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Environmental Quarterly

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Rising Costs of Energy

The rising costs of energy are affecting everyone, everyday. As Congress strikes up debate about the proposed energy bill and gasoline prices continue to rise, now is the time to focus on the impact of energy costs on affordable housing.

Energy costs burden the poor and affect the Department's ability to administer its programs. In 1999, HUD spent approximately \$1,154 billion in energy costs for utilities for public housing units. It is estimated that

Section 8 rental support includes more than \$2 billion per year for utilities.

Energy costs also burden the poor directly, causing poor families to spend a high percentage of their income for utilities and in some cases, causing homelessness when a family can no longer afford to pay their utility bills. For Aid to Families with Dependent Children (AFDC), the energy burden is, on average, seven times greater than for families at median income. AFDC families

spend 26% of their income for utilities, while families at median income spend 4% of their income for utilities. In a 1997 study conducted by Energy Cents Coalition in St. Paul, Minnesota, a review of St. Paul municipal records on evictions revealed that 26% of evictions were due to electric and gas termination and 40% of evictions were due to water cutoffs.

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HUD recognizes the affects of the rising costs of energy and is taking

Meeting HUD's Environmental Requirements: A Phase I May Not Be Sufficient

CONTRIBUTED BY LENWOOD SMITH, HUD FIELD ENVIRONMENTAL OFFICER IN GREENSBORO, NC

Did you know that a Phase I assessment does not identify thermal/explosive hazards, or other environmental factors, such as historic preservation, that must be addressed to comply with HUD's regulations? It is important to remember that a completed ASTM Phase I does not address all of HUD's environmental requirements. A complete list of all environmental factors that must be considered in an environmental assessment can be found at Sections 58.5 and 58.6.

This article will primarily focus on the ways to comply with

HUD's thermal/explosive requirements.

The thermal/explosive hazard requirements are found in 24 CFR 51 Subpart C.

HUD may not fund construction, rehabilitation or modernization projects that increase or create opportunity for building occupancy if these projects could be affected by thermal/explosive hazards such as above-ground storage tanks (ASTs) holding explosive or flammable materials (hereafter referred to as hazardous facilities). Note, HUD will

fund projects if these effects can be mitigated.

To document the absence of hazardous facilities, individuals not familiar with the thermal/explosive hazard regulations often cite the findings of Phase I Environmental Site Assessments (Phase I) conducted per ASTM Standard E 1527-00.

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Ron Monti is the latest addition to our Field Environmental Officer army. Ron was a Senior CPD Representative in the Buffalo Field Office.

Ron was recently in Dallas/Fort

Did you know???

Twenty-five percent of all U.S. homes have septic systems. Poorly managed systems have been named as a concern by nearly every federal and state program that deals with water resource issues. According to various reports and studies, an estimated 10-20 percent of septic systems fail each year.

State Brownfield Programs

You can now find convenient summaries and contact information for state brownfield programs.

EPA recently issued "State Brownfields and Voluntary Response Programs: An Update from the States:

See http://www.epa.gov/swerosps/bf/pubs/st_res_prog_report.htm for the full report.

Summer Yards: The benefits of Greenscaping

As you are out watering your grass (again) in a vain attempt to ward off the inevitable browning, think about the possibility of replacing the grass with native grasses and plants that can withstand the drought and require less maintenance.

EPA Region Five has established an excellent Greenscaping program with resources that are useful for all. For more information, see <http://www.epa.gov/glnpo/ecopage/landscape/index.html>

Focus on the Field: East St. Louis

The Greater St. Louis Empowerment Zone (EZ) submitted a large and environmentally complex project in November 2004 to convert used motor oil into two components, one for refinery processing as fuel, and a second to be used as a performance enhancer in asphalt manufacturing.

The EZ loan is for only \$2.5 million although the overall project will involve a \$60 million capital investment in the economically depressed community of East St. Louis, Illinois.

The 20-acre former industrial site lies along the Mississippi River and will involve not only site cleanup, but floodplain and wetland concerns in this highly flood prone area. The project has drawn additional interest from the Department of Energy which may seek to piggy back a coal gasification plant on the site that will generate electricity, and hydrocarbon chemicals for industrial processing.

St. Louis Senior Environmental Officer, Sandra Freeman, has undertaken the very complicated process confronting the many environmental issues associated with this site and completing the Environmental Assessment process.

There have been extensive negotiations with the Illinois Environmental Protection agency over air quality

permitting and Environmental Justice issues that may come into play as the project evolves.

Public hearings were held in late 2004 on the draft environmental assessment. A public meeting also was needed to address EZ boundary changes required to include the totality of the site in the EZ.

A final Environmental Assessment will be prepared by Sandy and submitted to the CPD Assistant Secretary for signature this summer.

This project will generate 25 full time employees and \$1 million in payroll for the East St. Louis area.

Energy Continued

HUD recognizes the affects of the rising costs of energy and is taking action to improve energy efficiency. HUD encourages energy efficiency for its programs, including energy efficiency mortgages, and HUD has entered into an Energy Action Plan with the Department of Energy to promote the use of combined heat and power for HUD projects. For more information on HUD's energy policy and initiatives, please see <http://www.hud.gov/offices/cpd/energyenviro/energy/index.cfm>.



Historic Preservation Happenings

Preserve America

Assistant Secretary, Pam Patenaude, and General Deputy Assistant Secretary, Nelson Bregón, along with OEE's David Blick attended an awards ceremony at the White House for 2005 Preserve America Presidential Awards.

Preserve America is a White House initiative that highlights the efforts of President and Mrs. Bush to preserve our national heritage. Awards are given out annually in two categories, Heritage Tourism and Privately Funded Preservation.

The two winners in the Heritage Tourism category were: Restoration of The Mount, Lenox, Massachusetts and Texas Heritage Trains Program, Texas.

In the Privately Funded Preservation category, the two winners were: Bolduc Historic Properties-Operational Enhancement, Sainte Genevieve, Missouri and Isaiah Davenport House Museum, Savannah, Georgia.

For more information on these award winners, please see <http://www.achp.gov/news-PAPresaward05.html>

The Advisory Council on Historic Preservation (ACHP) held its spring business meeting in Annapolis, Maryland May 18, 2005. Deputy Assistant Secretary, Anna Maria

Summary of ACHP Meeting

Farias, spoke to HUD's involvement through the McKinney-Vento Homelessness Act process during the Federal Agency Committee meeting.

The biggest issue of debate at the ACHP meeting is the announced base closures under BRAC and how ACHP members will deal with the Section 106 compliance aspects for Dept. of Defense (DOD) in the coming months. Where appropriate, HUD will partner with DOD on base closures.

For more info. on the meeting, see: <http://www.achp.gov/news>



World Environment Day (WED) --- June 1 – 5th

@ San Francisco

WED has established by the United Nations General Assembly in 1972. Each year a different city hosts WED.

The UN uses WED to stimulate awareness of the government and enhance political attention and public action.

For more info. see <http://www.wed2005.org/1.0.php>

Environmental Requirements cont.

In other words, if the Phase I reports no recognized environmental conditions, then the project evaluator assumes that there are no hazardous facilities.

However, a Phase I conducted in strict accordance with ASTM Standard E 1527-00 does not address the issue of hazardous facilities as defined in the thermal/explosive hazard regulations.

Phase I's do not address hazardous facilities (along with many other environmental issues, including NEPA, historic preservation and noise) because the strict intent of a Phase I is completion of "All Appropriate

Inquiry" to determine if CERCLA, Comprehensive Environmental Response Compensation and Liability Act of 1980, defined contaminants and petroleum products may be present on property that an individual or corporation intends to purchase or insure. The purpose of this "All Appropriate Inquiry" is to protect the prospective purchaser or insurer from liability due to the presence of pre-existing contaminants or petroleum products on the property. For instance, if someone purchases or insures property without first conducting "All Appropriate

Inquiry" and contaminants are later found on the property, the new owner or insurer could be held liable for harm caused by the contaminants.

To comply with the HUD regulations at 24 CFR 51 Subpart C, the presence/absence of hazardous facilities must be determined using the procedures outlined in *Siting of HUD-Assisted Project Near Hazardous Facilities*. These procedures are similar to a Phase I in that site visits, record reviews, and interviews are required. Cont. on page 4

Environmental Requirements cont.



However, procedures for determining the presence/absence of hazardous facilities differ from Phase I procedures in the following ways: 1.) A site visit conducted to determine the presence/absence of hazardous facilities requires recordation of all visible ASTs over 100 gallons; not just the ASTs on or adjacent to the property as required by a Phase I; 2.) A record review for determining the presence/absence of hazardous facilities requires a review of current maps and aerial photographs to determine the presence/absence of mapped or remotely visible ASTs within 1-mile of the property; not historic maps and aerial photographs that only show the property and its immediate surroundings as required by a Phase I; and 3.) Interviews for determining the presence/absence of hazardous facilities require completion of interviews

with the local fire marshall, fire department, police department, or emergency management agency regarding the presence of known or planned ASTs and explosive storage facilities that may affect the property; not current or past property owners who may be aware of CERCLA defined contaminant or petroleum product releasing activities as required by a Phase I.

If a hazardous facilities review indicates the presence of hazardous facilities, the project must be assessed to determine if it is located within the Acceptable Separation Distance (ASD) of the facilities. ASDs for thermal radiation and blast overpressure (explosion) are determined using Appendices F and G of *Siting of HUD-Assisted Project Near Hazardous Facilities*. If the project is located within an ASD for thermal radiation or blast overpressure, the project must be rejected unless a suitable barrier presently

exists or will be constructed between the project and the hazardous facility.

If potential contaminants (recognized environmental concerns) are identified in a Phase I, off-site contamination sources may be eliminated through completion of a more detailed records review; however, if the potential contaminants are from on-site sources or cannot be eliminated by a more detailed record review, a Phase II is necessary. A Phase II assessment involves sampling to determine if contaminants are present on the property at harmful levels. If contaminants are present at harmful levels, then the property may be rejected, the contaminants removed (remediated), or institutional/engineering controls implemented to prevent site users from coming into contact with the contaminants.

Please feel free to copy and /or edit portions of this newsletter for your own communication with HUD grantees.

Local Government Brownfields Acquisition: The Need to Update EPA Guidance on CERCLA Liability Protection for “Involuntary Acquisitions”

BY: R. WESTON DONEHOWER, SPIEGEL & MCDIARMID, WASHINGTON, DC
ARTICLE FROM AMERICAN BAR ASSOCIATION’S ENVIRONMENTAL TRANSACTIONS AND BROWNFIELDS COMMITTEE NEWSLETTER, VOL. 7, NO.2, MARCH 2005

Local governments across the nation are playing an increasing role in brownfields revitalization. Yet, localities need protection from Superfund liability in their critical role in brownfield acquisitions by eminent domain and condemnation. The National Association of Local Governmental Environmental Professionals (NALGEP) is moving forward on an effort to request updated guidance from the U.S. Environmental Protection Agency (EPA) clarifying that local governments will not be liable under Superfund for the “involuntary acquisition” and ownership of contaminated brownfield properties through eminent domain or condemnation. NALGEP has formed a “Local Brownfields Acquisition Task Force” to research and examine the issue, develop a position paper on the need for updated EPA guidance, and present the findings to EPA and Department of Justice brownfields and enforcement officials.

The Critical Role of Local Governments in Brownfields Revitalization

Local governments are increasingly playing a role in revitalizing brownfield sites. This role includes acquiring brownfield properties, either for public use, or in order to clean them and broker them to the private sector for productive reuse. This local government brownfields acquisition role is especially important for those abandoned, “mothballed” sites that will not get private sector attention without significant public sector involvement, or where the site owners are not willing or able to sell because they are unknown, unreachable or recalcitrant. When local governments cannot obtain property by purchase, they will often consider using their condemnation powers to acquire these brownfields. The Brownfields Revitalization Act of 2001 has stimulated local government involvement in brownfields, yet that law (1) did not extend any new liability protection for sites acquired by localities prior to the passage of

the law and (2) did not clarify the meaning of the “local government involuntary action” protections from Superfund liability.

These problem brownfield properties will remain vacant and dangerous without the help of local governments. If local governments can obtain ownership and control over these sites, it will enable these localities to conduct environmental assessments and investigation, clean up the sites through state voluntary cleanup programs or other means, and work in partnership with prospective purchasers to remove the threat of contamination at these properties.

a) Avoiding Superfund Liability for Local Government Acquisition of Sites

The potential for Superfund or “CERCLA” liability for owners of contaminated sites has made many localities reluctant to acquire these properties. *Recognizing the importance of protecting local governments from CERCLA liability for their public sector role at contaminated sites, Congress passed amendments to the Superfund statute in 1986, exempting local governments in their roles as sovereign entities from CERCLA liability for “involuntary acquisition” of contaminated properties.*

Specifically, CERCLA Section 101(20)(D) provides an exemption from CERCLA owner/operator liability, and CERCLA Section 101(35)(A)(ii) provides an affirmative defense to Superfund liability for circumstances in which the local government acquires the site involuntarily, such as through “tax delinquency, abandonment, escheat, or the exercise of eminent domain authority by purchase or condemnation.” In addition, once the locality obtains such a site, it has a continuing obligation under CERCLA to exercise due care and take other steps to prevent releases of contamination. (Continued on page 6)

Local Government Brownfields Acquisition continued

b) Local Government Acquisition Guidance Needs Updating

EPA issued guidance on this “involuntary acquisition” issue in 1995, titled “Policy on CERCLA Enforcement Against Lenders and Government Entities that Acquire Property Involuntarily.” That guidance was superseded in 1997 when EPA’s Office of Enforcement and Compliance Assurance issued a memorandum entitled “Policy on Interpreting CERCLA Provisions Addressing Lenders and Involuntary Acquisitions by Government Agencies.” The 1997 guidance is available at <http://www.epa.gov/EPA-WASTE/1997/July/Day-07/fl7595.htm>.

Although the 1997 guidance recognizes that local governments may acquire properties through condemnation or eminent domain, the policy states that CERCLA protections is *only* available when “[t]he government’s interest in and ultimate ownership of the property exists only because the actions of a nongovernmental party gives rise to the local government’s legal right to control or take title to the property.” The policy also suggests that the CERCLA protection only applies in the cases of eminent domain when the government take private property for “public use.”

This policy needs updating to address the emerging role of local governments in brownfields revitalization, and to make clear that CERCLA protection is available to localities seeking to promote brownfields revitalization through condemnation of contaminated sites. Localities seek guidance on how the typical role of local governments at contaminated brownfield sites – as a party that obtains mothballed and abandoned sites by condemnation in order to facilitate their reuse by the private sector – is a role protected from Superfund liability. For example, the current EPA guidance suggests that proactive local governments that seek to revitalize these brownfield sites by using condemnation and eminent domain tools might be subjected to Superfund enforcement, because these local governmental brownfields efforts are not strictly “involuntary” since they did not arise “only because [of] the actions of a nongovernmental party.” As a result, many localities remain fearful and uncertain about their ability to proactively promote brownfields revitalization by acquiring and cleaning these sites.

Many questions remain about the role of local governments in contaminated property acquisition. The following real-world examples illustrate the issue:

Proactive Condemnation of Brownfields – A locality in New York is fostering the revitalization of a contaminated waterfront into a tourism and commerce destination by creating a vision for re-use, raising funds, improving infrastructure and facilitating the resolution of complex regulatory issues. The New York locality is condemning properties on this waterfront that have been mothballed by recalcitrant site owners, such as a junkyard owner who is not interested in selling. Under these circumstances, will a local government that condemns a brownfield property for the purpose of brokering a site to the private sector definitely receive the CERCLA Section 101(20)(D) and 101(35)(A)(ii) protections from Superfund liability? Does it depend on whether the condemnation is for a “public” or “proprietary” purpose?

Brokering Brownfields to the Private Sector – A major city in the Midwest had entered into a partnership with the chamber of commerce to assemble brownfields properties in a long-blighted downtown area along the riverfront, for creation of a mixed-use redevelopment. The city intends to assemble the properties, conduct environmental assessments, pursue necessary cleanup and regulatory approvals, and then broker the property to the chamber of commerce and private developers. Will such a local government receive CERCLA protection if the eventual reuse of the brownfields is a private sector, profitable economic development activity? What if the local government recovers monies from its private partners as part of this economic development project?

Where Does Involuntary Acquisition Stop and Bona Fide Prospective Purchasing Start? – A locality in New England seeks to acquire properties to support the expansion of mass transit facilities. The city attempts to purchase properties from current site owners, but if they refuse to sell, the city condemns the properties. Is the involuntary acquisition protection from CERCLA available, or must the locality conduct “all appropriate inquiries” in order to become a CERCLA bona fide prospective purchaser?

These issues should be resolved in order to allow and promote more brownfields (Continued on page 7)

Local Government Brownfields Acquisition continued

revitalization by local governments.

In order to seek clarification on these issues from EPA, NALGEP has convened a Task Force of approximately 30 local officials from across the country to examine the impact of EPA's current policies regarding the involuntary acquisition of brownfield properties by local governments. NALGEP, in cooperation with the Task Force and EPA, is conducting research on the impact of the current policies and plans to prepare a white paper with our findings and recommendations. We are coordinating with both EPA's Brownfields Office and the Superfund Enforcement Office in carrying out the project. So far, the Task Force has held two conference calls to kick off the project and discuss how the EPA's policies are impacting localities' efforts to redevelop brownfields. In addition, we have developed a list of research questions, and begun conducting research by reviewing the relevant statutes, regulations, and policies, and by talking with experts in the field. The NALGEP Board approved Ceil Price, an attorney with the city of Houston, and Evans Paull, of the Baltimore Development Corporation, to serve as co-chairs of the Task Force.

The goals of the Task Force are to: (a) identify the extent of local government concerns over Superfund liability related to site acquisitions via eminent domain and condemnation; (b) develop a position paper with findings and recommendations for revised EPA guidance; and (c) meet with EPA and DOJ officials to seek revised EPA policy guidance on involuntary acquisition of brownfields by local governments.

NALGEP would like to hear from anyone with relevant experience. To share your experience, or for more information, please contact NALGEP's Weston Donehower at (202)879-4005 or Weston.donehower@spiegelmc.com

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