**Model**

**Local Government Comfort/Status Letter**

**September 2021**

[**Insert Addressee**]

RE: [**Insert name or short description of property/site**]

Dear [**Insert name of interested party**]:

Thank you for [contacting or having your attorney/contractor/agent contact] the U.S. Environmental Protection Agency (EPA or the Agency) on [**insert** **date**] about your plans concerning the property referenced above (“Property”) at the [**insert name of Superfund site**] (“Site”). In your inquiry, you described your interest in [**insert general description of the proposed activity at the Property.**] and requested that we provide you with a Superfund comfort/status letter.

[**Optional: EPA regional office practice information**]

The purposes of this comfort/status letter are to provide you with information that may be relevant to the potential Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) liability concerns you have identified at the Property and summarize the relevant information available to EPA about the [**insert name of Superfund site**] as of the date of this letter. We hope this information will enable you to make informed decisions as you move forward with your plans regarding the Property.

Under CERCLA (commonly referred to as Superfund),[[1]](#footnote-2) the Agency’s mission is to protect human health and the environment from risks posed by exposure to contaminated or potentially contaminated land, water, and other media. A Superfund cleanup can help return these properties to productive reuse. We are providing this letter consistent with the Agency’s 2019 Comfort/Status letter policy.[[2]](#footnote-3)

**Property Status**

Interested parties can find information on sites that are, or potentially are, contaminated and may warrant action under Superfund, including site-specific documents and fact sheets, in the Superfund Enterprise Management System (SEMS).[[3]](#footnote-4) **[Add the site-specific URL to the Superfund site profile if available].**

The Property [**insert one of the following:**

[**a.**] is defined as

[**b.**] is situated within

[**c.**]may be part of

[**d.**]is located near the[**insert SEMS/NPL site name**] (“Site”)].

This Site [is or was] located in SEMS [**insert one of the following**:

[**a.**] but is not on the National Priorities List (NPL).

[**b.**] and has been proposed to the National Priorities List (NPL).

[**c.**] and is on the National Priorities List (NPL).

[**d.**] and is subject to [**describe ongoing response action**] under the Superfund Alternative Approach.[[4]](#footnote-5)

[**e.**] but was [deleted or partially deleted] from the National Priorities List (NPL).]

For the reasons stated below, we are addressing the Siteunder Superfund [remedial or removal] authority.

**History and Status of the Site**

SEMS provides information on (1) whether an NPL site is proposed, final, or deleted, (2) sites subject to a federal [remedial or removal] action, and (3) sites with a [Superfund Alternative Approach](https://www.epa.gov/enforcement/superfund-alternative-approach) agreement.[[5]](#footnote-6)

**[Note: Include a discussion, if known of the current site conditions, cleanup status, selected remedies, Agency actions, reasonable steps, land use restrictions and determinations, deed restrictions, ready for reuse determinations, etc.]**

**Reuse of the Property**

**If there is enough information available to the EPA Region to determine the local government’s proposed reuse, insert the following:**

Based on the information [you provided or that was provided on your behalf], EPA understands that you **[or** **insert name of interested party if requestor is a third party]** intend to [**insert brief description of the general description of the development and acquisition method to be used by the state or local government]** at the Property. We also understand the development will involve [**insert brief description of proposed on-site activities**]. **[Optional, in whole or in part, and to be revised, as needed, if incompatibilities are currently known:** Please note that, to ensure the remedy remains protective of human health and the environment, any development must be compatible with the EPA [or federal agency] cleanup actions and institutional controls designed to protect the remedy and prevent unacceptable exposure to residual contamination. [I**nsert language interference with government investigations or cleanup.**] As of the date of this letter, we [have not identified any obvious incompatibility or have identified an incompatibility] between your proposed use of the Property as you have described it to us and EPA’s selected cleanup option [**if incompatibilities are identified, explain EPA concerns and potential options, if possible. Also, insert any land use restrictions, if known by the EPA Region]**.] As your plans develop further, please continue to discuss the development with us [and/or the affected federal agency].

**CERCLA § 101(20)(D) State and Local Government Liability Exemption**

EPA understands that you are interested in information regarding the state and local government liability exemption provision of CERCLA. In 2018, Congress enacted the Brownfields Utilization, Investment, and Local Development Act of 2018 (BUILD Act).[[6]](#footnote-7) CERCLA § 101 (20)(D), as amended by the BUILD Act, provides liability protection to local governments[[7]](#footnote-8) that may exempt them under certain circumstances from being an “owner” or “operator” and thus may protect them from potential CERCLA liability.

The BUILD Act amended CERCLA § 101(20)(D) to add a new category of exempt acquisitions, “through seizure or otherwise in connection with law enforcement activity” and to remove the requirement that state and local governments must acquire title to property “involuntarily.” Section 101(20)(D) now states that a “unit of State 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” is exempt from the definition of “owner or operator” if that government entity did not cause or contribute to the release or threatened release of a hazardous substance from the facility. Please note that some actions or omissions during ownership (such as dispersing contaminated soil during excavation and grading and failing to prevent the release of hazardous substances) may cause or contribute to a release of hazardous substances from a property and make the local government ineligible for the exemption.[[8]](#footnote-9)

On June 15, 2020, EPA issued guidance that describes the Agency’s enforcement discretion policies that may apply to state and local governments and to your situation.[[9]](#footnote-10) The Local Government Guidance provides:

The CERCLA § 101(20)(D) exemption from owner or operator liability includes circumstances in which a local government acquires title to property “by virtue of its function as sovereign.” This phrase is undefined in the statute. To provide clarity to local governments, the EPA generally intends to exercise its enforcement discretion to treat a local government acquisition as “by virtue of its function as sovereign” only when the government acquires title to the property by exercising a uniquely governmental authority via a function that is unique to its status as a governmental body.

[Depending on the scenario raised at the site, the EPA Region may want to discuss issues addressed in the Guidance and include language from the Guidance. For example, the letter could discuss key issues including what is a unit of state or local government, what acts or omissions may cause or contribute to a release or threatened release, or what activities may be a function of sovereign acquisition.]

[**Include as appropriate:** Based on the information the EPA currently has on your situation, described above, should the [**insert local government name**] acquire the impacted Property by [**insert the acquisition method local government is pursuing, e.g. condemnation or foreclosure**], the CERCLA § 101(20)(D) exemption may apply.[**When the 101(20)(D) exemption does not clearly apply, but the circumstances fit within one of the enforcement discretion scenarios, delete the preceding sentence and replace it with:** Based on the information in your representation, the Local Government Guidance may apply.] Courts, not EPA, are the final arbiter of whether a party has achieved a liability protection. Thus, EPA recommends that you consult your legal counsel to assess whether you satisfy each of the statutory requirements necessary to achieve and maintain the state and local government liability exemption. In cases where it is unclear whether the CERCLA § 101(20)(D) exemption applies ––or when a local government wishes to obtain additional liability protection—EPA encourages local governments to achieve and maintain Bona Fide Prospective Purchaser (BFPP) status pursuant to CERCLA §§ 101(40) and 107(r), described below.

**CERCLA’s Bona Fide Prospective Purchaser Liability Protection**

EPA generally encourages units of state and local government to establish and maintain BFPP status in cases where it is unclear whether the CERCLA § 101(20)(D) liability exemption or other liability protections apply. Congress amended CERCLA in 2002 to exempt certain parties who buy contaminated or potentially contaminated properties from CERCLA liability if they qualify as BFPPs. The BFPP provision provides that a person who meets the criteria of CERCLA §§ 101(40) and 107(r)(1), and who purchases the property after January 11, 2002, will not be liable as an owner or operator under CERCLA.

[**For lessees add:** The statutory definition of a BFPP also includes a party who acquires a leasehold interest in a property after January 11, 2002, where the leasehold is not designed to avoid liability and the interested party meets certain conditions and criteria.]

A key advantage of the BFPP provision is that it is self-implementing, therefore, the Agency is not involved in determining whether a party qualifies for BFPP status. A party, on its own, can achieve and maintain status as a BFPP, which provides statutory protection from CERCLA liability, without entering into an agreement with EPA, so long as that party meets the threshold criteria and continuing obligations identified in the statute.[[10]](#footnote-11)

[**If appropriate: Intergovernmental transfers of property]**

[**Include if appropriate: Application of BFPP provision]**

[**Optional:** **Reasonable Steps**

Among other criteria outlined in CERCLA, a BFPP must take “reasonable steps” to stop continuing releases, prevent threatened future releases, and prevent or limit human, environmental, or natural resources exposure to any previously released hazardous substances as required by CERCLA § 101(40)(B)(iv). This requirement is explored further in the Common Elements Guidance.[[11]](#footnote-12)

[**If there is enough information available to the EPA Region to determine reasonable steps, insert the following:** By making the BFPP exemption subject to the obligation to take “reasonable steps,” EPA believes Congress intended to protect certain landowners from CERCLA liability while at the same time recognizing that these landowners should act reasonably, in conjunction with other authorized parties, in protecting human health and the environment. As noted above, the Agency [or federal department/agency] has [**insert most recent/relevant action taken by the Agency or other federal department if a federal facility**] at the Siteand has identified several environmental concerns. Based on the information we have evaluated; we believe that the following may be reasonable steps related to the hazardous substance contamination found at the Site:

**[Insert the list of reasonable steps or paragraphs outlining reasonable steps with respect to each environmental concern.]**

Any reasonable steps suggested by EPA are based on the nature and extent of contamination currently known to the Agency and are provided as a guide to help you as you seek to reuse the Property. Because a final determination about which steps are reasonable would be made by a court rather than EPA, and because additional reasonable steps may later be necessary based on site conditions, this list of reasonable steps is not exhaustive. You should continue to identify reasonable steps based on your observation and judgment and take appropriate action to implement any reasonable steps whether EPA regional staff has identified any such steps.[[12]](#footnote-13)

[**If the EPA Region has insufficient information to identify reasonable steps, insert the following (language may be modified, as appropriate):** As noted above, [**insert explanation as to why the EPA Region is lacking information (e.g., the remedial investigation has not yet been completed for the Site)**]. Although reasonable steps may be appropriate, we do not have enough information about the nature and extent of contamination at the Site to provide [you or **insert name of the interested party if requestor is a third party**] with what EPA would consider to be appropriate reasonable steps at this time.]

**Third Party and Innocent Landowner Defenses**

CERCLA § 107(b)(3) provides a “third party” affirmative defense to CERCLA liability for any owner, including a local government, that can prove, by a preponderance of the evidence, that the contamination was caused solely by an act or omission of a third party whose act or omission did not occur “in connection with a contractual relationship.” An entity asserting a CERCLA § 107(b)(3) defense also must show that it exercised due care with respect to contamination and that it took precautions against foreseeable acts or omissions, and the consequence thereof, by the third party that caused the contamination.

CERCLA’s third-party defense includes an “innocent landowner defense” as an exclusion to the definition of “contractual relationship” in Section 101(35). The “innocent landowner defense” applies to entities that meet the criteria set forth in CERCLA §§ 101(35) and 107(b)(3). A “contractual relationship” under CERCLA § 101(35)(A) does not include the scenario where “the defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfers or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.” As discussed in the Local Government Guidance, EPA generally intends to exercise its enforcement discretion to treat local governments that acquire property through escheat or eminent domain under certain circumstances as exempt under Section 101(20)(D). CERCLA § 101(35)(A)(ii) provides an additional liability protection through an affirmative defense for these types of acquisitions, provided other requirements, including the exercise of due care, are satisfied.

**[Note: Pursuant to requirement C7 of the** [**OSRE Roles Chart**](https://cfint.rtpnc.epa.gov/ioic/osre_roles/)**, before the EPA Region inserts language discussing a statutory exemption or guidance not included in this model letter, the Region should consult with OSRE as this would be considered a significant deviation from this model.]**

[**Liens**

[**Optional: Superfund Lien Pursuant to CERCLA § 107(*l*).**

[**Insert one of the following:**

[**a.**]No Superfund lien has arisen against the[Site or Property]pursuant to CERCLA § 107(*l*) or

[**b.**]A Superfund lien has arisen on the[Site or Property]pursuant to CERCLA § 107(*l*).]

[**Then choose one of the following:**

[**i.**]EPA has not filed a notice of lien pursuant to CERCLA § 107(*l*)(3) on this [Site or Property] and is not in a position today to determine whether we intend to file such notice of lien with respect to the [Site or Property].

[**ii.**] EPA has not filed a notice of lien pursuant to CERCLA § 107(*l*)(3) on this [Site or Property]. Pursuant to CERCLA § 107(*l*), the Agency will generally not file a notice of lien on property currently owned by a non-liable party.

[**iii.**] EPA has not filed a notice of lien pursuant to CERCLA § 107(*l*)(3) on this [Site or Property] because to date, we have recovered all the costs incurred at the Site from the potentially responsible parties (PRPs).

[**iv.**]EPA has filed a notice of its Superfund lien on this [Site or Property] pursuant to CERCLA § 107(*l*). According to the settlement agreement between the Agency and [**insert name of the interested party**], when the property is sold, we will release this lien upon compliance by the [**insert name of the interested party**] with the terms of the settlement agreement.

[**v.**]EPA has filed a notice of its Superfund lien on this [Site or Property] pursuant to CERCLA § 107(*l*) and [is or is not] willing to seek resolution leading to release of the lien.

[**vi.**]EPA generally will not file a notice of a CERCLA § 107(*l*) lien on the property after such lien becomes unenforceable through operation of the statute of limitations provided in CERCLA § 113 (*See* CERCLA § 107(*l*)(2)).]]

[**Optional: Windfall Lien Pursuant to CERCLA § 107(r)**

Although Congress provided liability protection under CERCLA for BFPPs to encourage the purchase and reuse of contaminated properties, the property they acquire may be subject to a windfall lien pursuant to CERCLA § 107(r) if there are unrecovered response costs incurred by the United States and the response action increases the fair market value of the property. Unlike a CERCLA § 107(*l*) lien (“Superfund lien”), a windfall lien is not a lien for all the Agency’s unrecovered response costs. The windfall lien is limited to the lesser of the Agency’s unrecovered response costs or the increase in fair market value attributable to EPA’s cleanup.[[13]](#footnote-14)

[**Optional, if applicable, choose one of the following:**

**[a.]** Based upon the information now available to EPA, the Agency is not in a position today to determine whether the windfall lien policy may apply to this [Site or Property].

**[b.]** EPA has not filed notice of a windfall lien under Section 107(r) of CERCLA on this [Site or Property]. In accordance with EPA policy, the Agency, generally, will not file notice of a windfall lien [**insert reason set forth in the windfall lien policy, for example, “where a bona fide prospective purchaser acquires the property at fair market value after cleanup”**].

**[c.]** Based upon the information available to EPA and consistent with the windfall lien policy, we believe that your situation may fall under the [**insert reason set forth in the Windfall Lien Policy**] section of the policy.

**[d.]** Based upon the information available to EPA, we believe that a windfall lien [has arisen or may arise] on the [Site or Property][**Optional:** in the amount of $ \_\_\_]. If you wish to settle the windfall lien, we are willing to consider a resolution leading to release of the lien.]]

**State Actions**

We can only provide you with information about federal **[insert relevant statute, e.g., Superfund]** actions at the Site, federal law and regulations, and EPA guidance. **[Include the following only if the recipient is a local government:** For information about potential state actions and liability issues, please contact [**insert** **name of state’s environmental program or name of specific state contact and contact information**]. [**Note: If there is a state contact who handles technical issues, also insert their contact information.**]].

**Conclusion**

EPA remains dedicated to facilitating the cleanup and beneficial reuse of contaminated properties and hopes the information contained in this letter is useful to you. You may find it helpful to consult your own environmental professional, legal counsel, and your state, tribal, or local environmental protection agency before taking any action to acquire, clean up, or redevelop the Property. These consultations may help you obtain a greater level of comfort about the compatibility of the proposed use and ensure compliance with any applicable federal, state, local, and/or tribal laws or requirements. If you have any additional questions or wish to discuss this information further, please feel free to contact [**insert EPA contact information**].

Sincerely,

[**Insert regional contact name**]

[**Insert regional contact title**]

[**Optional:** **Enclosure(s) (#)**]

cc: [**Insert EPA OSRE comfort/status letter contact**]

[**Insert FFEO comfort/status letter contact, if applicable]**

[**Insert EPA OLEM contact, if applicable**]

[**Insert state contact(s), if applicable**]

1. 42 U.S.C. §§ 9601, *et seq.* [↑](#footnote-ref-2)
2. See 2019 Policy on the Issuance of Superfund Comfort/Status Letters available on the Agency’s website at https://www.epa.gov/enforcement/comfortstatus-letters-guidance. [↑](#footnote-ref-3)
3. SEMS is available at on the Agency’s website at <https://cumulis.epa.gov/supercpad/cursites/srchsites.cfm>. [↑](#footnote-ref-4)
4. See *Transmittal of Updated Superfund Response and Settlement Approach for Sites Using the Superfund Alternative Approach (SAA Guidance)* (Sept. 28, 2012), <https://www.epa.gov/enforcement/transmittal-memo-updated-superfund-response-and-settlement-approach-sites-using>. Information on the Superfund Alternative Approach is available on the Agency’s website at <https://www.epa.gov/enforcement/superfund-alternative-approach>. [↑](#footnote-ref-5)
5. See *Transmittal of Updated Superfund Response and Settlement Approach for Sites Using the Superfund Alternative Approach (SAA Guidance)* (Sept. 28, 2012), <https://www.epa.gov/enforcement/transmittal-memo-updated-superfund-response-and-settlement-approach-sites-using>. See *Transmittal of Updated Superfund Response and Settlement Approach for Sites Using the Superfund Alternative Approach (SAA Guidance)* (Sept. 28, 2012), [↑](#footnote-ref-6)
6. Brownfields Utilization, Investment, and Local Development Act of 2018, Division N of Pub. L. No. 115-141, 132 Stat. 1052 (March 23, 2018). [↑](#footnote-ref-7)
7. Many of the references to “local governments” in this letter and to CERCLA’s liability protections are also applicable to state governments. [↑](#footnote-ref-8)
8. For additional discussion of post-acquisition activities that may or may not be considered releases under CERCLA, see the disposal discussion beginning on page 8 of the EPA’s *Enforcement Discretion Guidance Regarding Statutory Criteria for Those Who May Qualify as CERCLA Bona Fide Prospective Purchasers, Contiguous Property Owners, or Innocent Landowners* (“Common Elements Guidance”), July 29, 2019, available on the Agency’s website at <https://www.epa.gov/enforcement/common-elements-guidance>. [↑](#footnote-ref-9)
9. See *Superfund Liability Protections for Local Government Acquisitions after the Brownfields Utilization, Investment, and Local Development Act of 2018* (“Local Government Guidance”), (June 15, 2020), available on the Agency’s website at <https://www.epa.gov/enforcement/guidance-superfund-liability-protections-local-government-acquisitions>. [↑](#footnote-ref-10)
10. See *Enforcement Discretion Guidance Regarding Statutory Criteria for Those Who May Qualify as CERCLA Bona Fide Prospective Purchasers, Contiguous Property Owners, or Innocent Landowners* ("Common Elements") (“Common Elements Guidance”) (July 29, 2019), available on the Agency’s website at <https://www.epa.gov/enforcement/common-elements-guidance>*.* [↑](#footnote-ref-11)
11. *Id.* [↑](#footnote-ref-12)
12. CERCLA § 101(40)(B)(iv) provides that “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 releases; and (iii) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance.” [↑](#footnote-ref-13)
13. For more information, please refer to the Agency’s *Interim Enforcement Discretion Policy Concerning “Windfall Liens” Under Section 107(r) of CERCLA (“*Windfall Lien Policy”) (July 16, 2003)available at <https://www.epa.gov/enforcement/interim-guidance-enforcement-discretion-concerning-windfall-liens-cercla-section-107r>]. [↑](#footnote-ref-14)