



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION I

5 Post Office Square, Suite 100
Boston, MA 02109-3912

Dated as of the date signed below

Sent by email to:

Town of Troy NH Selectboard
16 Central Square
Troy, NH 03465

RE: EPA Comfort/Status Letter; Troy Mills Landfill Superfund Site property.

Dear Selectboard,

Thank you for contacting the U.S. Environmental Protection Agency (EPA or the Agency) about the Town of Troy's (the "Town" or "you/your") potential interest in acquiring an approximately 270-acre parcel (the "Property") that contains the approximately 17-acre Troy Mills Landfill Superfund Site (the "Site"). As part of your investigation of the Town's potential acquisition of the Property you have requested that EPA provide you with a Superfund comfort/status letter concerning the Site within the Property.

Under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, commonly referred to as Superfund),¹ the Agency's mission is to protect human health and the environment from the actual or potential risks posed by exposure to contaminated or potentially contaminated land and other media. A Superfund cleanup can help return lands to productive reuse. We are providing this letter consistent with the Agency's 2019 and 2021 Comfort/Status letter policies.²

The purpose of this comfort/status letter includes providing you with information that may be relevant to the potential CERCLA liability concerns you have identified at the impacted Property and summarizing the relevant information available to the EPA about the Site as of the date of this letter. We hope this information will enable you to make informed decisions regarding the Property's cleanup status and CERCLA's liability protections as you move forward with making a decision about the Property.

Property Status

Information on sites that are, or potentially are, contaminated with hazardous substances, pollutants and contaminants and may warrant action under Superfund, including site-specific documents and fact sheets, is recorded in the EPA's Superfund Enterprise Management System (SEMS), which may be accessed at <https://cumulis.epa.gov/supercpad/cursites/srchsites.cfm>. SEMS includes a public access database that contains information about sites where there has been EPA regional office involvement under Superfund.

¹ 42 U.S.C. §§ 9601, *et seq.*

² See [2019 Policy on the Issuance of Superfund Comfort/Status Letters & 2021 Transmittal of New and Updated Model Status/Comfort Letters](#).

The Troy Mills Landfill Superfund Site is located entirely within the Property. This Site is on the National Priorities List (NPL) and subject to a bankruptcy settlement entered between the United States and Troy Mills Incorporated (TMI)(the Property's owner and former operator of the Site) (*In re: Troy Mills, Incorporated*, (N.D. W.Va., Ch 7 Bankruptcy No. 1:01-bk-13341, 2008). Additional Site information is provided below.

History and Status of the Site

The Troy Mills Landfill Superfund Site is located in Troy, New Hampshire about 1.5 miles south of the center of the Town of Troy. The Site is bordered to the north by an approximately 9-acre solid waste landfill that is separately regulated by New Hampshire Department of Environmental Services (NHDES) Solid Waste Management Bureau; to the east by a former railroad bed currently used as a State-owned walking, non-motorized vehicle, horseback riding trail, and in the winter as an all-terrain vehicle (ATV), and snowmobile trail, and beyond by undeveloped land; to the west by undeveloped land; to the north by a wetland area and Rockwood Brook; and to the south by the eastern branch of Rockwood Brook and beyond by undeveloped land, a utility right of way, and several residential trailers. Rockwood Brook flows south to north and continues downstream to Sand Dam Pond, a recreational area located approximately one mile north of the Site. See **Figure 1** for a Site map.

TMI disposed of hazardous substances that were generated at its acrylic fabric manufacturing facility in Troy between 1967 and 1978. An estimated 6,000 to 10,000 55-gallon drums of waste liquid and sludge containing mostly plasticizers such as [di](2-ethylhexyl) phthalate (DEHP) and a petroleum-based solvent known as VarsolTM were disposed of on Site. Other drummed waste included pigments, surplus mixes, and tank residuals of vinyl resins, paint resins, and top coating products. In 2001 TMI filed for bankruptcy, as a result, TMI is now a defunct corporation.

Following the bankruptcy filing by TMI, NHDES referred the Site to EPA Region 1 in 2001 to have the Site evaluated for a CERCLA removal action. At the same time, EPA began evaluating the Site for listing on the Superfund National Priorities List (NPL). In September 2003, EPA listed the Site on the NPL, and initiated a CERCLA time-critical removal action. The first phase of the removal action included the installation of three Light Non-Aqueous Phase Liquid (LNAPL) interceptor trenches to capture free product floating on the groundwater. The second phase of the removal action, which was initiated in July 2004, involved the excavation of 7,692 buried drums, the removal of 29,924 gallons of flammable liquid waste and 3,099 cubic yards of sludge, and the excavation of 26,244 tons of heavily contaminated soil which were all transported off-Site for disposal at permitted facilities. In the spring and summer of 2005, EPA completed its time-critical removal action with the construction of a two-foot thick permeable soil cap over the excavation area to prevent direct contact risks to underlying residual contaminated soils.

A Record of Decision (ROD) for the Site was signed on September 30, 2005 and amended by a 2014 Explanation of Significant Differences (ESD). The selected remedy included source control, management of contaminant migration, and institutional controls (ICs). The 2005 ROD also incorporated components of the time-critical removal action into the remedy (operation and maintenance (O&M) of the interceptor trenches and permeable soil cap). Long-term remedial actions, as specified in the ROD, began in 2006 and were implemented to address remaining Site risks through monitored natural attenuation (MNA) of groundwater contaminants; collection and off-site disposal of LNAPL; monitoring of groundwater, surface water, sediment, leachate, and wetland soil quality; maintaining the permeable soil cap over the former drum disposal area; and implementing appropriate ICs. The 2014 ESD updated cleanup levels for several Chemicals of Concern (COCs) and updated Applicable or Relevant and Appropriate Requirements (ARARs) cited in the ROD both to include revised State and federal standards and to identify additional

standards that were not specifically identified in the ROD. The updated ARARs are shown in Attachment 1 of the ESD.

Since 1979, multiple investigations have been conducted in and around the former drum disposal area and have documented the presence of VOCs, semi-VOCs, and inorganic compounds in groundwater, leachate, surficial soil, surface water, and sediment.

Additional information regarding Site history and current status, including figures which show the extent of groundwater contamination, can be found in EPA's 2020 Third Five-Year Review for the Site at <https://semspub.epa.gov/work/01/100015004.pdf>.

As mentioned above, SEMS provides information for NPL sites (*i.e.*, sites proposed to the NPL, currently on the final NPL, or deleted from the final NPL), sites subject to a federal removal action, and sites with a [Superfund Alternative Approach](#) agreement.³ The profile includes information such as the status of cleanup efforts and cleanup milestones that have been reached. For more information about the Site, please visit SEMS at www.epa.gov/superfund/troymills.

Reuse of the Property

Based on the information you provided, EPA Region 1 understands that you are interested in potentially purchasing the property for recreational use or other municipal purposes. The current ongoing Site related response activities involve maintenance and monitoring of the soil cap and monitoring of the groundwater, as well as additional investigations of certain emerging contaminants, specifically per- and polyfluoroalkyl substances (PFAS).

As of the date of this letter, and reviewing the information provided by the Town to date, we have not identified any obvious incompatibility between the proposed use of the majority of the Property, which doesn't include the Site. Any redevelopment within the Site itself will need to comply with an *Easement Deed and Restrictive Covenants* for the Troy Mills Landfill Superfund Site, dated November 3, 2009 (the Grant) and held by the State of New Hampshire. The Grant may be accessed at <https://sems.epa.gov/work/1673030208124/01-464318.pdf>. Below is language from the Grant that lists the following environmental use restrictive covenants created to protect human health and the environment with regard to residual contamination remaining on the Easement area:

- (a) The groundwater within the area of the Easement, as described in Exhibit B of the Grant, and shown in a plan entitled "*Groundwater Management Zone and Activity and Use Restriction Plan*" (Exhibit C)⁴ is contaminated with volatile and semi-volatile organic compounds, petroleum related hydrocarbons, or other substances deemed potentially harmful to human health. This document establishes the boundaries of a Groundwater Management Zone ("GMZ") within the area of Easement described in Exhibit B. The extraction of any groundwater, injection of water into the ground or application of surface water in a manner that causes the

³ See *Transmittal of Updated Superfund Response and Settlement Approval for Sites Using the Superfund Alternative Approval (SAA Guidance)* (Sept. 28, 2019), <https://www.epa.gov/enforcement/transmittal-memo-updated-superfund-response-and-settlement-approach-sites-using>.

⁴ Also shown in Figure 1 of this letter.

migration of any contaminated groundwater in excess of Interim Groundwater Cleanup Levels established under the Record of Decision, Troy Mills Landfill Superfund Site (Exhibit D), to a point beyond the applicable GMZ is prohibited.

- (b) The surface and subsurface soils within the area of the Easement described in Exhibit B may be contaminated with volatile and semi-volatile organic compounds, petroleum related hydrocarbons, or other substances deemed potentially harmful to human health. In order to prevent direct exposure to and protect the public and site personnel (from exposure to the contaminants), and to protect the integrity of the Grantee's remedial activities, and to prevent interference with such remedial activities, subject to paragraph B. below, this document establishes Activity and Use Restrictions ("AUR") within the area of Easement described in Exhibit B. The AUR prohibits the use of any portion of the area of Easement described in Exhibit 8 for residential use, childcare centers, playgrounds, athletic fields, or elementary or secondary schools. Digging, excavation, or construction within the AUR area is prohibited unless approval is obtained from the New Hampshire Department of Environmental Services ("NHDES") or its successors and assigns, with notification of the United States Environmental Protection Agency, Region 1 ("EPA").
- (c) In order to protect the integrity of the Grantee's remedies with respect to the AUR shown in Exhibit C, no action that impacts the integrity of the soil cap within the AUR shall be taken. Such prohibited activities include, but are not limited to, use of all terrain vehicles (ATV) or other similar vehicles, excavation or other activities that lead to erosion or damage of the soil cap.
- (d) The Grantor covenants not to disturb, move, damage, mar, tamper with, interfere with, obstruct, or impede any monitoring wells, treatment facilities, piping, and other facilities associated with any environmental investigation, response action or other corrective action within the Easement.

Note that under the terms of the Grant, a Grantor may request from NHDES or its successors and assigns, with a copy to EPA, a modification or release of one or more of the environmental use restrictive covenants in whole or in part in this section, subject to the notification and concurrence or approval of the NHDES and notification of EPA.

As your plans develop further, please continue to discuss your plans to acquire the property with EPA and NHDES. EPA recommends that you consult with your own legal counsel and environmental professional to ensure that your proposed reuse will not affect EPA's cleanup response nor incur CERCLA liability.

CERCLA § 101(20)(D) State and Local Government Liability Exemption

EPA understands that you are interested in information regarding the state and local government liability exemption provision of CERCLA. In 2018, Congress enacted the Brownfields Utilization, Investment, and

Local Development Act of 2018 (BUILD Act).⁵ CERCLA § 101 (20)(D), as amended by the BUILD Act, provides liability protection to local governments⁶ that may exempt them under certain circumstances from being an “owner” or “operator” and thus may protect them from potential CERCLA liability.

The BUILD Act amended CERCLA § 101(20)(D) to add a new category of exempt acquisitions, “through seizure or otherwise in connection with law enforcement activity” and to remove the requirement that state and local governments must acquire title to property “involuntarily.” Section 101(20)(D) now states that a “unit of State or local government which acquired 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” is exempt from the definition of “owner or operator” if that government entity did not cause or contribute to the release or threatened release of a hazardous substance from the facility. Please note that some actions or omissions during ownership may cause or contribute to a release of hazardous substances from a property and make the local government ineligible for the exemption.⁷

On June 15, 2020, EPA issued guidance that describes the Agency’s enforcement discretion policies that may apply to state and local governments and to your situation.⁸ The Local Government Guidance provides:

The CERCLA § 101(20)(D) exemption from owner or operator liability includes circumstances in which a local government acquires title to property “by virtue of its function as sovereign.” This phrase is undefined in the statute. To provide clarity to local governments, the EPA generally intends to exercise its enforcement discretion to treat a local government acquisition as “by virtue of its function as sovereign” only when the government acquires title to the property by exercising a uniquely governmental authority via a function that is unique to its status as a governmental body.

Common governmental property acquisitions by virtue of a local government’s function as sovereign include:

- Tax delinquency and tax lien foreclosures
- Some transfers between governmental units
- Tax increment financing transactions
- Escheat
- Eminent domain authority for a public use
- Holding an unexercised right of way
- Demolition lien foreclosure
- Foreclosure while administering a government loan, loan guarantee, or loan insurance program

⁵ Brownfields Utilization, Investment, and Local Development Act of 2018, Division N of Pub. L. No. 115-141, 132 Stat. 1052 (March 23, 2018).

⁶ Many of the references to “local governments” in this letter and to CERCLA’s liability protections are also applicable to state governments.

⁷ For additional discussion of post-acquisition activities that may or may not be considered releases under CERCLA, see the disposal discussion beginning on page 8 of the EPA’s *Enforcement Discretion Guidance Regarding Statutory Criteria for Those Who May Qualify as CERCLA Bona Fide Prospective Purchasers, Contiguous Property Owners, or Innocent Landowners* (“Common Elements Guidance”), July 29, 2019, available on the Agency’s website at <https://www.epa.gov/enforcement/common-elements-guidance>.

⁸ See *Superfund Liability Protections for Local Government Acquisitions after the Brownfields Utilization, Investment, and Local Development Act of 2018* (“Local Government Guidance”), (June 15, 2020), available on the Agency’s website at <https://www.epa.gov/enforcement/guidance-superfund-liability-protections-local-government-acquisitions>.

- Acting as a conservator or receiver under a clear and statutory mandate or regulatory authority

Such uniquely governmental functions and specific limitations on the EPA's enforcement discretion are discussed in the Local Government Guidance.

Based upon your representation of your situation and the information currently available to the EPA, the Local Government Guidance may apply. Courts, not EPA, are the final arbiter of whether a party has achieved a liability protection. Thus, EPA recommends that you consult your legal counsel to assess whether you satisfy each of the statutory requirements necessary to achieve and maintain the state and local government liability exemption. In cases where it is unclear whether the CERCLA § 101(20)(D) exemption applies—or when a local government wishes to obtain additional liability protection—EPA encourages local governments to achieve and maintain Bona Fide Prospective Purchaser (BFPP) status pursuant to CERCLA §§ 101(40) and 107(r), described below.

CERCLA Third Party and Innocent Landowner Defenses

In addition to the liability exemption discussed immediately above, CERCLA § 107(b)(3) provides a “third party” affirmative defense to CERCLA liability for any owner, including a local government, that can prove, by a preponderance of the evidence, that the contamination was caused solely by an act or omission of a third party whose act or omission did not occur “in connection with a contractual relationship.” An entity asserting a CERCLA § 107(b)(3) defense also must show that it exercised due care with respect to contamination and that it took precautions against foreseeable acts or omissions, and the consequence thereof, by the third party that caused the contamination.

CERCLA's third-party defense includes an “innocent landowner defense” as an exclusion to the definition of “contractual relationship” in Section 101(35). The “innocent landowner defense” applies to entities that meet the criteria set forth in CERCLA §§ 101(35) and 107(b)(3). A “contractual relationship” under CERCLA § 101(35)(A) does not include the scenario where “the defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfers or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.” As discussed in the Local Government Guidance, EPA generally intends to exercise its enforcement discretion to treat local governments that acquire property through escheat or eminent domain under certain circumstances as exempt under Section 101(20)(D). CERCLA § 101(35)(A)(ii) provides an additional liability protection through an affirmative defense for these types of acquisitions, provided other requirements, including the exercise of due care, are satisfied.

CERCLA's Bona Fide Prospective Purchaser Liability Protection

The EPA understands that you are interested in information regarding the bona fide prospective purchaser (BFPP) provision of CERCLA. EPA generally encourages units of state and local government to establish and maintain BFPP status in cases where it is unclear whether the CERCLA § 101(20)(D) liability exemption or other liability protections apply. Congress amended CERCLA in 2002 to exempt certain parties who buy, or lease contaminated or potentially contaminated properties from CERCLA liability if they qualify as BFPPs. The BFPP provision provides that a person meeting the criteria of CERCLA §§ 101(40) and 107(r)(1), and who purchases the property after January 11, 2002, will not be liable as an owner or operator under CERCLA. The statutory definition of a BFPP also includes a party who acquires a leasehold interest in a property after January 11, 2002, where the leasehold is not designed to avoid liability and the interested party meets certain conditions and criteria.

The Agency has issued guidance discussing some of the BFPP criteria. See *Enforcement Discretion Guidance Regarding Statutory Criteria for Those Who May Qualify as CERCLA Bona Fide Prospective Purchasers, Contiguous Property Owners, or Innocent Landowners* (“Common Elements”) (“Common Elements Guidance”) (July 29, 2019; <https://www.epa.gov/enforcement/common-elements-guidance>).

Based upon your representation of your situation and the information currently available to the EPA about the conditions at the Site, the BFPP provision may apply to your situation. Note that a court, rather than the EPA, ultimately determines whether a landowner has met the criteria for BFPP status. Thus, the EPA recommends that you consult with your legal counsel to assess whether you satisfy each of the statutory requirements necessary to achieve and maintain BFPP status. As another basis for liability protection, the EPA generally encourages local governments to consider layering their available liability protections and to establish and maintain BFPP status even when another liability protection may apply.

A key advantage of the BFPP provision is that it is self-implementing; therefore, the Agency is not involved in determining whether a party qualifies for BFPP status. A party, on its own, can achieve and maintain status as a BFPP, which provides statutory protection from CERCLA liability, without entering into an agreement with EPA, so long as that party meets the threshold criteria and continuing obligations identified in the statute.

Among other criteria outlined in CERCLA, a BFPP must take “reasonable steps” to stop continuing releases, prevent threatened future releases, and prevent or limit human, environmental, or natural resources exposure to any previously released hazardous substances as required by CERCLA § 101(40)(B)(iv). This requirement is explored further in the Common Elements Guidance. A BFPP must conduct “all appropriate inquiry” regarding a property prior to purchase.

Proposed Reuse of the Properties and Reasonable Steps

You have asked what actions by you, as the potential owner of the Property, may constitute reasonable steps if you choose to acquire the Property. Reasonable next steps include those measures that will protect the remedy infrastructure from any actions taken by the Town or others within the Site. You must also ensure that the remedial infrastructure remains accessible for sampling and maintenance.

By making the BFPP Exemption subject to the obligation to take reasonable steps, EPA believes Congress intended to protect certain landowners from CERCLA liability while at the same time recognizing that these landowners should act reasonably, in conjunction with other authorized parties, in protecting human health and the environment. As noted above, the Agency has taken response actions at the Site and has identified several environmental concerns. Based on the information we have evaluated, we believe that the following may be reasonable steps related to the hazardous substance contamination found at the Site:

- Ensuring activities within the Site do not impact the soil cap.
- Implementing practices that protect remedial infrastructure from any damage during any proposed activities within the Site (for example, flagging and protecting the wells prior to clearing activities) and afterwards.
- Ensuring that EPA and NHDES have continued access to the Property and the Site activities including but not limited to, sampling or maintenance of groundwater wells, five-year reviews, and monitoring compliance with institutional controls.
- Notifying NHDES and EPA of any proposed restricted activities under the Site’s AUR and complying with all AUR terms and conditions.
- Preventing contact with groundwater and refraining from installing or operating any public or

private wells within the Site and notifying EPA and NHDES if the installation of public or private wells are proposed anywhere on the Property.

- Complying with any institutional controls established on the Property in association with the Site remedy.
- Not performing any activities or constructing any structures that will or may interfere with the Site cleanup or exacerbate contaminated conditions at the Site.

Any reasonable steps suggested by EPA Region 1 are based on the nature and extent of contamination currently known to the Agency and are provided as a guide to help you as you seek to reuse the Property. Because a final determination about which steps are reasonable would be made by a court rather than the EPA, and because additional reasonable steps may later be necessary based on site conditions, this list of reasonable steps is not exhaustive. You should continue to identify reasonable steps based on your observation and judgment and take appropriate action to implement any reasonable step whether or not the EPA regional staff have identified any such steps.⁹ We recommend that you consult with your environmental professional and legal counsel to ensure that you take the reasonable steps necessary with respect to any hazardous substance contamination.

Liens and Potential Liens on the Property

A Superfund lien has arisen and has been perfected/filed on the Property pursuant to CERCLA § 107(I), as part of the United States' bankruptcy settlement with TMI (Cheshire County Registry of Deeds, Bk 2524, Pg 0096). EPA is willing to seek resolution leading to release of the lien in the event the Town is interested in acquiring the Property.

Although Congress provided liability protection under CERCLA for BFPPs to encourage the purchase and reuse of contaminated properties, the property they acquire may be subject to a windfall lien pursuant to CERCLA § 107(r) if there are unrecovered response costs incurred by the United States and the response action increases the fair market value of the property. Unlike a CERCLA § 107(I) lien (aka "Superfund lien"), a windfall lien is not a lien for all the Agency's unrecovered response costs. The windfall lien is limited to the lesser of the Agency's unrecovered response costs or the increase in fair market value attributable to EPA's cleanup. Based upon the information now available to EPA, the Agency is not in a position today to determine whether the windfall lien policy may apply to this Property.

State Actions

We can only provide you with information about federal Superfund actions at the Site, federal law and regulations, and EPA guidance. For information about potential state actions and liability issues, please contact Joshua C. Harrison, Counsel, or Michael Summerlin, State Project Manager, of the NHDES for more information about potential state actions and liability issues at joshua.harrison@doj.nh.gov or Michael.D.SummerlinJr@des.nh.gov, respectively.

Conclusion

EPA Region 1 remains dedicated to facilitating the cleanup and reuse of contaminated properties and hopes the information contained in this letter is useful to you. Please note that this letter does not offer

⁹ CERCLA § 101(40)(B)(iv) provides that "The person exercises appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to (i) stop any continuing release; (ii) prevent any threatened future releases; and (iii) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance."

conclusive statements about Site conditions or liability. You may find it helpful to consult your own environmental professional, legal counsel, and your state, or local environmental protection agency before taking any action to acquire, clean up, or redevelop the impacted Properties. These consultations may help you obtain a greater level of comfort about the compatibility of the proposed use and ensure compliance with any applicable federal, state, and/or local laws or requirements. If you have any additional questions or wish to discuss this information further, please feel free to contact Gerardo Millan-Ramos, EPA Remedial Project Manager, at millan-ramos.gerardo@epa.gov, or David Peterson, Senior Enforcement Counsel, at peterson.david@epa.gov.

Sincerely,

Bryan Olson,
Director, Superfund and Emergency Management Division

cc: Gerardo Millan-Ramos, EPA
David Peterson, EPA
Michael Summerlin, NHDES
Joshua C. Harrison, NHDOJ
Elizabeth Freed, EPA

This map illustrates the Metacomb-Menadock Trail area, highlighting various land features and infrastructure. Key elements include:

- Trail:** The Metacomb-Menadock Trail is shown as a green dashed line running vertically through the center of the map.
- Land Features:**
 - Steep-Sloped Area:** A large green-shaded region on the left side of the trail.
 - Flat, Solar Potential:** A yellow-shaded area on the right side of the trail, adjacent to the wetlands.
 - Wetlands:** A blue-shaded area located between the steep-sloped area and the flat solar potential area.
 - Sand and Gravel Quarries:** A brown-shaded area located to the right of the wetlands.
- Infrastructure:**
 - 345 kV Power Line:** A thick orange line running diagonally across the bottom of the map.
 - Current Access:** A dashed line indicating existing access points.
 - Potential Access:** A dashed line indicating potential future access points.
 - NHDOT Parcel:** A small black-outlined rectangle located within the flat, solar potential area.
- Geographic Labels:**
 - Prospect St:** Located at the top of the map.
 - Morse St:** Located near the top of the trail.
 - Sand Dam Pond:** A blue pond located to the right of the trail.
 - South St:** A road running vertically on the right side of the map.
 - Troy:** A town label located in the bottom right corner.
 - Fitzwilliam:** A town label located in the bottom right corner.
 - Rockwood Pond Rd:** A road located in the bottom right corner.

