scheme and help maximize the liability protections available.

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[1]EPA, *Superfund Liability Protections for Local Government Acquisitions after the Brownfields Utilization, Investment, and Local Development Act of 2018*, p. 3, Office of Enforcement and Compliance Assurance (June 15, 2020) (2020 Guidance).
[2]*Id.*
[3]*Compare* 42 U.S.C. 9601(20)(D) (2017) with 42 U.S.C. 9601(20)(D) (2018). Prior to the BUILD Act, CERCLA required a "unit of State or local government [to have] acquired ownership or control **involuntarily** through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government **involuntarily** acquire[d] title…" (emphasis added).
[4]*Id.* at 6.
[5]*Id.*
[6]2 C.F.R. § 200.64.
[7]2020 Guidance at 6.
[8]*Id.* at 7.
[9]*Id.*
[10] *Id.* at 8.
[11]*Id.*
