September 27, 2017

The Honorable Elizabeth Esty
221 Cannon House Office Building
Washington, DC 20515

The Honorable Peter DeFazio
Ranking Member
House Transportation & Infrastructure Committee
Washington, DC 20515

The Honorable Grace Napolitano
Ranking Member
House Transportation & Infrastructure Subcommittee
Water Resources & Environment
Washington, DC 20515

The Honorable John Katko
620 Longworth House Office Building
Washington, DC 20515

Dear Representatives Esty, DeFazio, Napolitano, and Katko:

On behalf of the nation's mayors, cities, counties and regional councils, we wish to thank you for your work on H.R.1758, the Brownfields Reauthorization Act of 2017. Redeveloping brownfields is a huge priority for local governments for all the obvious reasons—it is good for the environment and the economy, it creates jobs and it removes eyesores from our neighborhoods.

To date, we have been very supportive of H.R. 1758. However, a last minute change made in the Committee threatens our support. Specifically, we are concerned about the amended language in Section 2 on Redevelopment Certainty for Governmental Entities. This revised section would add "*or fails to exercise appropriate care (as described in paragraph (40)(D) following acquisition*" to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). This new language would increase liability issues for local governments and, in fact, would put additional requirements on cities and counties to take on ownership of brownfields.

Virtually every community in America, large and small, urban and rural, contains properties that lay vacant for years due to fears about environmental contamination and associated liability issues. Adding additional requirements would add uncertainties and will actually deter local governments from acquiring the properties in the first place. A number of our cities and counties have weighed in on this provision, their comments are highlighted in the attachment.

Based on these concerns, we encourage you to modify this language before moving forward. If you have any questions, please do not hesitate to contact any of our staff: Judy Sheahan (USCM) at jsheahan@usmayors.org; Carolyn Berndt (NLC) at berndt@nlc.org; Julie Ufner (NACo) at jufner@naco.org; or Sarah Reed (NARC) at sarah@narc.org.

Thank you for your consideration.

Sincerely,

Tom Cochran
CEO and Executive Director
The U.S. Conference of Mayors

Clarence E. Anthony
CEO and Executive Director
National League of Cities

Matthew D. Chase
Executive Director
National Association of Counties

Leslie Wollack
Executive Director
National Association of Regional Councils

cc: Members of the Transportation and Infrastructure Committee
Ian Bennitt, Majority Staff Director, Transportation and Infrastructure Subcommittee Water Resources & Environment
Ryan Seiger, Minority Staff Director, Transportation and Infrastructure Subcommittee Water Resources & Environment

City and County Feedback
H.R. 1758, Brownfields Reauthorization Act of 2017
Section 2 – Redevelopment Certainty for Governmental Entities

The Transportation and Infrastructure Committee, in reporting out H.R. 1758, the Brownfields Reauthorization Act of 2017 revised Section 2 – Redevelopment Certainty for Governmental Entities. The revision added the words "*or fails to exercise appropriate care (as described in paragraph (40)(D) following acquisition*" to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). This new language would significantly increase liability issues for local governments and, rather than hasten brownfields cleanup projects, have a chilling effect on their redevelopment.

The amended text of CERCLA would read:
(D) The term ''owner or operator'' does not include a unit of State or local government which acquired ~~ownership or control involuntarily through seizure or otherwise in connection with law enforcement activity through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue~~ ownership or control through seizure or otherwise in connection with law enforcement activity, or through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility or fails to exercise appropriate care (as described in paragraph (40)(D)) following acquisition, and such a State or local government shall be subject to the provisions of this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 107.

We sent this amended language to our cities and counties. Here is a snapshot of some of the responses:

- *"Government acquires property as a sovereign for a wide range of reasons, including public safety. There will be cases where government won't inspect, assess and manage such properties and fail to meet due care. To bring local government into the chain of liability under such circumstances is harsh and substantially narrows the sovereign exemption local government enjoys. Strike the due care requirement. If it remains, my enthusiasm for the bill drops."*

- *"Requiring governments to exercise "care" for property obtained via bankruptcy, tax foreclosure, abandonment and other ways will result in a potentially huge burden to those governments."*

- *"The phrase "appropriate care" is defined with essentially the same "reasonable steps" language that is included in the continuing obligations that CERCLA protected owners (Bona Fide Prospective Purchasers, Innocent Landowners, Contiguous Property Owner) are currently required to satisfy in order to maintain their status. "Reasonable steps" are generally interpreted to mean that owners not undertake remediation activities, but take affirmative actions to notify appropriate authorities and responsible parties of a release; limit access to dangerous conditions; continue, maintain and repair mitigation and protective systems already in place on a property; and do some basic investigation short of complete site characterization to understand the nature and extent of the contamination enough to decide what steps are reasonable to stop or limit the release.*

  The overall change in HR 1758 broadens the state and local government liability exclusion from "involuntary acquisition" to other voluntary actions "by virtue of its function as sovereign" and helps them exercise more of their functions as governments freed from liability concerns. However, the "appropriate care" requirement would add new conditions to the protections for involuntary acquisitions that currently do not seem to apply. Under the existing CERCLA statutory language, state and local governments that involuntarily acquire properties need only ensure that they do not "cause or contribute" to the release or threatened release of contamination.

The crux of the matter are instances where the state or local government acts voluntarily to do something it has little or no choice but to do by virtue of its function as sovereign. Examples may include voluntary acquisition, condemnation or the negotiated purchase of properties under threat of condemnation for a road or public utility project, or similar acquisitions of blighted or unsafe properties needed for urban redevelopment activities, rather than allowing such properties to be purchased by speculators at tax foreclosure sales. Unlike BFPPs, state and local governments have little choice to avoid properties with contamination while exercising these functions as sovereign. Adding "reasonable steps" requirements to the "cause and contribute" standard will not lift the chill of liability that inhibits local governments from taking on these needed improvements for the public good.

- *"The exception doesn't provide a lot of relief given the burdens inherent in the extensive definition of the "care" that is still required from these governmental entities."*

- *"CERCLA Section 101(20)(D) as it currently stands was enacted as part of the so-called 2002 Brownfields Amendments, which were intended to encourage redevelopment and continue the relative safe harbor provided for an "involuntary acquisition" so long as a party who foreclosed or condemned ("involuntarily acquired") a contaminated property simply abated any threats to human health and the environment the site posed and then and stabilized the property.*

  What is proposed will not only have a chilling effect on Brownfield redevelopment, but it also will cause municipalities to question whether they should condemn such properties for the purpose of protecting their citizens by preventing or abating uncontrolled hazardous substance releases….EPA's discretionary budget is constrained and there are limited funds in the Superfund account to fund EPA emergency or remedial responses at abandoned sites that pose real threats. Requiring a condemning authority to conduct more of a remedial response versus a stabilization action will discourage municipalities from securing abandoned sites by way of condemnation. The likely result is that abandoned hazardous substance-contaminated sites will continue to pose threats: Neither EPA nor cash-constrained states could step in under CERCLA's or state equivalent legislation's emergency authorities due to lack of funding, and municipalities will not risk the consequences the proposed revision would impose when they just want to secure and stabilize a dangerous site.

- *"People are correct to be concerned about "due care" requirements—the "reasonable" part of reasonable steps often gets brushed aside, and due care can end up eating up CERCLA exemptions. Given the issues due care has raised for bone fide prospective purchasers, the inclusion of this requirement is probably <u>not</u> something we would welcome."*

- *The requirements of paragraph (40)(D) also gives us cause for concern. Specifically, sub-paragraph (i), which would require local units of government to take 'reasonable steps' to **<u>stop any</u>** continuing release from brownfield sites.*

  There are many potential kinds of 'releases', ranging from leaking storage tanks or drums, to RCRA 8 metals, to chlorinated solvent plumes which can extend hundreds of feet away from impacted sites. Just defining the nature and extent of some releases, particularly solvent plumes, can cost tens or hundreds of thousands of dollars in environmental assessments. Treating these plumes, thereby stopping the release, can sometimes run into the millions of dollars, and take years to complete. As you indicated, other types of cleanups to prevent releases can also quickly become expensive, and have long timeframes.

  It's not at all clear what would be considered 'reasonable steps' in these situations. The term is nebulous, and seemingly open to interpretation. I imagine there might be a certain degree of understanding by regulatory entities regarding the circumstances local governments may find themselves in, but I don't believe we would want to rely on that.

Further expanding on my comment regarding what may be "reasonable steps", I believe that particular phrase is widely open to interpretation. Hypothetically, and depending on the individual, a 'reasonable step' for cash-strapped local governments could be seeking funding to assess a property that may be experiencing a release. Alternatively, it could also be more narrowly interpreted to be simply remediating source material contributing to or causing a release. As it's phrased, it's just not the sort of language we could feel comfortable hanging our hat on.