

# What's The Risk ?

Federal Government  
Perspective

United States  
Environmental Protection Agency

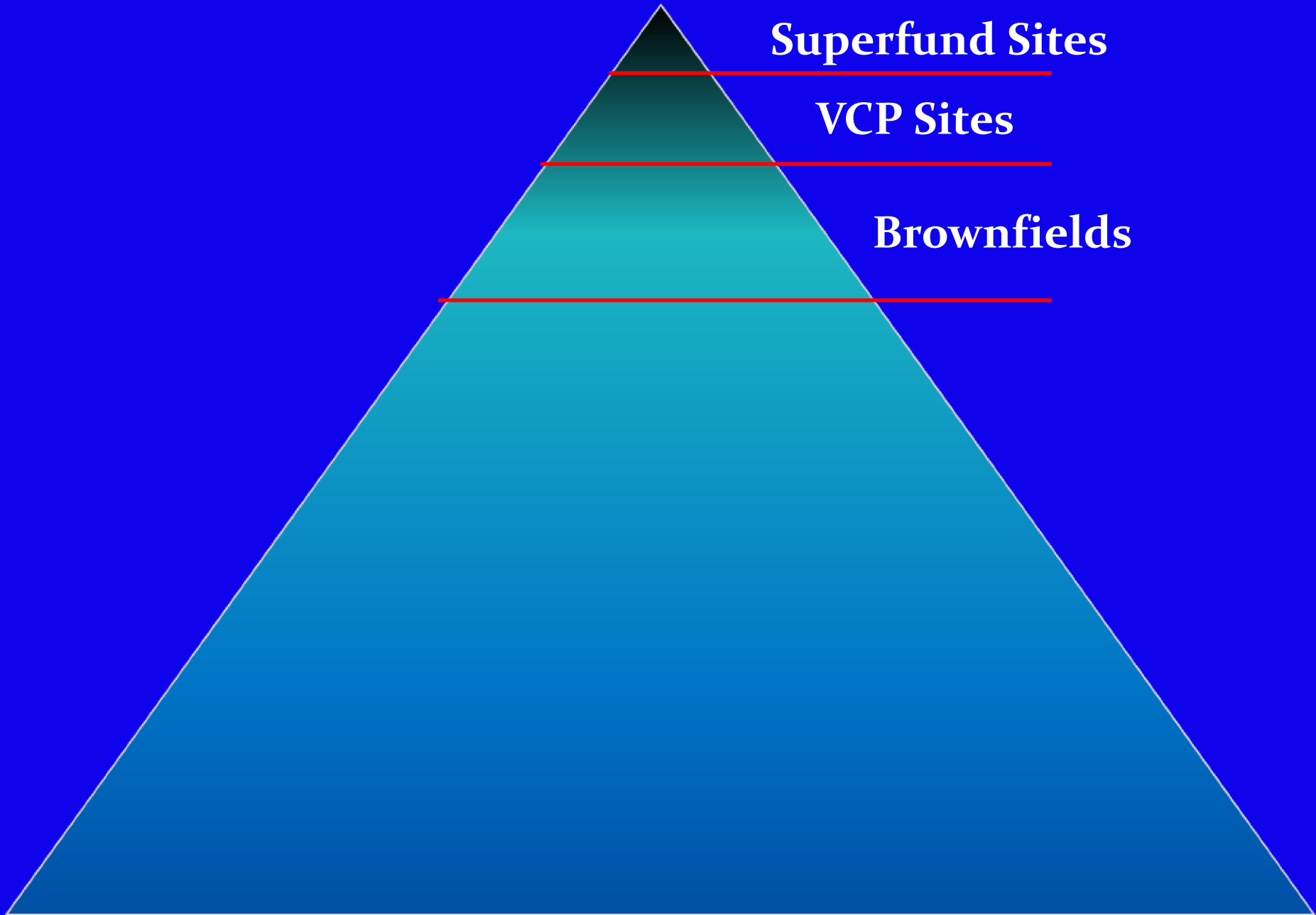
# Presentation by Heather Gray

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- It is US EPA Policy to facilitate the appropriate re-use of contaminated properties
- It is US EPA Policy to remove obstacles from appropriate re-use of contaminated properties



**Superfund Sites**

**VCP Sites**

**Brownfields**

**Voluntary Remediation Program Memorandum of Agreement  
Between the  
United States Environmental Protection Agency Region III and the  
West Virginia Department of Environmental Protection**

This Memorandum of Agreement (MOA) is entered into between the Regional Administrator, United States Environmental Protection Agency (U.S. EPA), Region III and the Cabinet Secretary, West Virginia Department of Environmental Protection (WVDEP) to support and strengthen efforts to achieve cleanups that are protective of human health and welfare and the environment through the appropriate use of the State voluntary remediation program. This MOA is intended to help property owners, developers, consultants, public officials, and the general public to understand the roles and responsibilities of U.S. EPA and WVDEP and the potential utilization of the WVDEP Voluntary Remediation Program (VRP) to assess and address environmental contamination.

**I. Purpose and Scope**

**A. General**

U.S. EPA Region III and WVDEP agree to exercise their respective legal authorities in order to:

- 1) facilitate timely implementation of the environmental cleanup requirements of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. §§ 9601 *et seq.* (CERCLA, also known as Superfund);
- 2) assist U.S. EPA in meeting the federal Government Performance and Results Act of 1993, 31 U.S.C. §1115 *et seq.* (GPRA) implementation schedule;
- 3) facilitate the cleanup and productive redevelopment and sustainable reuse of brownfields and other contaminated properties in West Virginia;

For the West Virginia Department of Environmental Protection

  
\_\_\_\_\_

2/24/10  
Date

For the U.S. Environmental Protection Agency, Region III

  
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2/24/10  
Date

# EPA Enforcement Bar for Eligible Response Sites in State cleanup programs

- CERCLA 128(b)
- Enforcement bar applies only to “eligible response sites”
- Defined at CERCLA 101(41) and 101(39)

# Eligible Response Site

- Brownfield site, where there is potential presence of a hazardous substance
- Does **not** include ongoing CERCLA removal sites
- Does **not** include proposed or final National Priorities List sites

# Eligible Response Site (con't)

- Does **not** include sites where there are CERCLA orders or consent decrees
- Does **not** include sites where there are RCRA orders or consent decrees (federal or state)
- Does **not** include sites where there are polychlorinated biphenyls (PCBs) subject to federal remediation

# Eligible Response Site (con't)

- Does **not** include sites where EPA has made a determination of imminent and substantial endangerment
- Does **not** include sites where EPA, in consultation with the State, determines that information is discovered not known to the State when cleanup was approved or completed, such that the site requires further remediation

# EPA Enforcement Bar

- Eligible Response Site

# 2002 Brownfields Amendments to the Superfund law

- Statutory legal liability protections for Bona Fide Prospective Purchasers who satisfy nine specified criteria
- Federal grant funding for Brownfields sites
- Recognition of qualified State Voluntary Cleanup Programs

Parties can purchase contaminated property with knowledge of the contamination and not be held liable

!!!

– *if* they comply with certain conditions.

# “BFPP”

- Bona Fide Prospective Purchaser

# Statutory Requirements for CERCLA BFPP Liability Protections

- Threshold Criteria:
  - Purchaser is not a responsible party and not affiliated with a responsible party.
  - Conduct All Appropriate Inquiries prior to purchase.
- Continuing Obligations – after purchase

- All Appropriate Inquiries is the first step in a continuum:
- Find out about environmental problems at a property so that they can be properly addressed to protect public health and the environment

- 40 C.F.R. Part 312

- Format for AAI Report: None
- Required: Declaration of Environmental Professional that AAI has been developed and performed in conformance with the standards and practices set forth in 40 C.F.R. part 312

- Final rule references the ASTM E1527-05 standard as consistent and compliant with the regulatory standards.
- Inquiries conducted according to the ASTM E1527-05 standard will be recognized as compliant with final rule.

Purpose of All Appropriate Inquiries  
is to create informed purchasers who  
will be stewards of the property

What about purchasers at tax sales?

# Continuing Obligations

- Comply with land use restrictions
- Do not impede effectiveness or integrity of institutional controls
- Provide cooperation, assistance and access
- Comply with CERCLA information requests and subpoenas
- Take “Reasonable Steps” with respect to existing contamination

# A helpful resource:

- EPA's "Common Elements" Guidance

(March 06, 2003)

<http://www.epa.gov/compliance/cleanup>

# What are 'reasonable steps'?

- Stop continuing releases
- Prevent threatened future releases
- Prevent or limit human, environmental or natural resource exposure to earlier hazardous substance releases

# Common Elements Guidance

## Attachment B

### Reasonable Steps Q's & A's

- Maintaining barriers
- Repair of caps
- Investigation and assessment
- Placement of signs or fences
- Generally **not** groundwater remediation

Reasonable steps are similar to “due care”

- Court decisions are clear that “due” care is **not** “no” care

EPA Region 3 issues “reasonable  
steps” letters, at sites of  
Federal Interest

# Question:

- Ok, being a BFPP is good, but what about

*WINDFALL LIENS*

???

# Windfall Lien:

- The response action increases the Fair Market Value of the property above the FMV of the property that existed before the response action was initiated

United States  
Environmental Protection Agency

Office of Enforcement and  
Compliance Assurance

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## **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.



# Involuntary Acquisition of Property by Local Government

- CERCLA 101(20)(D)
- CERCLA Owner/Operator does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as a sovereign

# Qualification:

- Does not apply if the State or Local government has caused or contributed to the release

## Another option: third party defense

- Government entities which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation

# Third party defense:

- Must also exercise due care
- Must take precautions against foreseeable acts or omissions of third party

# Can qualify under more than one category

- A Municipality may also want to establish BFPP status

# Need more info?

- [www.epa.gov/compliance/cleanup](http://www.epa.gov/compliance/cleanup)
- Heather Gray, Office of Regional Counsel
- Christopher Thomas, Coordinator, EPA  
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