

**“Accelerate Land Reuse for Community Revitalization”  
The Salvation Army Kroc Center, Camden, NJ - October 18, 2018**

**Statutory Liabilities and Protections for Acquiring Contaminated Properties**

**LIABILITIES**

*Onerous Liability for Cleanup Costs: **Strict liability, jointly and severally, without regard to fault***

**New Jersey**

Spill Compensation and Control Act, (“Spill Act”) (1976), N.J.S.A. 58:10-23.11 et seq., applies to “any person who has discharged a hazardous substance, or is in any way responsible for any hazardous substance.”:

- Former and current property owners
- Current operators
- Former operators who had a “nexus” to the discharge

**Federal**

Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA” or “Superfund”), 42 U.S.C. §§ 9601-9675. Establishes EPA’s authority for cleaning up properties contaminated with hazardous substances regardless of whether the properties are in use or abandoned.

**Applicability:** Section 101(21) includes a local government as a “**person**” who may be a “**Potentially Responsible Party**” held liable for the cleanup costs.:

- Current owner or operator of a facility (contaminated property).
- Former owner or operator of a facility at the time of disposal of the hazardous substance.
- Arranges – “Any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances”.
- Transports – “Any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release”.



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**EXEMPTIONS & DEFENSES TO LIABILITY – NEW JERSEY**

Spill Act provides **Exemption** for government entities

- Involuntary Acquisition
  - Bankruptcy, Tax Delinquency, Abandonment, Escheat, Eminent Domain, Condemnation
- Purpose for promoting redevelopment

**No liability protection** if the government entity:

- Caused or contributed to the discharge of a hazardous substance; **or**
- If it acquired ownership of the property by condemnation or eminent domain while property is being remediated in a timely manner by another party.

Spill Act provides **“Innocent Purchaser” Defense**

- Property acquired on or after September 14, 1993 where there has been a discharge; **and**
- Must establish **by preponderance** of the evidence:
  - Acquired the real property after the discharge of the hazardous substance;
  - Did not know and had no reason to know that any hazardous substance had been discharged;
  - Person did not discharge the hazardous substance, is not in any way responsible for the hazardous substance, and is not a corporate successor to the discharger or to any person in any way responsible for the hazardous substance or to anyone liable for cleanup and removal costs; **and**
  - Person gave notice of the discharge to NJDEP upon actual discovery
- Must conduct “All Appropriate Inquiry” (through a Preliminary Assessment, Site Investigation) into the previous ownership and uses of the property.

Spill Act provides **Protection from Third Parties** other than State and Federal Government

- Must meet **all** of these conditions:
  - Acquired the real property after the discharge of the hazardous substance;
  - Person did not discharge the hazardous substance, is not in any way responsible for the hazardous substance, and is not a corporate successor to the discharger or to any person in any way responsible for the hazardous substance or to anyone liable for cleanup and removal costs;
  - Person gave notice of the discharge to NJDEP upon actual discovery;
  - Provides written notice of the acquisition to NJDEP on or prior to the acquisition date
  - Within 10 days after acquisition, person agrees in writing to provide property access to the NJDEP for remediation related activities; **and**
  - Remediates the property to NJDEP’s satisfaction.

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**EXEMPTIONS & DEFENSES TO LIABILITY – FEDERAL**

CERCLA provides **Exemption** for government entities as “Sovereign”:

- Acquired Ownership or Control
  - Seizure or Law Enforcement Activity, Bankruptcy, Tax Delinquency, Abandonment
- **No liability protection** if caused or contributed to the release or threatened release of a hazardous substance

CERCLA provides **“Third Party” Defense**

- Must establish **by preponderance** of the evidence:
  - Contamination was caused solely by the act or omission of Third Party whose act or omission did not occur “in connection with a contractual relationship”;
  - Exercised due care with the contamination; **and**
  - Took precautions against foreseeable acts or omissions, and consequences of Third Party.

CERCLA provides **“Innocent Purchaser” Defense**

- Property acquired after the disposal or placement of hazardous substance; **and**
- Must meet **one or more criteria by preponderance** of the evidence:
  - At time of acquisition did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility; **or**
  - Acquired by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation; **or**
  - Acquired by inheritance or bequest.

CERCLA provides **“Bona Fide Prospective Purchaser” (“BFPP”) Defense**

- When property is bought after January 11, 2002 **with** knowledge or have reason to know of contamination.
- **Establish BFPP status & maintain continuing obligations:**
  - Conduct “All Appropriate Inquiry” (through a Phase I Environmental Site Assessment) into previous ownership and uses of property prior to purchase;
  - Disposal of hazardous substances on the site occurred before acquisition;
  - Not already liable, affiliated with responsible party or reorganized entity of a responsible party;
  - Provide all legally required notices regarding the release;
  - Provide full cooperation, assistance and access for conducting response actions;
  - Comply with all institutional and engineering controls and not impede their effectiveness;
  - Comply with governmental requests for information and subpoenas; **and**
  - Exercise “appropriate care” with the hazardous substances found by reasonable steps to (i) stop continuing release; (ii) prevent threatened future release; and (iii) prevent or limit human, environmental or natural resource exposure to earlier hazardous substance releases.

