BROWNFIELDS LIABILITY

LISA GRISWOLD
ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION
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
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.
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
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


Applicable Laws
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

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

LIABILITY PROTECTIONS

WHAT IF I HAVE AN INTEREST IN A CONTAMINATED PROPERTY?
“Innocent Landowner” or ILO

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

• Conducted “All Appropriate Inquiry”
• Must satisfy “ongoing obligations”

https://www.epa.gov/enforcement/innocent-landowners
“Bona fide Prospective Purchaser” or BFPP and now Leesees

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

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

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

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).
HOW DOES THIS APPLY TO MY BROWNFIELDS?

TELL ME WHAT I REALLY WANT TO KNOW
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?
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!

Lisa Griswold
ADEC SPAR CSP Brownfields
555 Cordova Street
Anchorage, AK  99501
(907) 269-2021
Lisa.Griswold@Alaska.gov