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United States Environmental Protection Agency

CERCLA Liability and Local Government Acquisitions and Other Activities

Office of Site Remediation Enforcement

Local governments can play an important role in facilitating the cleanup and redevelopment of properties contaminated by hazardous substances. In particular, by acquiring contaminated properties, local governments have an opportunity to evaluate and assess public safety needs and promote redevelopment projects that will protect and improve the health, environment, and economic well-being of their communities.

One impediment to local government acquisition of contaminated property is concern about potential liability for the cleanup costs under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, also known as "Superfund" or "CERCLA," 42 U.S.C. §§ 9601-9675.

This fact sheet addresses CERCLA liability issues for local governments and summarizes key statutory provisions and requirements.[1] It is intended to assist local governments by identifying CERCLA liability issues and protections that may be applicable to local governments as they consider involvement at contaminated properties.

The U.S. Environmental Protection Agency (EPA) recommends that local governments refer to the statutory language of CERCLA, the regulations at 40 C.F.R. Part 300 (known as the "National Contingency Plan"), and relevant EPA guidance (referenced at the end of this document) for more detail. EPA's Regional offices[2] also may be able to provide information and assistance to local governments considering acquisition of contaminated properties. EPA also encourages local governments to consult with their state environmental protection agency and legal counsel prior to taking any action to acquire, cleanup, or redevelop contaminated property.

What is CERCLA?

CERCLA outlines EPA's authority for cleaning up properties contaminated with hazardous substances regardless of whether the properties are in use or abandoned. Additionally, CERCLA establishes a strict liability system for determining who can be held liable for the costs of cleaning up contaminated properties. CERCLA also provides EPA with robust enforcement

[1] A local government also may have obligations and/or be potentially liable under other environmental statutes such as the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992 (RCRA) or state laws.

[2] For contact information, see http://www.epa.gov/aboutepa/postal.html#regional.

authorities to compel cleanups and recover EPA's response and enforcement costs incurred at these properties. Properties addressed under CERCLA authorities are commonly known as "Superfund sites."

CERCLA also includes authority for EPA to provide grant funding for the assessment and cleanup of brownfield sites. CERCLA § 101(39)(A) defines a brownfield site as "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant." Many of the properties that local governments may be interested in acquiring may qualify as brownfield sites.

For more general information about, and an overview of, CERCLA, please see EPA's website at http://www.epa.gov/superfund/policy/cercla.htm.

What are the various ways local governments become involved at contaminated properties?

Local governments may become involved with contaminated properties in a number of ways, many of which present opportunities to facilitate cleanup or redevelopment. The ways include:

- Providing incentives to promote redevelopment (*i.e.*, zoning, tax increment financing, etc.);
- Responding to an emergency on the property;
- Transferring of tax liens;
- Collaborating with the current property owner;
- Leasing of the property by the municipality;
- Acquiring the property and "simultaneously" transferring it to a third party;
- Acquiring the property with subsequent transfer to a third party;
- Acquiring the property and managing it through a "land bank"; or
- Acquiring the property for long-term use.

Can a local government be liable under CERCLA?

Yes. CERCLA is a strict liability statute that holds potentially responsible parties (PRPs) jointly and severally liable, without regard to fault, for cleanup costs incurred in response to the release or threatened release of hazardous substances. Under CERCLA § 107, a person, including a local government, may be considered a PRP[3] if the person:

- Is the current owner or operator of the contaminated property;
- Owned or operated the property at the time of the disposal of the hazardous substance;
- Arranged for the hazardous substances to be disposed of or treated, or transported for disposal or treatment; or
- Transported the hazardous substances to the property.

[3] According to CERCLA, federally recognized tribes are not included as PRPs.

A local government that falls into one of the classes of PRPs described above may be potentially liable under CERCLA. Fortunately, CERCLA includes liability exemptions, affirmative defenses, and protections that may apply to local governments. Additionally, EPA has enforcement discretion guidance and site-specific tools that may address concerns about potential CERCLA liability.

Is a local government liable under CERCLA if it responds to an emergency on a contaminated property?

Local units of government, especially fire, health, and public safety departments, are often the first responders to emergencies and other dangerous situations at contaminated properties in their communities. So as not to interfere with these activities, CERCLA § 107(d)(2) provides that state or local governments will not be liable for "costs or damages as a result of actions taken in response to an emergency created by a release or threatened release of a hazardous substance by or from property owned by another party." *Note: This protection does not apply in cases where the local government is grossly negligent or intentionally engages in misconduct.* CERCLA § 107(d)(2). *Negligence and intentional misconduct are fact-specific determinations.*

In addition, CERCLA § 123 authorizes EPA to reimburse local governments for the costs of temporary emergency measures taken in response to releases within their jurisdiction. These temporary measures must be "necessary to prevent or mitigate injury to human health or the environment associated with the release or threatened release of any hazardous substance, pollutant, or contaminant." This reimbursement is to give financial assistance to government entities that do not have a budget allocated for emergency response and cannot otherwise provide adequate response measure. The amount of the reimbursement may not exceed $25,000 for a single response.

For more information on CERCLA § 123 reimbursements, please see EPA's website at http://www.epa.gov/ceppo/web/content/lawsregs/lgrover.htm.

What CERCLA liability protections are available to local governments if they acquire contaminated property?

CERCLA contains liability exemptions, affirmative defenses, and protections which may apply to a local government when it:

- Acquires contaminated property involuntarily by virtue of its function as a sovereign, CERCLA § 101(20)(D);
- Qualifies for a third party defense or innocent landowner liability protection, CERCLA §§ 107(b)(3), 101(35)(A);
- Qualifies as a bona fide prospective purchaser (BFPP) when it acquires the contaminated property, CERCLA §§ 101(40), 107(r)(1); or
- Is conducting or has completed a cleanup of a contaminated property in compliance with a state cleanup program, CERCLA § 128(b).

Each of these is discussed below in further detail.

Key CERCLA Provisions ● – ***Could apply to local governments*** ○ – ***Could apply to local governments under certain circumstances***	**Methods of Property Acquisition**							
	Tax Foreclosure	**Bankruptcy**	**Escheat**	**Eminent Domain**	**Purchase**	**Inheritance or Bequest**	**Abandonment**	**Gift/Donation**
Involuntary Acquisition *§ 101(20)(D)*	●	●	●	○			●	
Bona Fide Prospective Purchaser Protection *§§ 101(40) and 107(r)(1)*	●	●	●	●	●	●	●	●
Third Party and Innocent Landowner Defenses *§§ 107(b)(3) and 101(35)(A)*			●	●	○	●		
Enforcement Bar *§ 128(b)*	●	●	●	●	●	●	●	●

The method or type of property acquisition by a local government will play a critical role in the application of liability exemptions, affirmative defenses, or protections. Although most often applied in the purchase and gift/donation context, BFPP status is available for the majority of property acquisitions. *Note: In cases where it is unclear whether the involuntary acquisition exemption, affirmative defenses, or liability protections are sufficient, EPA encourages the local government to achieve and maintain BFPP status to increase certainty that it will not be liable under CERCLA.*

What is the meaning of "involuntary acquisition"?

CERCLA § 101(20)(D)[4] provides that a unit of state or local government will not be considered an owner or operator of contaminated property (and thus is exempt from potential CERCLA liability as a PRP) if the state or local government acquired ownership or control involuntarily. This provision includes a non-exhaustive list of examples of involuntary acquisitions, including obtaining property through bankruptcy, tax delinquency, abandonment, or "other circumstances in which the government entity involuntarily acquires title by virtue of its function as sovereign." However, it is important to note that this exemption will 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.

For purposes of EPA enforcement, EPA considers an involuntary acquisition or transfer to include situations "in which the government's interest in, and ultimate ownership of, a specific asset exists only because the conduct of a non-governmental party…gives rise to a statutory or common law right to property on behalf of the government."[5] Moreover, EPA acknowledges that tax foreclosure and other acquisitions by government entities often require some affirmative or volitional act by the local government.[6] Therefore, a government entity does not have to be completely passive during the acquisition in order for the acquisition of property to be considered involuntary under CERCLA.[7] Instead, EPA considers an acquisition to be involuntary if the government's interest in, and ultimate ownership of, the property exists only because the actions of a non-governmental party give rise to the government's legal right to control or take title to the property. For example, although a local government might be required to engage in certain discretionary or volitional actions to acquire title to a property through tax delinquency foreclosure or abandonment per state statute, EPA would consider the acquisition involuntary.[8]

For more information on state and local government involuntary acquisition, please see EPA's website at http://www.epa.gov/compliance/cleanup/revitalization/local-acquis.html.

How does a local government become a bona fide prospective purchaser (BFPP)?

A local government, whose potential liability is based solely on the fact that it knowingly purchased a contaminated property and is, therefore, considered the current owner or operator, will not be liable under CERCLA if it achieves and maintains BFPP status. BFPP status may be

[4] CERCLA § 101(35)(A)(ii) also discusses involuntary acquisitions for a unit of state or local government in the context of the innocent landowner defense pursuant to CERCLA § 101(35)(A).

[5] Municipal Immunity from CERCLA Liability for Property Acquired through Involuntary State Action (EPA/OSRE/OSWER, 10/20/1995) at 3.

[6] *Id.* at 4.

[7] *Id.*

[8] *Id.*

achieved even when the buyer has knowledge of the contamination on the property at the time of purchase. Moreover, EPA encourages local governments to achieve and maintain BFPP status in cases where it is unclear whether involuntary acquisition, affirmative defenses, or other liability protections may be sufficient to avoid CERCLA liability.

CERCLA §§ 101(40) and 107(r)(1) provide that a BFPP is a person or tenant of a person who acquired the property after January 11, 2002 and meets the following threshold criteria:

- All Appropriate Inquiries (AAI) were performed prior to purchase of the property pursuant to CERCLA § 101(35)(B);
- All disposal of hazardous substances occurred before the party acquired the property; and
- The party has "no affiliation" with a liable or potentially liable party.

CERCLA §§ 101(40)(C)-(G) provide additional criteria for maintaining BFPP status. These continuing obligations that must be met after acquisition of the property include:

- Complying with land use restrictions and not impeding the effectiveness of the institutional controls;
- Taking "reasonable steps" to prevent the release of hazardous substances. These obligations are site-specific, but may include preventing threatened future releases and/or limiting exposure to earlier hazardous substance releases. Institutional controls, discussed further below, may play a critical role in complying with reasonable steps;
- Providing full cooperation, assistance and access;
- Complying with information requests and administrative subpoenas; and
- Providing legally-required notices.

To remain protected from CERCLA liability for the existing contamination while it owns the property, a local government must maintain its BFPP status for as long as the potential for liability exists. Potential liability exists for as long as contamination remains on the property and/or the statute of limitations on CERCLA cost recovery actions is not in effect. It is important to note that a local government may become liable for any new contamination that may occur, even if the statute of limitations has run on existing contamination.

Although a BFPP is not liable for the cost of cleaning up the property, the property itself could be subject to a "windfall lien"[9] if EPA has spent money cleaning up the property after the BFPP acquires it and EPA's cleanup efforts have increased the fair market value of the property. CERCLA § 107(r)(2). The windfall lien is limited to the lesser of EPA's unrecovered response costs or the increase in fair market value attributable to EPA's cleanup. EPA may be able to file a windfall lien on the property if:

- EPA spent money cleaning up the property before acquisition by a BFPP if certain requirements are met (*i.e.*, where there are substantial unreimbursed costs);
- EPA's response action results in a significant increase in the property's fair market value;
- There are no viable, liable parties from whom EPA could recover its costs; and

[9] CERCLA contains two sections which discuss the ability of the federal government to impose liens. This fact sheet addresses the windfall provision of CERCLA § 107(r), but will not discuss liens provided under CERCLA § 107(l).

- A response action occurs while the property is owned by a person who is exempt (other than a BFPP) from CERCLA liability.

Whether EPA will perfect a windfall lien and prevent a potential windfall in such instances will be determined by site-specific circumstances and the equities of the particular situation.

For more information on AAI, please see EPA's website at http://www.epa.gov/brownfields/aai/index.htm. For more information on the BFPP liability protection and/or windfall liens, please see EPA's website at http://www.epa.gov/compliance/cleanup/revitalization/bfpp.html.

What are the requirements for the third party defense or innocent landowner defense?

CERCLA § 107(b)(3) provides a "third party" affirmative defense to CERCLA liability for any owner, including local governments, that can prove, by the preponderance of the evidence, that the contamination 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." Moreover, an entity asserting the CERCLA § 107(b)(3) defense must show that: a) it exercised due care with respect to the contamination; and b) it took precautions against foreseeable acts or omissions, and the consequences thereof by the third party that caused the contamination.

Congress enacted the Brownfields Amendments[10] and expanded the third party defense by creating exclusions to the definition of a contractual relationship. Previously, the deed transferring title between a PRP and the new landowner was a "contractual relationship" that prevented the new landowner from raising the traditional CERCLA § 107(b)(3) third party defense. To promote redevelopment and provide more certainty, Congress also clarified the "innocent landowner defense," which requires an entity to meet the criteria set forth in CERCLA § 101(35), in addition to the requirements of CERCLA § 107(b)(3). CERCLA § 101(35)(A) distinguishes three types of innocent landowners:

- Purchasers who acquire property without knowledge of contamination, CERCLA § 101(35)(A)(i);
- Governments "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," CERCLA § 101(35)(A)(ii); and
- Inheritors of contaminated property, CERCLA § 101(35)(A)(iii).

For more information on qualifying for the innocent landowner defense where the purchaser acquired property without knowledge of the contamination, please see EPA's *Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchasers, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability* (Common Elements Guidance) available at http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf.

[10] Small Business Liability Relief and Brownfields Revitalization Act (Pub. L. No. 107-118)(hereinafter the "Brownfields Amendments").

How do state response programs interact with CERCLA's enforcement bar?

Many states have established state-specific response programs (for example, State Superfund, brownfields, and voluntary cleanup programs). These programs play a critical role in assessing and cleaning up the vast majority of our nation's brownfields and other lower-risk sites. EPA supports state response programs through:

- Grant funding to establish and enhance state programs; and
- Non-binding Memoranda of Agreement with individual states that provide general enforcement assurances to encourage assessments and cleanups pursuant to a state response program.

CERCLA § 128(b) protects local governments and other parties from EPA enforcement, subject to specific exceptions, when they comply with a state response program and are conducting or have completed a cleanup of an eligible response site, as defined by CERCLA § 101(41). This protection is known as the "enforcement bar." EPA has entered into non-binding Memoranda of Agreement with over 20 states which clarify EPA enforcement intentions under CERCLA at sites addressed in compliance with state response programs. It is important to note that while CERCLA § 128(b) may prohibit EPA from taking an enforcement action; it does not preclude third party litigation.

For more information about state voluntary cleanup programs and Memoranda of Agreement, please see EPA's website at http://www.epa.gov/compliance/cleanup/revitalization/state.html.

What should a local government do if it obtains contaminated property from a land bank or redevelopment authority?

EPA recognizes the importance and increased use of land banks and redevelopment agencies as a tool to address abandoned or vacant properties, promote smart growth, improve existing land use practices, and support local community development. In an effort to make greater use of these tools, an increasing number of states and local governments are passing legislation creating land banks or redevelopment authorities to acquire, redevelop, and reuse abandoned properties.

While many abandoned properties that are of interest to land banks and redevelopment authorities are not likely to be contaminated, local governments should be aware that contamination and potential CERCLA liability may exist. A local government may increase the likelihood that the land bank or redevelopment authority is eligible for CERCLA liability protection by ensuring that the land bank or redevelopment authority conducts AAI prior to acquiring the property. Not only is AAI a critical requirement for obtaining most CERCLA landowner liability protections, but it also aids local governments in making informed property acquisition decisions. When acquiring abandoned contaminated properties, EPA encourages local governments to obtain BFPP status prior to acquisition if it is unclear whether other exemptions, affirmative defenses, or liability protections may apply.

How does CERCLA liability affect eligibility for federal brownfields grant funding?

EPA brownfields grant money is available to eligible entities as defined by CERCLA § 104(k)(1). However, these funds cannot be used to pay response costs at a brownfield site for which the grantee is potentially liable under CERCLA § 107. If an applicant for brownfields grant money may be potentially liable at the site for which they are seeking funds, they must document that they qualify for one of CERCLA's liability protections. Therefore, one benefit of being covered by a CERCLA liability protection is that it enables certain non-liable entities to be potentially eligible for federal brownfields grant funding. If a local government intends to protect itself against CERCLA liability and compete for federal brownfields grant funding, it is advisable for the local government to evaluate whether it is eligible for a grant or become eligible through a liability protection before acquiring a brownfield site.

TYPES OF BROWNFIELDS FUNDING OPPORTUNITIES

CERCLA §§ 104(k)(4) and (6) authorize EPA's Brownfields Program to provide funding in a variety of ways:

- Assessment Grants
- Cleanup Grants
- Revolving Loan Fund Grants
- Job Training Grants
- Training, Research, and Technical Assistance Grants
- Targeted Brownfields Assessments
- Area-Wide Planning Pilot Program

For more information about obtaining an EPA brownfields grant, grant guidelines, and discussions about the various types of grants that are available, please see EPA's website at http://www.epa.gov/brownfields/grant_info/index.htm.

What protections exist when municipal solid waste is disposed of at a contaminated property?

Prior to the Brownfield Amendments, entities that disposed of municipal solid waste at contaminated properties argued that they should not be liable for the cleanup of contamination that was originally and primarily caused by industrial polluters. To address this issue, the Brownfield Amendments included CERCLA § 107(p) to create a qualified exemption from CERCLA liability for certain residential, small business, and non-profit generators of municipal waste at sites on CERCLA's National Priorities List. However, this exemption does not apply to municipalities who owned or operated a site.

For more information on the municipal solid waste exemption and EPA's guidance on the exemption, please see EPA's website at http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-msw-exempt.pdf.

What steps might a local government take at a contaminated property to protect human health and the environment and ensure the integrity of a cleanup?

When contamination remains on a property during or after cleanup activities, institutional controls may be used alone or in combination with engineered controls to ensure protection of human health and the environment. Generally, institutional controls are designed to limit land or resource use (*e.g.*, prohibitions on residential use or extraction of ground water) and to ensure the integrity of engineered controls (*e.g.*, restrictions on excavating soils on or in the vicinity of a landfill cap).

As with engineered controls, institutional controls must be maintained, monitored, and evaluated for as long as contamination remains on the property at levels that do not allow for unrestricted use and unlimited exposure.

WHAT IS AN INSTITUTIONAL CONTROL?

An institutional control is a legal or administrative restriction on the use of, or access to, a contaminated property to protect:

1) the health of both humans and the environment; and

2) ongoing cleanup activities and to ensure viability of the engineered controls.

There are four categories of institutional controls:

- Proprietary Controls (*e.g.*, easement, real covenant, statutory covenant)
- Governmental Controls (*e.g.*, zoning, building permit, land use ordinance)
- Enforcement and Permit Tools (*e.g.*, consent decree, permit, order)
- Informational Devices (*e.g.*, deed notice, government advisory, state registry)

Whether or not a local government asserts BFPP status, it may play a key role in implementing, monitoring, and enforcing certain institutional controls – particularly for those it has the legal authority to implement or enforce. A local government also may work proactively with developers, prospective buyers and tenants, and other parties to ensure that institutional control requirements are understood and properly integrated into the planning and future reuse of the property.

If institutional controls are already in place on a particular property, it is important for local governments to understand the obligations the institutional controls impose and to consider how those obligations might be viewed by future owners, developers and property users. In some situations, EPA or the state may be willing to modify existing institutional controls to facilitate the appropriate reuse of the property as long as the engineered controls component of the cleanup will not be compromised and remains protective of human health and the environment.

For more information about institutional controls issues, please see EPA's website at http://www.epa.gov/superfund/policy/ic/index.htm.

CERCLA Liability and Local Government Acquisition of Contaminated Property: Key Documents		
Local Government Issue	**CERCLA Provision**	**Relevant EPA Documents or Guidance (if any)**
Involuntary Acquisition	§ 101(20)(D)	• Policy on Interpreting CERCLA Provisions Addressing Lenders and Involuntary Acquisitions by Government Entities (EPA/OSRE, 6/30/1997) • Policy on CERCLA Enforcement Against Lenders and Government Entities that Acquire Property Involuntarily (EPA/DOJ, 9/22/2005) • Municipal Immunity from CERCLA Liability for Property Acquired through Involuntary State Action (EPA/OSRE/OSWER, 10/20/1995) • Fact Sheet: The Effect of Superfund on Involuntary Acquisitions of Contaminated Property by Government Entities (EPA/OSRE, 12/31/1995)
Third Party and Innocent Landowner Defenses	§§ 107(b)(3), 101(35)(A)(ii)	• Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchasers, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability ("Common Elements") (EPA/OSRE, 3/6/2003)
Bona Fide Prospective Purchaser	§ 101(40) and § 107(r)	• Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchasers, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability ("Common Elements") (EPA/OSRE, 3/6/2003) • Issuance of CERCLA Model Agreement and Order on Consent for Removal Action by a Bona Fide Prospective Purchaser (OSRE/USDOJ, 11/27/2006) • Enforcement Discretion Guidance Regarding the Applicability of the Bona Fide Prospective Purchaser Definition in CERCLA § 101(40) to Tenants (OSRE/OSWER, 1/19/2009) • Enforcement Discretion Guidance Regarding the Applicability of the Bona Fide Prospective Purchaser Definition in CERCLA Section 101(40) to Tenants: Frequently Asked Questions (OSRE, 11/1/2009)
Windfall Liens	§ 107(r)	• Interim Enforcement Discretion Policy concerning Windfall Liens Under Section 107(r) of CERCLA (EPA/DOJ, 7/16/2003) • Windfall Lien Guidance: Frequently Asked Questions (OSRE, 4/1/2008) • Windfall Lien Administrative Procedures (OSRE, 1/8/2008)

Local Government Issue	CERCLA Provision	Relevant EPA Documents or Guidance (if any)
Brownfield Grants	§ 104(k)(4) and (6)	• Brownfields Assessment Pilot/Grants at http://epa.gov/brownfields/assessment_grants.htm • Revolving Loan Fund Pilot/Grants at http://epa.gov/brownfields/rlflst.htm • Cleanup Grants at http://epa.gov/brownfields/cleanup_grants.htm • Area-Wide Planning Pilot Program at http://www.epa.gov/brownfields/areawide_grants.htm • Brownfield Grant Guidelines Frequently Asked Questions at http://www.epa.gov/brownfields/proposal_guides/faqpguid.htm
Institutional Controls	§§ 101(40)(F), 107(q)(1)(A)(V)	• Institutional Controls: A Citizen's Guide to Understanding Institutional Controls at Superfund, Brownfields, Federal Facilities, Underground Storage Tank, and Resource Conservation and Recovery Act Cleanups (EPA/OSWER, 2/2005) • Institutional Controls: A Guide to Implementing, Maintaining, and Enforcing Institutional Controls at Contaminated Sites (EPA Interim Final Draft 11/2010) • Institutional Controls: A Site Manager's Guide to Identifying, Evaluating and Selecting Institutional Controls at Superfund and RCRA Corrective Action Cleanups (EPA/OSWER, 9/2000)
State Voluntary Cleanups and Memoranda of Agreement	§§ 101(41), 128	• To see state-specific voluntary cleanup programs Memoranda of Agreement, please see http://www.epa.gov/brownfields/state_tribal/moa_mou.htm

Contact Information

If you have any questions about this fact sheet, please contact Cecilia De Robertis of EPA's Office of Site Remediation Enforcement at 202-564-5132 or derobertis.cecilia@epa.gov.

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