



CALIFORNIA LAND RECYCLING CONFERENCE

Imagine | Innovate | Implement
September 29 – October 1, 2026 | Foster City

AAI and After:

The Narrow Path for Preserving Liability Protections
9/29/2026



OFFICE OF BROWNFIELDS
Department of Toxic Substances Control - Cleanup in Vulnerable Communities Initiative



CENTER FOR CREATIVE
LAND RECYCLING
RECLAIM. CONNECT. TRANSFORM.

SPEAKERS



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THE WILDERNESS OF STRICT LIABILITY



Common law tools for contaminated sites

- Nuisance, public and private
- Negligence
- Trespass
- Strict liability for abnormally dangerous activities
- Limited government duty under the public trust doctrine

Problems

- The plaintiff carries the burden of proof on causation
- Contamination often old, with many sources
- Responsible parties often dissolved or insolvent
- Defenses based on compliance with permits and applicable law
- Damages after harm occurs, with no mechanism to compel or fund a cleanup

The common law could sometimes compensate a plaintiff or nudge public policy toward protection. It could not clean up a site.



1980 Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

- Incidents at Bridgeport NJ, Wilson Creek TN, and Love Canal NY
- Sweeping scope of potentially responsible parties (PRPs)
- Established Superfund to fund cleanup at orphan sites; otherwise the **private sector is responsible for all costs**
- CERCLA imposed **strict, joint and several, retroactive liability** for contamination cleanup



THE INTENT

- Make the parties responsible for the worst sites pay for cleanups
- Use strict, joint and several, retroactive liability to reach every responsible party
- Use Superfund to cover the orphan sites

THE RESULT

- Investors avoided any former industrial sites, urban areas generally
- Greenfields were chosen over brownfields
- Deindustrialization and underinvestment compounded
- Brownfields



Kaiser Aluminum & Chemical Corp. v. Catellus Development Corp., 976 F.2d 1338 (9th Cir. 1992) (contractor moving contaminated soil onsite can be held liable as a transporter)

United States v. Bestfoods, 524 U.S. 51 (1998) (a parent corporation can be held directly liable as a “operator” if it actively participates in and exercises control over the operations of a subsidiary’s facility where hazardous substances are released).

A PATH THROUGH THE WILDERNESS

2002 Small Business Liability Relief and Brownfields Revitalization Act

Brownfields are “real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.”

**450,000 to 1 million properties
nation wide qualified as
brownfields.**

- States took the initiative: Minnesota, Illinois, New Jersey, Pennsylvania
- California pioneered voluntary cleanup programs in 1995
- EPA established early grant programs on its own initiative
- **2002 Act provided critical protections to support investment: provide some shelter from strict liability. Defenses for:**
 - Bone fide prospective purchasers
 - Innocent landowners
 - Contiguous landowners



BE PREPARED





Safety First!

ALL APPROPRIATE INQUIRES
42 U.S.C. 9601(35)(B)

“all appropriate inquiries . . . into the previous ownership
and uses of the facility in accordance with generally
accepted good commercial and customary standards
and practices”



Designation: E1527 – 21

**Standard Practice for
Environmental Site Assessments: Phase I Environmental
Site Assessment Process¹**

Requirements for AAI

180-Day Requirements

- Visual inspections of the subject property and adjoining properties;
- Search for recorded environmental liens and AULs;
- Review of federal, tribal, state and local government records;
- Interviews with owners, operators and occupants;
- Declaration by environmental professional

One Year Components

- Historical research
- Historical uses of the subject property and adjoining properties
- Physical setting review
- Interviews with state and local government officials

Von Duprin LLC v. Major Holdings, LLC, 12 F.4th 751 (7th Cir. 2021)



User Responsibilities

- Critical to establish CERCLA LLP
- Often overlooked
- CERCLA - Requires a User...
 - Search for environmental liens and activity use limitations*
 - Specialized knowledge
 - Purchase price vs. fair market value consideration
 - Commonly known community information
 - Degree of obviousness of contamination
- ASTM - Reason for performing ESA (only required disclosure to the EP)
- **MUST BE COMPLETED FOR EPA GRANT RECIPIENTS!!**

*180-day ESA viability begins with these (not ESA cover date)

Packing the right tools

- PHASE Is are the multitool of environmental diligence
- Ensure that it's the right one, simple & focused or more comprehensive?

Cultural and historic resources

Ecological resources

Endangered species

Biological agents

Indoor air quality

Industrial hygiene

Lead-based paint

Lead in drinking water

Mold or microbial growth conditions

PCB-containing building materials

(e.g., fluorescent light ballasts, paint, and caulk)

Naturally occurring radon

Emerging contaminants

Wetlands

Compliance review





Continuing Obligations

- Demonstrate no discharge of hazardous substances after acquisition
- Comply with all land use restrictions and institutional controls
- Take reasonable steps to prevent releases of hazardous substances
- Provide full cooperation, assistance, and access for response actions or natural resources restoration
- Comply with information requests and administrative subpoenas
- Provide all legally required notices

PROVISIONS!



Funding your project

- Important to be aware of and adhere to AAI, when considering federal funding opportunities that can address contamination
- Want to be **eligible** to apply for and receive funding by not being liable for contamination under CERCLA

Assessment Grants

- For communities, non-profits, cities, etc. beginning to address their brownfield challenges
 - ~\$500,000
 - Project period up to 4 years

Community-wide Assessment Grants for States and Tribes (CWAGST)

- For States and Federally Recognized Tribal Nations
 - ~\$1,000,000
 - Project Period up to 5 years

**Funding amounts based on anticipated FY27 awards*

Funding your project

EPA Brownfield Funding Opportunities - *Funding amounts based on anticipated FY27 awards*

Cleanup Grants

- Conduct cleanup activities at specific site(s)
- ~\$500,000
- Project period up to 4 years

Revolving Loan Fund (RLF) Grants

- Revolving loan to other communities
- ~\$1,000,000
- Project period up to 5 years

Multipurpose Grants

- Combination of assessment, cleanup and reuse planning
- ~\$1,000,000
- Project period up to 5 years
- ***NOT BEING OFFERED FOR FY27 COMPETITION CYCLE**



Funding your project

EPA Brownfield Funding Opportunities — *Funding amounts based on anticipated FY27 awards*

Job Training Grants

- Funding to provide environmental training for residents impacted by brownfield challenges in their communities
- Recruit, train and place unemployed and underemployed residents into full-time, sustainable employment
- ~\$300,000
- Project period up to 3 years



Targeted Brownfield Assessment - (TBA) Program

- EPA provides contractor assistance to conduct environmental sampling
- Up to \$100,000 worth of technical assistance
- Applications accepted on rolling basis
- No cost for applicant



AAI and Opportunity

State and federal support: program development & training, site assessment, financing, grants, tax credits. Built upon the Brownfields Act, supported by AAI.

- **Equitable Communities Revitalization Grants**
- **California Land Reuse and Revitalization Act**

Eligible parties include bona fide purchasers, innocent landowners, and contiguous property owners.

- Infill development: vacant or underutilized properties in urban areas.
- An agency certificate on completion
- Immunity for the contamination the agreement addressed
- Immunity that extends beyond the applicant to successors and lenders

MOST FEDERAL, STATE, AND LOCAL PROGRAMS REQUIRE AAI



**HAVE A MAP, CHOOSE
A ROUTE**



What do regulators look for when approving projects?

-What EPA looks at when approving use of Brownfields funding

- EPA considers liability under CERCLA when it comes to hazardous substances and other contaminants
- Whether you are liable as a responsible parties under CERCLA
- Must submit site eligibility checklist for each site
- EPA must approve before brownfields funding spent on site/activity
- Reviewed on case-by-case basis



What do regulators look for when approving projects?

-What EPA looks at when approving use of Brownfields funding

Law generally excludes the use of Brownfields funding for:

- Properties that have an existing federal order to be cleaned up – CERCLA, RCRA, etc.
- Any grant or loan being used for payments that violate THE POLLUTER PAYS PRINCIPLE
 - i.e. Party responsible for causing pollution should bear the costs of preventing, controlling and cleaning up that pollution rather than society



General Questions We Will Ask

How was the property acquired?

- Purchase, foreclosure, donation, eminent domain, etc.

When was the property acquired? (if owned)?

- month, day, year

Party from who applicant acquired ownership from?

- Important for petroleum site eligibility

Any relationship or affiliations with prior owners/operator?

Contribution to Contamination?

- Did applicant cause/contribute to release of hazardous substances at the site?
- Arrange for disposal/transport of hazardous substances to site?

Continuing Obligations?

- Reasonable steps taken with regards to contamination on site?

**Reasonable steps - Stopping and/or not exacerbating any continuing release, preventing threatened future release; and preventing or limiting exposures to any previously released hazardous substance*

Defenses to Liability

At least ONE defense to liability must apply – when using brownfields funding

Sovereign Function Defense

- State or local government acquired property through: Seizure, bankruptcy, tax delinquency, abandonment, etc.

Bona fide prospective purchaser defense (BFPP)

- CAR/applicant conducted a phase I environmental site assessment or other All Appropriate Inquiries (AAI) investigation prior to acquiring the property.
- Will need to provide date of AAI phase I
- Must not have caused/contributed to the release of hazardous substance at property

Publicly owned brownfield (acquired before Jan. 11, 2002)

- CAR/applicant is an eligible public entity who acquired the property prior to Jan. 11, 2002



Additional Notes

Sites with Hazardous Building Material (HBM)

- If CAR owns the site with the HBM
- Must be able to state that hazardous substance has not been released into the outdoor environment. (and there is no threat of release)
- All other site eligibility requirements are met

Site Eligibility for Tribes

- Tribes are exempt from CERCLA liability
- EPA interprets that tribes do not meet definition of “person” thus cannot be a “Potential Responsible Party”
- EPA will still request information (site name, location, site background, suspected contamination, etc.)
- For property not on tribal lands – EPA will use regular hazardous site eligibility checklist

EATERY & ROASTERY

Brownfield to Table



Buyer – restaurateur with history of unique, successful establishments



Site - two-acre, abandoned former vehicle scrap yard



Goal –mixed use (first floor restaurant with owner residence above)



Municipality – EPA Grant recipient with Assessment and RLF Funding; supportive of project

An aerial photograph of an industrial or commercial site. A large, paved parking lot is filled with numerous cars, mostly dark-colored. To the right of the parking lot is a large, multi-story building with a dark roof and light-colored walls. The building has several windows and a flat roof. The surrounding area includes some trees and other industrial structures.

Brownfield to Table

- EPA Eligibility Approved
- Municipality funds Phase I ESA
- User Responsibilities
- Phase I ESA
 - REC 1 – likely release of HS from historical use as dry cleaner
 - REC 2 – likely release of HS and PP from historical automotive service
 - REC 3 – likely migration from known release at eastern adjoining property
- What do we do now?

Phase II Process (ASTM E1903)

Statement of
Objective

Conceptual
model

Sampling plan

Conduct the
sampling

Validate the
conceptual
model

Report results



**STAY ON
THE PATH**





Brownfield to Table

- **Statement of Objective**
 - What contaminants are present and can they be mitigated for use as a restaurant?
- **Conceptual Model and Work Plan-Sampling Analysis Plan (WP/SAP)**
- **EPA Approval of WP/SAP**
- **Phase II ESA Scope**
 - 20 soil borings and 8 monitoring wells
 - 40 soil, 10 soil gas, and 8 groundwater samples
 - QAQC to satisfy EPA QAPP
 - Analyzed for VOCs, SVOCs, TPH, lead, cadmium, and chromium
- **Validated Conceptual Model**
- **Pathway Exceedances**
 - Commercial indoor air inhalation
 - Soil contact
 - Potable water

So, we're good?

A smiling woman with curly hair, wearing a light blue button-down shirt, is shaking hands with an older man with grey hair, wearing a dark suit. They are in an office setting with large windows in the background.

Revolving Loan Fund Support

- Application to provide \$1M loan for remediation or mitigation approved
- Loan agreement
 - 5 Year Term (no payment first year)
 - Low interest rate
- EPA RLF “Compliance” Requirements
 - Administrative Record
 - Analysis of Brownfield Cleanup Alternatives (ABCA)
 - Community Involvement Plan
 - Equivalency Memorandum
 - Historic Preservation / Endangered Species
 - Project Closeout Report

Open for Business

- **Transaction proceeds**
 - Bona Fide Prospective Purchaser
- **Continuing Obligations**
 - Secure/dispose of abandoned containers (Seller handle!)
 - Prevent third party exposures
 - Provide notifications / disclosures (if any)
 - Municipal drinking water connection
 - Design, install, **maintain** engineering barriers (vapor mitigation and direct contact)
 - Protect and maintain monitoring points
 - Operation, maintenance, and monitoring plans (OM&M)
- **Notify contractors**
- **Maintain documentation and financing “buckets”**
- **Continuing Obligations are...continuous**



THE DESTINATION





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THANK YOU!

| IMAGINE, INNOVATE, IMPLEMENT
THE FUTURE OF LAND RECYCLING



We appreciate your feedback, follow this QR code
to submit an evaluation form on Whova.

Join the conversation, use #CALRC2026 to share
your photos, insights and highlights!



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