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BROWNFIELDS LIABILITY

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ALASKA TRIBAL CONFERENCE ON ENVIRONMENTAL MANAGEMENT
(ATCEM)

WHAT WE'RE COVERING TODAY:

- Key Terms
- Laws and Regulations
 - History and applicability
- Liability protections
- How this applies to Brownfields



The background features a dark blue gradient with faint, light-colored circular patterns and a scale on the left side. The scale has markings from 40 to 260 in increments of 10. There are also several circular diagrams with arrows indicating clockwise or counter-clockwise directions.

KEY TERMS

THE WHAT-Y WHAT NOW?

WHAT IS “LIABILITY”?

A comprehensive legal term that describes the condition of being actually or potentially subject to a legal obligation

What is “strict liability”?

Legal obligation without regard to fault



What is “joint liability”?

A legal obligation for which more than one party is responsible

What is “joint and several liability”?

The status of those who are responsible together as one unit as well as individually for their conduct. The person who has been harmed can institute a lawsuit and recover from any or all of the wrongdoers—but cannot receive double compensation, for instance, the full amount of recovery from each of the two wrongdoers.

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APPLICABLE LAWS AND REGULATIONS

WHAT LAWS APPLY TO BROWNFIELDS?

APPLICABLE LAWS AND REGULATIONS

CERCLA AKA “Superfund”

Comprehensive Environmental Response, Compensation, and Liability Act

SBLRBRA AKA “The Brownfields Law”

Small Business Liability Relief and Brownfields Revitalization Act

SOA Law

State of Alaska Law

BUILD Act

Brownfields Utilization, Investment, and Local Development Act

**CERCLA
1980**

**BUILD
2018**

**SBLRBRA
2002**

**SOA
Law**

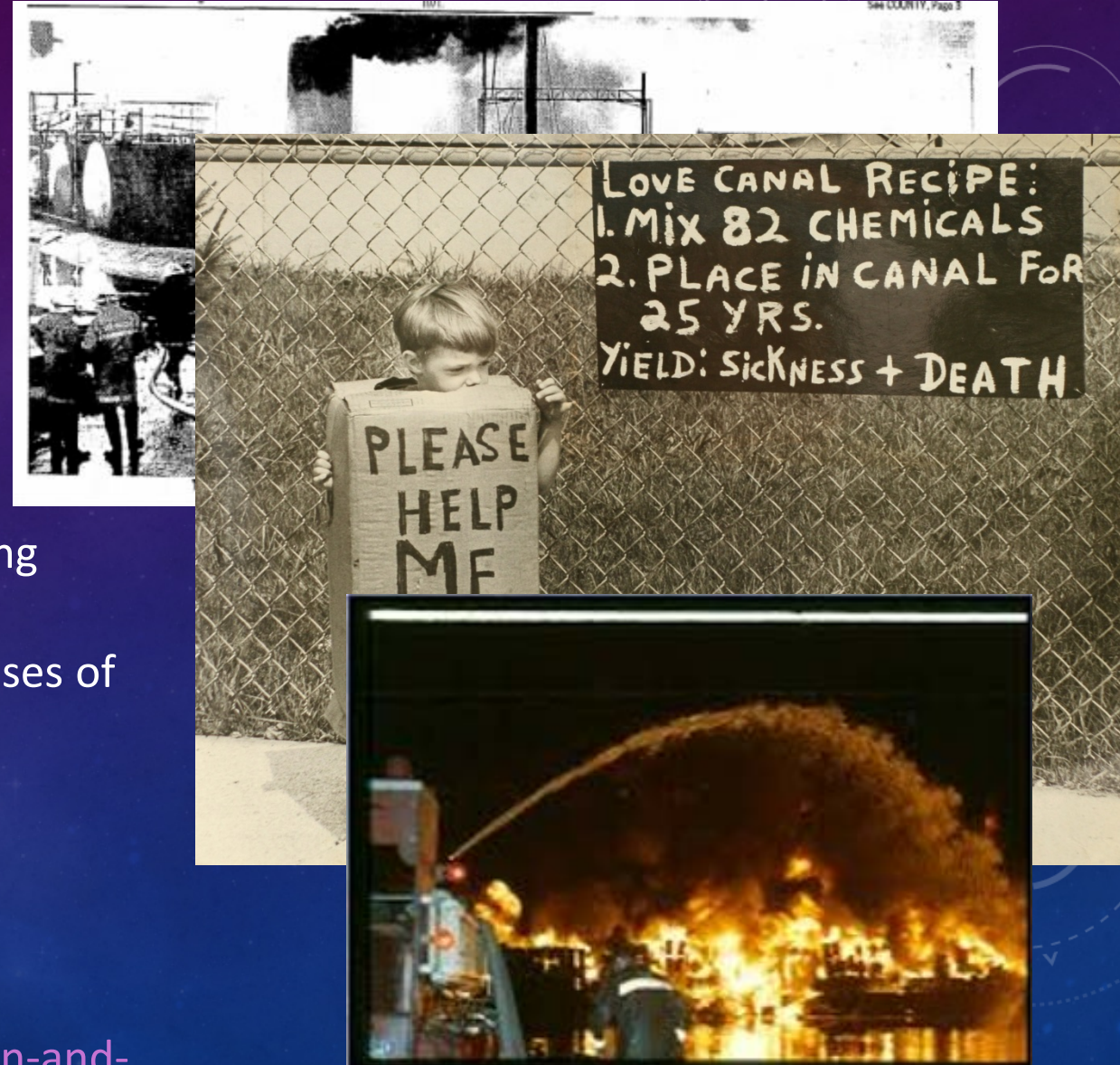
WHAT WAS BEHIND CERCLA?

- Resource Conservation and Recovery Act (RCRA)
- Toxic Substances Control Act (TSCA)
- Series of incidents
 - Bridgeport, New Jersey
 - Love Canal, New York
 - Elizabeth, New Jersey

What did CERCLA do?

- Established prohibitions and requirements concerning closed and abandoned hazardous waste sites
- Provided for liability of persons responsible for releases of hazardous wastes at these sites
 - Strict liability
- Established a trust fund to provide cleanup when no Responsible Party (RP) could be identified

<https://www.epa.gov/laws-regulations/summary-comprehensive-environmental-response-compensation-and-liability-act>



WHAT WAS BEHIND SBLRBRA?

- Need for funds to assist in cleaning up contaminated sites for reuse.
- Need for liability relief for those trying to redevelop contaminated land

What did SBLRBRA do?

- Increased funds to assess and cleanup Brownfields
- Clarified CERCLA liability protections
 - Bona fide prospective purchasers
 - Contiguous property owners
 - Innocent Landowners
- Funds to enhance State and Tribal Response Programs
- Described eligible types of property
 - Land contaminated by petroleum or petroleum products
 - Land contaminated by a controlled substance
 - Mine scarred lands



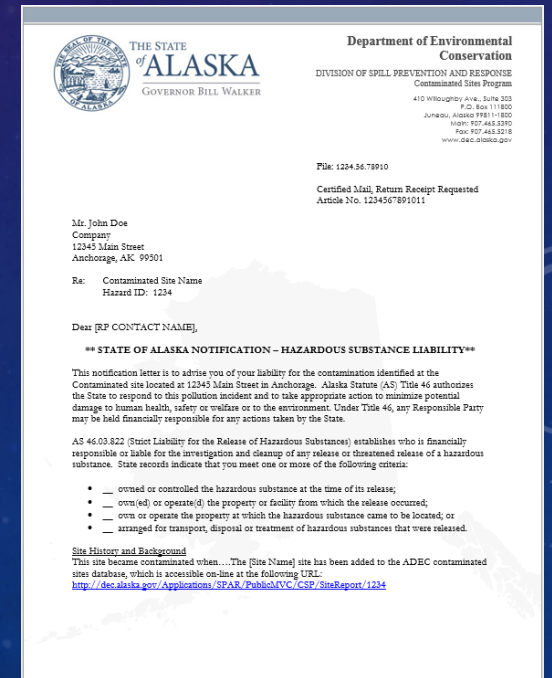
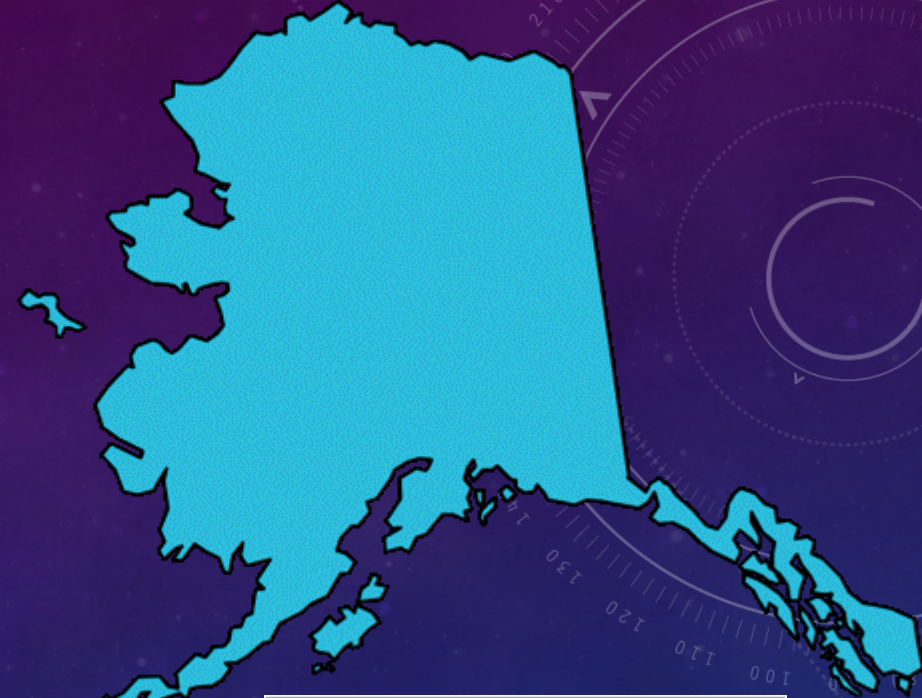
<https://www.epa.gov/brownfields/summary-small-business-liability-relief-and-brownfields-revitalization-act>

WHAT IS IN SOA LAW?

- AS 46.03.822 AKA “Mini CERCLA”
 - Strict liability
 - Joint and Several liability
- AS 46.04

What does SOA Law do?

- Notifications of Liability – Potential Responsible Party letters
 - Notification of how/why liable
 - Owned or operated property or facility at time of release
 - Owned or operated property or facility where release occurred
 - Own(ed) or operate(d) the property where the hazardous substance became to be located
 - Arranged for transport, disposal or treatment of hazardous substances that were released
 - Cost recovery language
 - Per AS 46.04 requires ADEC to cost recover for certain tasks including oversight or those incurred by responding to a release or threatened release
 - State action
 - If actions by RP are not considered satisfactory, ADEC may assume lead role in investigation and cleanup, and the RP billed



WHAT WAS BEHIND THE BUILD ACT?

- Re-authorization of the EPA Brownfields Program
- Need for liability clarifications
- Need for eligibility expansion

What did the BUILD Act do?

- Redevelopment certainty for Government entities
- Alaska Native Village and Native Corporation Liability Relief
- Petroleum Brownfield Enhancement
- Prospective Purchasers AND Lessees
- Certain Publicly Owned Brownfield Sites made eligible

Brownfields Utilization, Investment, and Local Development Act (BUILD Act)

Bill Summary

Overview

In March 2018, Congress passed the BUILD Act, which amends the Brownfields provisions of CERCLA, as part of the FY 2018 Omnibus Bill. In this factsheet, we explain the major changes to the Brownfields Amendments. The BUILD Act reauthorized the Brownfields Provisions through 2023.



More Redevelopment Certainty for Governmental Entities

Local or state governments that take control of a contaminated site no longer has to be an "involuntary" acquisition.



Alaska Native Village and Native Corporation Liability Relief

Provides liability relief for Alaska Native Villages and Native Corporations for a facility received under the Alaska Native Claims Act, as long as the entity did not cause or contribute to the release of a hazardous substance from the facility.



Petroleum Brownfield Enhancement

Removed the language and requirement that petroleum brownfield sites be "of relative low risk" in order to be eligible for funding.



Prospective Purchasers and Lessees

Bona Fide Prospective Purchaser definition was amended to include language related to those who have tenancy or leasehold interests in the facility.



Expanded Eligibility for Non-Profit Organizations

Non-profits (including LLCs and community development entities that are non-profit) can now apply for assessment and RLF grants.



Certain Publicly Owned Brownfield Sites

Publicly owned sites acquired prior to January 11, 2002 can apply for assessment and remediation (RLF and cleanup) grants as long as the entity is not responsible for the contamination.



Increased Funding for Remediation Grants

Increased the cleanup grant funding amount to \$500,000 per site; eligible entities can also request a waiver to \$650,000 per site, based on the anticipated level on contamination, size, or ownership status of the site.



Multipurpose Brownfields Grants

Grant authority for multi-purpose grants (assessment and cleanup combination) was increased up to \$1,000,000. No more than 15% of the total appropriation can be awarded to multi-purpose grants.



Allowing Administrative Costs for Grant Recipients

Entities are now able to use up to 5% of grant awards on administrative costs.



Grant Applications

New ranking criteria focusing on renewable energy or energy efficiency projects and waterfront developments.



Small Community Technical Assistance Grants

Authorized a new grant program for states and tribes to provide training, technical assistance, or research for small communities (populations of 15,000 or less), Indian tribes, rural areas, and disadvantaged areas. Maximum of \$20,000 per community.



June 2018

EPA 560-F-18-170

<https://www.epa.gov/brownfields/summary-2018-build-act-provisions>

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LIABILITY PROTECTIONS


WHAT IF I HAVE AN INTEREST IN A CONTAMINATED PROPERTY?



“Bona fide Prospective Purchaser” or BFPP and now Lessees

Purchased property knowing, or having reason to know the property is contaminated

- Conducted “All Appropriate Inquiry”
- Must satisfy “ongoing obligations”
- Demonstrate “no affiliation” with liable party
- Acquired property after January 11, 2002



**All Appropriate Inquiries Rule:
Reporting Requirements and Suggestions on
Report Content**

WHAT IS “ALL APPROPRIATE INQUIRIES”?
“All appropriate inquiries” is a process of evaluating a property’s environmental conditions and assessing potential liability for any contamination. All appropriate inquiries must be conducted to obtain certain protections from liability under the federal Superfund Law (CERCLA).

WHY DID EPA ESTABLISHING STANDARDS FOR CONDUCTING ALL APPROPRIATE INQUIRIES?
The 2002 Brownfields Amendments to the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) require EPA to promulgate regulations establishing standards and practices for conducting all appropriate inquiries.

WHEN IS THE ALL APPROPRIATE INQUIRES RULE EFFECTIVE?
The final rule is effective on November 1, 2006, one year after its publication date in the Federal Register.

WHAT ARE THE DOCUMENTATION REQUIREMENTS FOR ALL APPROPRIATE INQUIRIES?
The final rule requires that the results of an all appropriate inquiries investigation be documented in a written report. The specific reporting requirements for all appropriate inquiries are provided in 40 CFR §312.21 (*Results of Inquiry by an Environmental Professional*) and §312.31 of the final rule and include:

- I. An *opinion* as to whether the inquiry has identified conditions indicative of releases or threatened releases of hazardous substances on, at, in, or to the subject property.
- II. An identification of *data gaps* (as defined in §312.10) in the information collected for the inquiry that affect the ability of the environmental professional to identify conditions indicative of releases or threatened releases of hazardous substances on, at, in, or to the subject property, as well as comments regarding the significance of these data gaps.
- III. *Qualifications and signature* of the environmental professional(s). The environmental professional must place the following statements in the document and sign the document:

“[I, We] declare that, to the best of [my, our] professional knowledge and belief, [I, we] meet the definition of Environmental Professional as defined in §312.10 of this part.”

“[I, We] have the specific qualifications based on education, training, and experience to assess a property of the nature, history, and setting of the subject property. [I, We] have developed and performed the all appropriate inquiries in conformance with the standards and practices set forth in 40 CFR Part 312.”
- IV. In compliance with §32.31(b), the environmental professional must include in the final report an *opinion regarding additional appropriate investigation*, if the environmental professional has such an opinion.



<https://www.epa.gov/enforcement/bona-fide-prospective-purchasers>

“Contiguous Property Owners” or CPO

For property adjacent to source of contamination.

Purchased property with no knowledge of contamination at the time of purchase

- Conducted “All Appropriate Inquiry”
- Must satisfy “ongoing obligations”
- Demonstrate “no affiliation” with liable party



All Appropriate Inquiries Rule: Reporting Requirements and Suggestions on Report Content

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<https://www.epa.gov/enforcement/contiguous-property-owners>

What is All Appropriate Inquiry?

- The process of evaluating a property's environmental conditions and assessing potential liability
- AAI must be conducted or updated within one year before date of acquisition *

* If more than 180 days, certain aspects must be updated before acquisition

- Requirements:
 - An opinion on if the inquiry identified conditions indicating a possible release
 - Identification of significant data gaps
 - Qualifications and signature of the Environmental Professional
 - Opinion regarding additional appropriate investigation



All Appropriate Inquiries Rule: Reporting Requirements and Suggestions on Report Content

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<https://www.epa.gov/brownfields/brownfields-all-appropriate-inquiries>

ONGOING OBLIGATIONS



- compliance with land use restrictions and not impeding the effectiveness or integrity of institutional controls; (ILO, BFPP and CPO)
- taking “reasonable steps” with respect to hazardous substances affecting a landowner’s property; (ILO, BFPP and CPO)
- providing cooperation, assistance and access; (ILO, BFPP and CPO)
- complying with information requests and administrative subpoenas; (BFPP and CPO) and
- providing legally required notices (BFPP and CPO).

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HOW DOES THIS APPLY TO MY BROWNFIELDS?

TELL ME WHAT I REALLY WANT TO KNOW

Eligibility



LIABILITY EFFECTS ELIGIBILITY

- Who owns the property?
- Did they cause the contamination?
- Who did cause the contamination?
- When was the property acquired?
- If applicable, did they conduct AAI?
- If applicable, are they meeting continuing obligations?

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CASE STUDIES

AKA “HYPOTHETICALS”

AKA “SO MY FRIEND KNOWS ABOUT THIS PROPERTY...”



CASE STUDY #1

- The Native Village of Gakona wants to purchase a property
- The property has a former auto repair garage on it, and there are no environmental reports available
- What liability protections could they get?

Innocent Land Owner



- What do they have to do in order to receive liability relief?

All Appropriate Inquiry



Satisfy Ongoing obligations





CASE STUDY #2

- The City of Golovin wants to purchase a property to build a harbor
- The property is a former Cannery that has a two year old report stating that there is pollution in the soil
- What liability protections could they get?
- Bonafide Prospective Purchaser
- What do they have to do in order to receive liability relief?

All Appropriate Inquiry



Demonstrate no affiliation with the RP 

Ongoing Obligations



*Prospective Purchaser Agreement with SOA



CASE STUDY #3

- Ahtna Inc. was conveyed land containing a former railyard via ANCSA that was contaminated during BLM ownership. They did not cause or contribute to the contamination after it was conveyed.
- What liability protections could they get?

Trick question! ANCSA Corporations received liability relief for lands conveyed via ANCSA, but were conveyed contaminated

- What do they have to do in order to receive liability relief?

Nothing

THANK YOU!

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