

LETTER OPINION
97-L-21

March 14, 1997

Mr. Wade G. Enget
Mountrail County State's Attorney
PO Box 369
Stanley, ND 58784-0369

Dear Mr. Enget:

Thank you for your letter regarding a county's involuntary ownership of land by a tax deed action and corresponding potential for liability if the land is contaminated with materials used in the production and processing of an oil or gas well.

You ask a series of questions in the context of a county becoming a property owner by way of tax deed action and discovering that the property has been contaminated.

You first ask what liability the county has to clean up the property. As long as the county was not involved in the original contamination, it is my opinion that the county does not have any federal or state liability to clean up the property.

Next, you ask, if the county offers the property for county sale, what liability the county has to the purchasing party for possible future cleanup of the property if serious contamination is found. If the county was not involved in the contamination, it is my opinion that the county does not have liability to the purchasing party for future cleanup of the property.

Finally, you ask whether the county has a right to seek contribution from its predecessors in title. It is my opinion that the county may seek cleanup from any parties responsible for the contamination. This may involve predecessors in title or other parties responsible for the contamination.

The Comprehensive and Environmental Response Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601, et. seq., is the federal statute outlining liability for owners of contaminated property. Although the state may require remediation and cleanup through several state and federal environmental statutes, there is no North Dakota statute which addresses liability of state or local governments for cleanup of property based only upon having received the property involuntarily through tax deed. The State Department of Health is the agency charged with ensuring remediation of most

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contamination within the state. It consistently follows liability precepts as outlined in CERCLA.

CERCLA, at 42 U.S.C. § 9601(20)(D), provides:

The term "owner or 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 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, and such a State or local government shall be subject to the provisions of this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title.

This is a narrow exception that was carved from the definition of "owner or operator" to exclude state and local governments from liability "when they have acquired ownership of a facility 'involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title.'" Westfarm Associates Ltd. Partnership v. Washington Suburban Sanitary Com'n, 66 F.3d 669, 678 (4th Cir. 1995). Provided that the county did not have a role in the contamination of the property, the exclusion from the term "owner or operator" removes the county from being subject to the liability provisions in CERCLA. 42 U.S.C. § 9607(a).

Thus, the county is not liable for cleaning up contaminated property which is acquired through a tax deed action. This exception is negated if the county caused or contributed to the release which resulted in the contamination.

Even though the county is not liable to a regulatory entity for remediation, it may seek to clean up the property to make it more viable for sale and reentry on the tax roles. In this case, the county may voluntarily remediate the property or seek contribution from potential responsible parties or predecessors in title. The State Department of Health is experienced in requiring remediation and may assist an individual county in remediation, particular when the contamination could result in an adverse impact on surface or groundwater within the state. Please contact Assistant Attorney

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General Bill Delmore at 701-328-5151 if you have specific questions regarding potential remediation.

In addition, the specific property you reference in your letter may have been the subject of an oil and gas bond required under N.D.C.C. ch. 38-08 and such bond may still be in place to cover required reclamation. Please contact the Oil and Gas Division of the State Industrial Commission at 701-328-9900 regarding the specific property. You might also ask the Division if it has any programs available to assist the county with a reclamation project. See N.D.C.C. §§ 38-08-04.5, 38-08-04.11.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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