



Liability Issues at Brownfields: Frequently Asked Questions

Alaska Department of Environmental Conservation
Division of Spill Prevention and Response
Contaminated Sites Program

Liability and Brownfields

Both federal and state environmental laws are based on the principle that the “polluter pays” for cleanup of contamination and not the taxpayer or the government. As a cornerstone of that maxim, for both state and federal law, the owner or operator of a contaminated property is generally held liable for the property’s cleanup based solely on their ownership of the property. Liability concerns may impact some parties’ decision whether or not to acquire contaminated property. “Brownfields” are underused or abandoned properties whose expansion, redevelopment, or reuse may be complicated by the real or perceived presence of contamination. To encourage the purchase, cleanup, and revitalization of brownfields, federal and state laws provide relief from liability to certain classes of responsible parties when they did not cause or contribute to the contamination. These provisions can be utilized by parties who have demonstrated an interest in reusing a brownfield property.

For More Information

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Understanding liability in the brownfields context is critical to anyone who has purchased or acquired a property (or may purchase or acquire a property) that may be contaminated in order to determine whether they are responsible for paying for part or all of a cleanup. In addition, potentially responsible parties (PRPs) are not eligible to receive brownfields funding unless they can demonstrate they qualify for liability relief under federal law.

This fact sheet is intended for owners and potential purchasers of brownfields properties, although anyone with an interest in brownfields reuse/redevelopment may find it useful to learn more about how state and federal liability provisions could pertain to brownfields. It generally summarizes several of the liability issues that may be of concern when considering a brownfield project; however, due to the site-specific nature of many brownfields, this fact sheet does not address all potential issues that may arise. **This fact sheet is for informational purposes only and is not intended to be legal advice. If you have questions or need legal advice, please consult an attorney.**

What does “liability” mean?

Liability is a comprehensive legal term that describes the condition of being actually or potentially subject to a legal obligation. For contaminated sites, both federal and state laws create a regulatory framework for liability that is strict, joint and several, and retroactive:

- ➡ What is “strict liability?” A 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 one or all of the wrongdoers—but cannot receive double compensation (e.g., the full amount of recovery from each of two wrongdoers).

➡ What if the contamination or release happened in the past? A party may be held liable retroactively, even if the contamination occurred decades ago.

When considering how to approach a brownfields project, one should understand the potential liabilities—as well as potential relief from liability—under both federal and state law. It's also important to appreciate the differences between federal and state laws and the respective criteria for achieving liability relief.

What laws set out liability and liability relief for brownfields?

Both federal and state laws create obligations and requirements for assessing and cleaning up contaminated sites, including brownfields, and establish a liability framework for determining who is responsible for paying for such activities. Key laws include:

Federal Laws:

- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or more commonly known as Superfund);
- Under CERCLA, the Small Business Liability Relief and Brownfields Revitalization Act (SBLRBRA, or more commonly known as the Brownfields Amendments); and
- Brownfields Utilization, Investment and Local Development (BUILD) Act.

State of Alaska Laws:

- Alaska Statute (AS) 46.03.822: Strict Liability for the Release of Hazardous Substances

Who can be held liable?

In general, federal and Alaska laws require certain classes of people (PRPs) to pay for cleaning up contamination existing on a property. Depending on whether you are looking at federal or state law, PRPs could include:

- Owners and persons with control over hazardous substance at the time of release;
- Owners and operators at the time of the release;
- Current owners and operators;

State and federal laws have many similarities, but also important differences. Additionally, both state and federal laws and regulations apply concurrently. Consequently, a party may qualify for a landowner liability relief provision under one framework, but not the other. For example, a party may meet the requirements of the bona fide prospective purchaser provisions under federal law; however, Alaska law does not have a similar liability protection. Thus, liability relief may not be assured under state law unless a state landowner liability relief protection applies.

To provide citizens, tribes, Alaska Native Village and Regional Corporations, municipal and borough governments, and other interested stakeholders with known information regarding a site's potential contamination, DEC maintains a database of contaminated sites that have been identified throughout Alaska. [The Contaminated Sites Database](#) includes thousands of sites that have been cleaned up, as well as those that are still being assessed and addressed. The database can be downloaded [here](#).

- Generators and arrangers; and
- Transporters.

What happens if I'm a PRP?

By definition, brownfields are properties that are either contaminated or *may potentially be* contaminated. In other words, a brownfield may not be contaminated, but the possibility that contamination is present may hinder reuse or redevelopment. If contamination is found at a property, DEC will send a notification letter to all identifiable PRPs. Among other information, the letter outlines why the site is believed to be contaminated and identifies the reason(s) why the letter's recipient is believed to be liable under AS 46.03.822(a) (Liability for the Release of Hazardous Substances).

One purpose of this letter is to begin a dialogue with the PRP to find out if the State's information is correct and whether other PRPs may have been involved in the contamination. Along with issuing a PRP letter, a project manager will often also send an Information Request asking for answers to these types of questions. If a party believes they are not a PRP or that they meet any of the criteria for obtaining liability relief, the party can provide that information so that it can be considered by DEC and the Department of Law.

Relevant for brownfields sites, PRPs are not eligible to receive federal or state brownfields funding unless they can demonstrate they qualify for liability relief. Also, DEC does not seek to recover its costs on any technical or site discussions about brownfields or any DEC Brownfields Assessment and Cleanup activities.

What liability relief may be available for owners or prospective purchasers of brownfields under federal and state law?

If you acquired or are looking to acquire a property that may be contaminated, both federal and state laws provide certain liability relief to landowners who meet specific criteria in an effort to encourage cleanup and reuse of those properties. Liability relief can look similar between federal and state law, but there are notable differences. Table 1 generally summarizes the major types of liability relief relevant to brownfields projects.

Table 1: General Types of Liability Relief that May Apply to Brownfield Projects	
State of Alaska (AS 46.03.822)	Federal (CERCLA 107)*
<ul style="list-style-type: none"> • Third Party Liability • Native Corporation receiving contaminated property under the Alaska Native Claims Settlement Act (ANCSA) • Involuntary acquisition of property by a state or local government unit 	<ul style="list-style-type: none"> • Innocent landowner/Bona fide prospective purchaser • Contiguous property owner • Native Corporation receiving contaminated property under ANCSA • State and local government activities (e.g., involuntarily acquiring property as a function of their governmental powers; responding to an emergency)

*Applicants must meet one of the liability protections under CERCLA to be eligible for brownfields federal funding, including state services that are provided using federal funds.

What liability relief is there under CERCLA with respect to brownfields?

The Brownfield Amendments outline and clarify liability relief for landowners who acquire contaminated property and meet a number of statutory criteria. These provisions are designed to be self-implementing; however, in limited circumstances and based on available resources, EPA may also issue clarifying “comfort/status letters,” which provide prospective purchasers with the information the Agency has about a property at the time of the letter’s issuance. Any questions regarding potential federal liability should be directed to the appropriate EPA Region 10 project officer.

Innocent Landowner (ILO)

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

- Conducted *All Appropriate Inquiry* prior to purchase
- Must satisfy *ongoing obligations*

More information on ILO can be found [here](#).

Bona Fide Prospective Purchaser (BFPP)

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

- Conducted *All Appropriate Inquiry* prior to purchase
- Must satisfy *ongoing obligations*
- Demonstrate *no affiliation* with liable party
- Acquired property after January 11, 2002

More information on BFPP can be found [here](#).

Contiguous Property Owners (CPO)

For property adjacent to source of contamination; purchased property with no knowledge of contamination at the time of purchase and:

- Conducted *All Appropriate Inquiry* prior to purchase
- Must satisfy *ongoing obligations*
- Demonstrate *no affiliation* with liable party

More information on CPO can be found [here](#).

Native Corporation Receiving Contaminated Property Under ANCSA

- The BUILD Act (2018) provided federal liability relief for Alaska Native Villages and Native Regional Corporations for contaminated property that was conveyed pursuant to ANCSA.

What does All Appropriate Inquiry (AAI) mean?

- 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 whether the inquiry identified conditions indicating a possible release
 - Identification of significant data gaps
 - Qualifications and signature of an environmental professional
 - Opinion regarding additional appropriate investigation

What are 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)

- Federal liability relief is available so long as the entity did not cause or contribute to the contamination or release of a hazardous substance.

What liability relief is there under Alaska State Law 46.03.822 that may be applicable to brownfields projects?

Alaska Statute 46.03.822 defines the conditions under which a person may be relieved of liability. The most common liability relief that may be available to private parties/landowners, municipalities, and Native Village and Regional Corporations include: (1) third party liability; (2) involuntary acquisition of property by a unit of state or local government; and (3) Native Corporations receiving property under ANCSA.

Third Party Liability (TPL) – AS 46.03.822(b), (c), and (l)

A PRP can seek liability relief by showing third party liability. This relieves the PRP from some aspects of liability:

- The release of a hazardous substance (including petroleum) occurred solely as a result of an intentional or negligent act or failure to act by a third party who is not otherwise affiliated with the person (e.g., contractual or employment relationship). The person must also have:
 - exercised *due care* with respect to the hazardous substance; and
 - taken *reasonable precautions* against the act or omission of the third party
- The person, within a *reasonable period of time* after the act occurred, must have:
 - discovered the release of the hazardous substance; and
 - began efforts to contain and clean up the hazardous substance
- In addition, the person must undertake all *reasonable inquiries* into prior ownership and use of the property and did not know or have a reason to know there had been a release of a hazardous substance
- Due diligence considerations to establish whether a person had no reason to know of a prior release include:
 - specialized knowledge or experience;
 - purchase price compared to the property value;
 - commonly known or reasonably ascertainable information about the property;
 - obvious or likely presence of contamination; and
 - ability to detect contamination by appropriate inspection.

Involuntary Acquisition of Property by a Unit of State or Local Government – AS 46.03.822(k)

- Acquired by a government unit, including municipalities, through some involuntary acquisition process by virtue of being the sovereign. For example, through:
 - bankruptcy, foreclosure, tax delinquency, abandonment or eminent domain.

Who can use the liability relief provisions listed in AS 46.03.822?

- The State
- Municipalities
- Native Villages
- Private Parties

Alaska's TPL Provision, (very) simplified:*

A person who acquires a property is not liable if he/she:

- Had no reason to know that a hazardous substance was disposed of prior to acquisition;
- Upon discovery of the hazardous release, takes steps to contain and clean up; and
- Did not contribute to or cause the hazardous release.

* See statute for limitations and qualifications to this simplified characterization.

- Government unit not liable as an owner/operator under AS 46.03.822 for pre-acquisition soil/groundwater contamination
- Must address post-acquisition leaks from tanks, drums, or other closed receptacles.

Native Corporations Receiving Contaminated Property Under ANCSA – AS 46.03.822(m)

- Under this provision, a Native Corporation that acquired land pursuant to ANCSA is not liable for a release or threatened release of a hazardous substance on the land *unless* the Native Corporation, by an act or omission, caused or contributed to the release or threatened release of the hazardous substance.
- In other words, a Native Corporation would not be liable so long as the contamination occurred prior to the land's conveyance and they did not actively or passively further the contamination.

As a potential property buyer, are there any means of assuring that I will not be held liable for contamination I did not cause?

DEC recognizes that environmental contamination can be an obstacle to property use, development, and financing. As such, on a case-by-case basis, DEC will work with the Department of Law to evaluate whether a prospective purchaser agreement (PPA) would be appropriate to help encourage site cleanup and reuse. A PPA is a legally binding agreement between DEC and an eligible applicant seeking to purchase a contaminated property. The agreement defines the extent of the applicant's liability to the State for environmental cleanup at the property in exchange for providing a "substantial public benefit" (e.g., significant reduction or elimination of risks to human health or the environment or generation of financial or other resources to be used for cleanup at the property).

PPAs are not automatic and can be time and resource intensive; however, they can also have several benefits to both the applicant and the State, such as: clarifying the applicability of certain liability provisions that can help secure necessary financing; initiate site characterization or cleanup actions; and unburden the State or local government from the cleanup costs of abandoned property. PPAs issued by the State do not provide liability protection from the federal government or from third party lawsuits. Similar enforcement instruments may be available at the federal level depending upon the specific circumstances and available resources. Interested parties should contact their EPA Region 10 project officer to learn more about these potential resources.

Additional Resources

The Revitalization Handbook – Addressing Liability Concerns at Contaminated Properties (EPA 2019) https://www.epa.gov/sites/production/files/2019-12/documents/revitalization_handbook_final_2019.pdf

Enforcement Discretion Guidance Regarding Statutory Criteria for Those Who May Qualify as CERCLA Bona Fide Prospective Purchaser, Contiguous Property Owners, or Innocent Landowners ("Common Elements") (EPA 2019) <https://www.epa.gov/sites/production/files/2019-08/documents/common-elements-guide-mem-2019.pdf>

Brownfields All Appropriate Inquiries (EPA) website: <https://www.epa.gov/brownfields/brownfields-all-appropriate-inquiries> (accessed September 2020)