



October 30, 2009

The Honorable Ed Markey
U.S. House of Representatives
2108 Rayburn House Office Building
Washington, DC 20515

The Honorable Frank Pallone, Jr
U.S. House of Representatives
237 Cannon Building
Washington, D.C. 20515-3006

The Honorable Joe Sestak
U.S. House of Representatives
1022 Longworth House Office Building
Washington, DC 20515

Dear Representatives Markey, Pallone, and Sestak:

RE: EPA Brownfields Reauthorization and Public Entity Liability

We understand that your offices are considering taking a lead sponsor role on a bill to reauthorize the U.S. Environmental Protection Agency (EPA) Brownfields program. We, the undersigned individuals and organizations, are writing to express our support for reauthorization of the EPA Brownfields Program and request consideration of an amendment that would clarify and bolster liability protections for public entities when they acquire contaminated land.

America's communities face a daunting but critically important task in attempting to clean up brownfields sites for new uses. Cities are in the process of transitioning their economies from industry and manufacturing to new sources of economic growth. The most environmentally responsible way to accommodate the new engines of growth is to locate the new uses right where the old industrial plants were established, with infrastructure in place and the workforce nearby. However, with an estimated 450,000 to 1,000,000 brownfields sites nationally, the task at hand faces numerous obstacles. Some of those obstacles would be significantly reduced if Congress adopts the recommendations of the National Brownfields Coalition for reauthorizing the EPA Brownfields Program.

One of the Coalition's proposals is to clarify and expand liability protections for public entities that acquire contaminated brownfields sites where the public entities had no involvement in the contamination. This proposal is of great interest to the many localities that are, out of necessity, taking ownership of brownfields properties. Some brownfields sites are unlikely to be redeveloped through private investment. If these sites are blighting influences that prevent neighborhood revitalization, the only option that will work is public acquisition.

Through a variety of means including tax liens, foreclosures, purchase, and the use of eminent domain, local governments can take control of brownfields in order to clear title, consolidate multiple parcels into an economically viable size, conduct site assessments, remediate environmental hazards, address public health and safety issues, and otherwise prepare the property for development by the private sector or for public and community facilities.

Although property acquisition is a vital tool for facilitating the development of brownfields, many local governments have been dissuaded by fears of incurring liability for contamination they had no role in creating or releasing. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) includes liability defenses and exemptions that may protect local governments that "involuntarily" acquire brownfields. However, the majority of the sites acquired by local government are either unprotected (which is the case for voluntary acquisition), or are subject to widely varying interpretations of what is meant by "involuntary acquisition." Even properties acquired through tax delinquency (one of the examples cited in the law and often presumed to be protected) may not necessarily be exempt if the local government took affirmative ("voluntary") steps in the tax delinquency process.

A 2006 report by the National Association of Local Government Environmental Professionals concluded that the term "involuntary acquisitions" is subject to wide interpretation and local governments find it "inconsistent, ambiguous, and confusing." The report further finds that EPA's various guidance documents on the subject only serve to "muddy the waters."

This lack of clarity and certainty has a chilling effect on strategic acquisition redevelopment activities. In some cases, local governments have adopted conservative policies that strictly limit the acquisition of contaminated properties. These policies keep localities out of the courtroom, but they also leave many contaminated sites as neglected blighting influences on their surrounding communities. In other cases, local governments have taken a risk by acquiring properties, essentially "rolling the dice" in favor of community revitalization.

A secondary problem is that many potential brownfields projects on publicly-owned sites have been ruled ineligible for EPA funding because the localities cannot satisfy the requirements to establish "involuntary acquisition." Aside from the loss of funding, localities rightly fear that, if EPA has determined them to be ineligible for funding, that is tantamount to determining that the locality is a potentially responsible party.

The undersigned organizations favor amending CERCLA to provide for greater clarity and a higher level of protection for acquisition activities that clearly serve public purposes. The

amendments should:

- Eliminate the term “involuntary” in describing the protected activities.
- Add a plain language exemption for local governments that acquire contaminated properties for redevelopment purposes, as long as the governmental entities have not created or released the contamination.
- Modify and expand the current protections under the category of “rendering care and advice” to include actions taken by local government to address public health and safety issues at sites, so long as the governmental entity acts responsibly in doing so.

We encourage you to consider improving liability protections so that governmental entities will not have to “roll the dice” when pursuing activities that are so clearly benefitting the public – addressing public health and safety concerns, attracting jobs and investment to distressed communities, and re-positioning vital assets for environmentally-responsible economic growth.

If you have any questions, please contact Chuck Thompson at the International Municipal Lawyers Association (202-742-1016, CThompson@imla.org), Evans Paull at the Northeast-Midwest Institute (202-329-4282, epaull@nemw.org), or Judy Sheahan at the U.S. Conference of Mayors (202-861-6775, jsheahan@usmayors.org).

Sincerely,

National Organizations and Non-Profits

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cc: The Honorable Henry A. Waxman
The Honorable Joe Barton
The Honorable Fred Upton, Ranking Member
Members of the House Energy and Commerce Committee