§ 1389-e. Liability exemptions and defenses. 1. Lender exemption. (a) For purposes of this title no lender shall incur any liability from any statutory claims of the state as an owner or operator of a site, or a person responsible for the disposal of a hazardous waste at such site, provided such lender, without participating in the management of such site, holds indicia of ownership primarily to protect the lender's security interest in the site or, if such lender did not participate in the management of such site prior to a foreclosure on such site, notwithstanding that such lender:

(1) forecloses on such site; and

(2) after foreclosure, sells, releases (in the case of a lease finance transaction), or liquidates such site, maintains business activities, winds up operations, or takes any other measure to preserve, protect or prepare such site prior to sale or disposition; provided, however, that such lender shall take actions to sell, release (in the case of a lease finance transaction), or otherwise divest itself of such site at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements.

(b) This exemption shall not apply to any lender that has caused or contributed to the release or threatened release of a hazardous waste from or onto the site, or to any lender that generated, transported, or disposed of, arranged for, or that caused the generation, transportation, or disposal of hazardous waste from or onto such site.

(c) For purposes of this section:

(1) The term "participating in management" means actually participating in the management or operational affairs of a site and does not include merely having the capacity to influence, or the unexercised right to control, site operations.

(i) A lender who holds indicia of ownership primarily to protect a security interest in such site shall be considered to participate in management only if, while the borrower is in possession of such site encumbered by the security interest, the lender:

(A) exercises decision making control over the environmental compliance related to such site, such that the lender has undertaken responsibility for the hazardous waste handling or disposal practices related to such site; or

(B) exercises control at a level comparable to that of a manager of such site, such that the lender has assumed or manifested responsibility:

(I) for the overall management of such site encompassing day-to-day decision making with respect to environmental compliance; or

(II) over all or substantially all of the operational functions, excluding financial or administrative functions, of such site other than the function of environmental compliance.

(ii) The term "participate in management" does not include:

(A) Performing an act or failing to act prior to the time at which a security interest is created in a site;

(B) Holding a security interest or abandoning or releasing a security interest;

(C) Including in the terms of an extension of credit, or in a contract or security agreement relating to such extension, a covenant, warranty, or other term or condition that relates to environmental compliance;

(D) Monitoring or enforcing the terms and conditions of the extension of credit or security interest;

(E) Monitoring or undertaking one or more inspections of such site;

(F) Requiring a response action or other lawful means of addressing the release or threatened release of a hazardous waste in connection with such site prior to, during, or on the expiration of the term of the extension of credit;

(G) Providing financial or other advice or counseling in an effort to mitigate, prevent, or cure default or diminution in the value of such site;

(H) Restructuring, renegotiating, or otherwise agreeing to alter the terms and conditions of the extension of credit or security interest, exercising forbearance;

(I) Exercising other remedies that may be available under applicable law for the breach of a term or condition of the extension of credit or security agreement; or

(J) Conducting a response action under 42 U.S.C. Section 9607(d) or under the direction of an on-scene coordinator appointed under the national contingency plan if the actions do not rise to the level of participating in management within the meaning of this subparagraph.

(2) The term "extension of credit" includes a lease finance

transaction:

(i) In which the lessor does not initially select the leased site and does not during the lease term control the daily operations or maintenance of such site; or

(ii) That conforms with regulations issued by the appropriate federal banking agency or the appropriate state bank supervisor (as those terms are defined in section 3 of the federal deposit insurance act (12 U.S.C. 1813)) or with regulations issued by the national credit union administration board, as appropriate.

(3) The term "financial or administrative function" includes a function such as that of a credit manager, accounts payable officer, accounts receivable officer, personnel manager, comptroller, or chief financial officer, or a similar function.

(4) The terms "foreclosure" and "foreclose" mean, respectively, acquiring and to acquire, a site through:

(i) Purchase at sale under a judgment or decree, power of sale, or nonjudicial foreclosure sale;

(ii) A deed in lieu of foreclosure or similar conveyance from a trustee;

(iii) Repossession if such site was security for an extension of credit previously contracted;

(iv) Conveyance pursuant to an extension of credit previously contracted, including the termination of a lease agreement; or

(v) Any other formal or informal manner by which the lender acquires, for subsequent disposition, title to or possession of a site in order to protect the lender's security interest.

(5) The term "lender" means:

(i) An insured depository institution as defined in section 3 of the federal deposit insurance act (12 U.S.C 1813);

(ii) An insured credit union as defined in section 101 of the federal credit union act (12 U.S.C. 1752);

(iii) A bank or association chartered under the farm credit act of 1971 (12 U.S.C. 2001 et seq.);

(iv) A leasing or trust company that is an affiliate of an insured depository institution;

(v) Any person, including a successor or assignee of any such person, that makes a bona fide extension of credit to or takes or acquires a

security interest from a nonaffiliated person;

(vi) The federal national mortgage association, the federal home loan mortgage corporation, the federal agricultural mortgage corporation, or any other entity that in a bona fide manner buys or sells loans or interests in loans;

(vii) A person that insures or guarantees against a default in the repayment of an extension of credit, or acts as a surety with respect to an extension of credit, to a nonaffiliated person; and

(viii) A person that provides title insurance and that acquires a site as a result of assignment or conveyance in the course of underwriting claims and claims settlement.

(6) The term "operational function" includes a function such as that of a site or plant manager, operations manager, chief operating officer, or chief executive officer.

(7) The term "security interest" includes a right under a mortgage, deed of trust, assignment, judgment, lien, pledge, security agreement, factoring agreement, or lease, and any other right accruing to a person to secure the repayment of money, the performance of a duty, or any other obligation by a nonaffiliated person.

2. Municipal exemption. (a) For the purposes of this title no public corporation shall incur any liability from any statutory claims of the state as an owner or operator of a site, or a person responsible for the disposal of a hazardous waste at such site, if such public corporation acquired such site involuntarily, and such public corporation retained such site without participating in the development of such site.

(b) This exemption shall not apply to any public corporation that has caused or contributed to the release or threatened release of a hazardous waste from or onto the site, or to any public corporation that generated, transported, or disposed of, arranged for, or that caused the generation, transportation, or disposal of hazardous waste, from or onto the site.

(c) When used in this section:

(1) "Public corporation" means a public corporation as defined in section sixty-five of the general construction law, a local public authority, supervisory district, improvement district within a county, city, town, or village, or Indian nation or tribe recognized by the

state or the United States with a reservation wholly or partly within the boundaries of New York state, or any combination thereof.

(2) "Involuntary acquisition of ownership or control" includes but is not limited to the following:

(i) Acquisitions by a public corporation in its sovereign capacity, including but not limited to acquisitions pursuant to abandonment proceedings or bequest;

(ii) Acquisitions by a public corporation, or its agent, acting as a conservator or receiver pursuant to a clear and direct statutory mandate or regulatory authority;

(iii) Acquisitions of assets through foreclosure and its equivalents, or otherwise, by a public corporation in the course of administering a loan, loan guarantee, tax lien, or tax forbearance agreement, or loan insurance program; or

(iv) Acquisitions by a public corporation pursuant to seizure, injunction, condemnation, or forfeiture authority; provided that such ownership or control is not retained primarily for investment purposes.

(d) For the purpose of this section, the terms "foreclosure" and "foreclose" mean, respectively, acquiring or to acquire a brownfield site through:

(1) purchase at sale under a judgment or decree, power of sale, or non-judicial foreclosure sale;

(2) a deed in lieu of foreclosure, or similar conveyance, or abandonment from a person or trustee;

(3) conveyance pursuant to an extension of credit or tax forbearance previously contracted; or

(4) any other formal or informal manner by which a person acquires, for subsequent disposition, title to or possession of a site in order to protect the security interest of the public corporation or lender.

(e) "Participating in development" means the carrying out, or causing or permitting the carrying out, of any above-grade improvements to the site or any other environmental investigation or remediation, except for those improvements which are part of a site remedial program pursuant to this article or in furtherance of site safety, such as fencing or lighting, but does not include licensing, regulatory oversight, or the mere capacity to regulate or influence, or the unexercised right to control the operation of the property. For purposes of this section,

participating in development does not include:

(1) having the capacity to influence management of a site;

(2) having the unexercised right to control or to regulate the site or operations thereof;

(3) holding, abandoning, or releasing a security interest or tax lien on such site;

(4) including a condition relating to environmental compliance in a contract, permit, license, or security agreement;

(5) monitoring or enforcing the terms and conditions of an agreement or tax forbearance agreement;

(6) monitoring or undertaking one or more inspections of a site including, but not limited to, boring test wells;

(7) exercising other remedies available under applicable laws;

(8) licensing, permitting, or granting permits, certificates of occupancy and variances as allowed by law and/or regulation;

(9) applying for or participating in federal or state statutory programs or benefits; or

(10) declining to take any of the actions described in subparagraphs one through nine of this paragraph.

(f) Any public corporation that has taken possession of a site shall notify the department of any release of hazardous waste within ten days of obtaining actual knowledge of such release, unless a shorter notice period is required under any other provision of law, in which case the shorter notice period controls. Failure to notify the department within the ten day or shorter notification period shall result in the loss of the exemption set forth in this section.

3. Fiduciary liability cap. For the purpose of this title, liability on the part of a fiduciary shall not exceed the assets held in the fiduciary capacity if such person is not liable independently of such person's ownership as a fiduciary or actions taken in a fiduciary capacity including, but not limited to, the fiduciary's negligently causing or contributing to the release or threatened release of hazardous waste at such site.

(a) For purposes of this subdivision:

(1) the term "fiduciary" means a person acting for the benefit of another party as a bona fide trustee; executor; administrator;

custodian; guardian of estates or guardian ad litem; receiver; conservator; committee of estates of incapacitated person; personal representative; trustee (including a successor to a trustee) under an indenture agreement, trust agreement, lease, or similar financing agreement, for debt securities, certificates of interest or certificates of participation in debt securities, or other forms of indebtedness as to which the trustee is not, in the capacity of trustee, the lender; or representative in any other capacity that the department, after providing public notice, determines to be similar to the various capacities previously described in this paragraph; and does not include either a person that is acting as a fiduciary with respect to a trust or other fiduciary estate that was organized for the primary purpose of, or is engaged in, actively carrying on a trade or business for profit, unless the trust or other fiduciary estate was created as part of, or to facilitate, one or more estate plans or because of the incapacity of a natural person or a person that acquires ownership or control of a property with the objective purpose of avoiding liability of the person or any other person.

(2) the term "fiduciary capacity" means the capacity of a person in holding title to a property, or otherwise having control of or an interest in a property, pursuant to the exercise of the responsibilities of the person as a fiduciary.

(b) Nothing in this subdivision affects the rights or immunities or other defenses that are available under law that are applicable to a person subject to this section; or creates any liability for a person or a private right of action against a fiduciary or any other person.

(c) Nothing in this subdivision applies to a person if that person acts in a capacity other than that of a fiduciary or in a beneficiary capacity and in that capacity, directly or indirectly, benefits from a trust or fiduciary relationship; or is a beneficiary and a fiduciary with respect to the same fiduciary estate and, as a fiduciary, receives benefits that exceed customary or reasonable compensation, and incidental benefits, permitted under other applicable law.

(d) This subdivision does not preclude a claim under this chapter against the assets of the estate or trust administered by the fiduciary; or a nonemployee agent or independent contractor retained by a fiduciary.

4. Affirmative defenses. (a) There shall be no liability under this title for a person otherwise liable who can establish by a preponderance of the evidence that the significant threat to the environment attributable to hazardous waste disposed at an inactive hazardous waste disposal site was caused solely by: (1) an act of God; (2) an act of war; or (3) an act or omission of a third party other than an employee or agent of such person, or than one whose act or omission occurs in connection with a contractual relationship existing directly or indirectly with such person (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier or rail), if such person establishes by a preponderance of the evidence that: (i) such person exercised due care with respect to the hazardous waste concerned, taking into consideration the characteristics of such hazardous waste, in light of all relevant facts and circumstances, and (ii) took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or any combination of them.

(b) For purposes of this section, (1) the term "act of God" means an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight, (2) the term "contractual relationship" includes, but is not limited to, land contracts, deeds, or other instruments transferring title or possession, unless the real property on which the site concerned is located was acquired by such person after the disposal or placement of the hazardous waste on, in, or at such site, and such person establishes one or more of the circumstances described in clause (i), (ii), or (iii) of this subparagraph by a preponderance of the evidence:

(i) At the time such person acquired the site, such person did not know and had no reason to know that any hazardous waste which is the subject of the significant threat determination was disposed of on, in, or at the site; or

(ii) Such person is a government entity which acquired the site by escheat, or through any other involuntary transfer or acquisition or

through the exercise of eminent domain authority by purchase or condemnation; or

(iii) Such person acquired the site by inheritance or bequest. In addition to establishing the foregoing, the person must establish that he or she has satisfied the requirements of clauses (i) and (ii) of subparagraph three of paragraph (a) of this subdivision, provides full cooperation, assistance, and site access to the persons that are authorized to conduct remedial actions at the site (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial remedial action at the site), is in compliance with any land use restrictions established or relied on in connection with the remedial action at a site, and does not impede the effectiveness or integrity of any institutional and/or engineering control employed at the site in connection with a remedial action.

(c)(1) To establish that the person had no reason to know of the matter described in clause (i) of subparagraph two of paragraph (b) of this subdivision, the person must demonstrate to a court that:

(i) on or before the date on which the person acquired the site, the person carried out all appropriate inquiries, as provided in subparagraphs two and four of this paragraph, into the previous ownership and uses of the site in accordance with generally accepted good commercial and customary standards and practices; and

(ii) the person took reasonable steps to:

(A) stop any continuing release;

(B) prevent any threatened future release; and

(C) prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous waste.

(2) Not later than one year after the effective date of this section, the commissioner shall by regulation establish standards and practices for the purpose of satisfying the requirement to carry out all appropriate inquires under subparagraph one of this paragraph.

(3) In promulgating regulations that establish the standards and practices referred to in subparagraph two of this paragraph, the commissioner shall include each of the following:

(i) the results of an inquiry by an environmental professional;

(ii) interviews with past and present owners, operators, and occupants

of the site for the purpose of gathering information regarding the potential for contamination at the site;

(iii) reviews of historical sources, such as chain of title documents, aerial photographs, building department records, and land use records, to determine previous uses and occupancies of the real property since the property was first developed;

(iv) searches for recorded environmental cleanup liens against the site that are filed under federal, state, or local law;

(v) reviews of federal, state, and local government records, waste disposal records, underground storage tank records, and hazardous waste handling, generation, treatment, disposal, and spill records, concerning contamination at or near the site;

(vi) visual inspections of the site and of adjoining properties;

(vii) specialized knowledge or experience on the part of the person;

(viii) the relationship of the purchase price to the value of the property, if the property was not contaminated;

(ix) commonly known or reasonably ascertainable information about the property;

(x) the degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation.

(4)(i) With respect to property purchased before May thirty-first, nineteen hundred ninety-seven, in making a determination with respect to a person described in subparagraph one of this paragraph a court shall take into account:

(A) any specialized knowledge or experience on the part of the person;

(B) the relationship of the purchase price to the value of the property, if the property was not contaminated;

(C) commonly known or reasonably ascertainable information about the property;

(D) the obviousness of the presence or likely presence of contamination at the property; and

(E) the ability of the person to detect the contamination by appropriate inspection.

(ii) With respect to property purchased on or after May thirty-first, nineteen hundred ninety-seven, and until the commissioner of environmental conservation promulgates the regulations described in

subparagraph two of this paragraph, the procedures of the American Society for Testing and Materials, including the document known as "Standard E1527-97", entitled 'Standard Practice for Environmental Site Assessment: Phase 1 Environmental Site Assessment Process', shall satisfy the requirements in subparagraph one of this paragraph.

(5) In the case of property for residential use or other similar use purchased by a nongovernmental or noncommercial entity, a site inspection and title search that reveal no basis for further investigation shall be considered to satisfy the requirements of this subparagraph.

(d) Nothing in this subdivision shall diminish the liability of any previous owner or operator of the site who would otherwise be liable under this title. Notwithstanding this subdivision, if such person obtained actual knowledge of the release or threatened release of a hazardous waste at the site when such person owned the site and then subsequently transferred ownership of the site to another person without disclosing such knowledge, such person shall be treated as a person responsible for the disposal of hazardous waste at the site, and no defense under this subdivision shall be available to such person. Nothing in this subdivision shall affect the liability under this section of a person who, by any act or omission, caused or contributed to the release or threatened release of a hazardous waste which is the subject of such proceeding relating to such site.