

# BROWNFIELDS FOR NON-PROFITS: THE LEGAL PERSPECTIVE

**Colorado Brownfields Conference 2003**

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# OVERVIEW

- I. Habitat for Humanity– EPA MOU**
- II. CERCLA Liability and Defenses**
- III. Other Key Issues**
  - I. Windfall Lien**
  - II. Davis-Bacon Act**
  - III. Confidentiality**
- IV. Conclusion**

# Habitat–EPA MOU

- **Partnership to build energy efficient housing on brownfields properties**
- **Encourage community revitalization and affordable housing for low-income persons**
- **Use brownfields funds for environmental assessments at community-identified properties**
- **Availability of EPA grant funds to clean up contaminated property**

# CERCLA Liability

- **Imposes cleanup liability on current and former owners and operators**
- **Strict liability**
- **Joint and several liability**
- **\$\$\$\$\$**

# 2002 Brownfields Law

- **Enacted January 2002**
- **Alters the Innocent Purchaser Defense**
- **Adds a New Contiguous Landowner Defense**
- **Adds a new Bona Fide Prospective Purchaser Exemption**
- **Adds new Protection for Cleanups under State Programs**

# Pre-2002 Defenses

- **Third Party Defense**
  - **Contamination caused solely by a third party**
  - **No contractual relationship**
  - **Due care and precautions**
- **Innocent Landowner Defense**
  - **“All appropriate inquiry”**
  - **No reason to know of contamination**

# Changes to Innocent Landowner Defense

- **“All appropriate inquiry” defined:**
  - **Post-5/31/97-compliance with ASTM Phase I**
  - **EPA regulations by January 2004**
- **Reasonable steps to stop and prevent releases and exposure**
- **Full cooperation with response actions**
- **Compliance with land use other institutional controls**

# Contiguous Landowner Defense

- **Contamination is caused by hazardous substances released from contiguous or similarly situated property owned by someone else**
- **Owner not otherwise potentially liable**
- **Owner did not cause, contribute, or consent to the release**
- **Owner has taken “reasonable steps” to stop and prevent releases and exposure**

# Contiguous Landowner Defense (Cont.)

- Full cooperation with response actions
- Compliance with land use restrictions and institutional controls
- Comply with all EPA information requests and administrative subpoenas
- Provide legally required notices with respect to the discovery or release of hazardous substances
- “All appropriate inquiry” at time of purchase
- No reason to know of contamination at time of purchase

# Bona Fide Prospective Purchaser Exemption

- Same as contiguous property defense, but:
  - Contamination can be from any pre-Closing source other than purchaser
  - Purchaser can buy property knowing of contamination
- Property must be acquired after January 11, 2002
- US is entitled to a lien on the property if:
  - US has not been reimbursed for its cleanup costs, and
  - the cleanup increases property's value

# Windfall Lien

- Unrecovered government response costs due to increase in facility's fair market value
- Will actions under the MOU trigger the windfall lien?
- Potential to deter prospective homeowners from participating in the program?

# **EPA'S RESIDENTIAL POLICY**

- **No enforcement action against residential property owners except in very limited situations**
- **Alleviate concerns about resale**

# Davis-Bacon Act

- **Pay prevailing wages and benefits on federally funded construction projects**
- **Brownfields funding subject to Davis-Bacon**
- **Volunteer Exception**

# Confidentiality

- **Who owns data generated with EPA  
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- **Access to information through FOIA**

# Conclusion

- Many opportunities under new Brownfields Law:
  - Removal of barriers to cleanup and redevelopment
  - New brownfields funding
- But also many open questions