ASTSWMO Webinar

History of the CERCLA BFPP Liability Defense, Current State Implementation, and What's Next

April 30, 2026

Today's Speakers

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CERCLA

CERCLA – The Beginning

- Comprehensive Environmental Response, Compensation, and Liability Act, 1980
- Response mismanaged hazardous waste sites (Love Canal)
- Established framework for cleanup contaminated sites
- Empowered USEPA to identify responsible parties and recover cleanup costs
- Introduced "polluter pays" principle
  - landmark in environmental accountability

The Liability Framework

- Joint and Several Liability – A Double-Edged Sword
- Anyone in the chain of ownership or operation held liable for the entire cost of cleanup, even if contribution minimal – "joint and several" liability
- Liability applied retroactively, strictly, and without fault
- Created uncertainty and hesitancy among lenders, developers, and municipalities
- **Result: Avoidance of potentially contaminated properties, even when cleanup was feasible**

CERCLA overview

- CERCLA's strict liability scheme applies to 4 classes of liable parties
  - Current owners and operators of a facility
  - Past owners and operators at time of disposal
  - Generators and arrangers
  - Certain transporters
- Liability is strict, joint and several, and retroactive
- Driven by "polluter pays" principle
- Unintended consequence of "polluter pays" was frozen markets for industrial property and abandonment of industrial properties, often resulting in urban blight
- In 1990s, focus was on finding solutions to these consequences

Unintended Consequences – From Cleanup to Sprawl

- When Good Intentions Stalled Reuse
- Investment shifted away from inner-city industrial lands toward "greenfields"
- Frozen markets for industrial property
- Abandonment of industrial properties
- Extreme risk aversion for large companies
  - "There's no such thing as a Fortune 500 'de mimimis' PRP"
- Cities left with idle and stigmatized properties
  - Later known as brownfields

Unintended Consequences – From Cleanup to Sprawl

- Urban disinvestment and suburban sprawl accelerated
- Increased infrastructure costs and environmental impacts
- Recognition eventually led to reforms and liability protections
- States were the initial laboratories for liability protection
- The federal government enacted broad liability protection in 2002

CERCLA defenses

- There are three main defenses to CERCLA's strict liability scheme:
  - Bona Fide Prospective Purchaser Defense ("BFPP")
  - Innocent Landowner Defense
  - Contiguous Property Owner Defense
- To be extended these defenses, parties must generally meet certain "threshold criteria," including satisfaction of All Appropriate Inquiries ("AAI").
- An ASTM-compliant Phase I will generally satisfy AAI, serving as a baseline for defenses against CERCLA's strict liability scheme.

Federal BFPP defense

- Property acquisition (includes leases too) after January 11, 2002
- Conduct “all appropriate inquiries,” most typically an ASTM-compliant Phase I
- No affiliation with responsible party
- “Reasonable steps” to stop continuing releases and prevent threatened future releases
- Do not impede remedial activity
- Provide access to those cleaning up property
- Cooperate with the imposition of, and compliance with, institutional controls

State law efforts to address CERCLA challenges

- Many states have adopted, either by reference or analogous language, CERCLA liability protections for prospective purchasers that satisfy AAI.
- But, state laws vary widely on whether a Phase I provides liability protection to a prospective purchaser. A selection follows:
  - Ohio - Incorporates federal BFPP definition into state law defenses. Ohio Rev. Code § 3746.122:
  - Michigan – In lieu of BFPP defense, a purchaser can conduct a baseline environmental assessment after closing and secure liability protection by doing so. MCL § 324.20126
  - North Carolina – No BFPP defense; instead, purchasers seeking liability protection enter NC's Brownfields Program, NCGS § 130A-310.30, *et seq*.
  - Virginia – BFPP defense but no Phase I required so long as:
    - No contribution to a release or threatened release of hazardous substances;
    - No familial, contractual, or financial relationship with a potentially liable entity;
    - Reasonable steps taken to mitigate any existing release or threatened release; and
    - No impeding any remediation action.
    - Virginia Code § 10.1-1234(B)

Where BFPP protection doesn't work

- Stock purchases (vs. property acquisition)
  - In this scenario, the target company continues to exist following the closing, with all of its pre-closing liabilities, including environmental liabilities
- On-site soil movement:
  - Courts have found that "disposal" under CERCLA includes active dispersion of contaminants during site development activities, like excavation and grading.
  - Brownfields redevelopment can trip over this interpretation of "disposal," defeating a once-valid BFPP defense, and finding a party liable as an owner/operator under CERCLA.
- Limited Phase I viability:
  - Only valid for 1 year before a new assessment is required
  - Certain sections must be updated when completed more than 180 days prior
- Other environmental laws, e.g., RCRA

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North Carolina

North Carolina
Department of Environmental Quality
Brownfields Redevelopment Section

Background

NC Brownfields Property Reuse Act

Problem – Fear of CERCLA Liability Prevented Reuse of Properties

- Options?
  - Reduce liability for everyone thereby discarding Polluter Pays principle?
  - Limit the level of liability for Prospective Developers to make the site suitable for reuse they propose

Solution - NC Brownfields Property Reuse Act of 1997

- Help the redeveloper (liability protections & tax incentives)
- Available ONLY to those who did not cause or contribute to site contamination
- Does not affect State's ability to enforce against polluter
- Protect Public Health and the Environment
- Ensure Enforceability of Land Use Restrictions

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Key Aspects

NC Brownfields Property Reuse Act of 1997

Similar to the 2002 Federal Brownfields Act…

- NPL sites not eligible
- Encourages reuse of land
- Developer must be non-responsible party

But different…

- Developer conducts the work and fund the section by programmatic fees (no state grants)
- AAI didn't exist, so it's not a statutory obligation
- Provides state liability protection for cleanup
- Land Use Restrictions, Liability Protections run with the land
- Provides direct property tax incentive

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Key Aspects

What a Brownfield Agreement Provides

Tax Incentives

- County Level
- Graded Scale
- 5 years, based on added redeveloped value
- Transferrable to future owners

Liability Protection

- Covenant not to sue between DEQ & PD
- Recognized by EPA as Due Care for Innocent Purchaser
- Does not have to be cleaned up to “unrestricted use” levels

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Regulatory Review Process

What does it take?

Brownfields Application (by Prospective Developer)

→ Eligibility Determination of Property and PD

→ Completion of Brownfields Assessment

→ Risk Evaluation, Draft Brownfields Agreement and Brownfields Survey Plat

↓

30 Day Public Notice

→ Recordation of "Notice of Brownfields Property" at Register of Deeds

→ Annual Land Use Restriction Update (LURU) Requirement

→ Continuing Obligations (Redeveloping the Redevelopment)

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Regulatory Review Process

Fee Structure

Agreement

- $45K
- $12 K (Low ECI)
- $8 K (municipality)

Construction

- $10K Annual
- Active Construction

Non-Compliance

- Statutory Requirement
- Cost Recovery
- Not a Penalty

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Expectations

Land Use Restrictions That Run With The Land

NC Uses LURs as “reasonable steps” for managing their Brownfields Property:

- Approved Land Uses
- Prohibitions - groundwater or surface water use, residential, specific chemical usages, etc.
- Environmental Management Plan & Redevelopment Report
- Soil management (caps/import & export/final grade sampling)
- Manage Vapor Intrusion Risk
- May include ongoing monitoring
- Annual LURU

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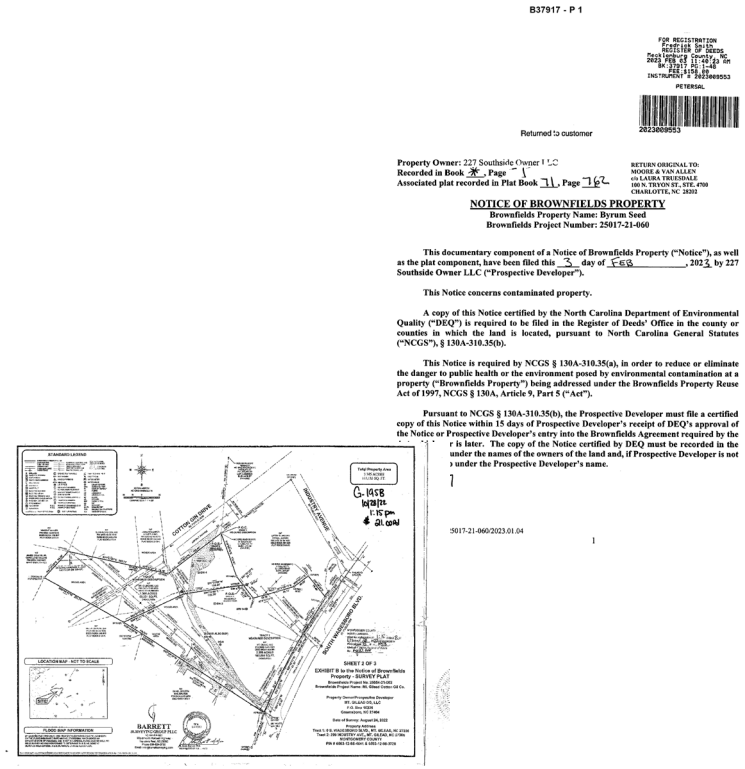
Outcome

The Notice of Brownfields Property

- Notice of Brownfields Property
  - Summary of History, Site Conditions, & LURs
  - Exhibit A – Brownfields Agreement
    - Exhibit 1 – Site Location Map
    - Exhibit 2 – Documentation of Contaminants
  - Exhibit B – Survey Plat
  - Exhibit C – Legal Description
- Land Use Restrictions (LURs)
  - Standard & Determined by risk
  - Apply to all future owners
  - Does not waive local zoning/permitting processes
- Reopeners
  - Violation of a land use restriction
  - Accurate information was not given to Program
  - New information raises risk to unacceptable levels



B37917 - P 1

FOR REGISTRATION
Properties Online
REGISTER OF DEEDS
Mecklenburg County
2023 Jan 04 01:14:48 PM
BK:37917 PG:1-8
FEE:$50.00
INSTRUMENT # 2023009553

PETERSAL

2023009553

Returned to customer

Property Owner: 227 Southside Owner I LC
Recorded in Book [illegible], Page [illegible]
Associated plat recorded in Plat Book 71, Page 762

RETURN ORIGINAL TO:
MOORE & VAN ALLEN
c/o LAURA TRUESDALE
100 N. TRYON ST., STE. 4700
CHARLOTTE, NC 28202

NOTICE OF BROWNFIELDS PROPERTY
Brownfields Property Name: Byrum Seed
Brownfields Project Number: 25017-21-060

This documentary component of a Notice of Brownfields Property ("Notice"), as well as the plat component, have been filed this 3 day of Feb, 2023 by 227 Southside Owner LLC ("Prospective Developer").

This Notice concerns contaminated property.

A copy of this Notice certified by the North Carolina Department of Environmental Quality ("DEQ") is required to be filed in the Register of Deeds' Office in the county or counties in which the land is located, pursuant to North Carolina General Statutes ("NCGS"), § 130A-310.35(b).

This Notice is required by NCGS § 130A-310.35(a), in order to reduce or eliminate the danger to public health or the environment posed by environmental contamination at a property ("Brownfields Property") being addressed under the Brownfields Property Reuse Act of 1997, NCGS § 130A, Article 9, Part 5 ("Act").

Pursuant to NCGS § 130A-310.35(b), the Prospective Developer must file a certified copy of this Notice within 15 days of Prospective Developer's receipt of DEQ's approval of the Notice or Prospective Developer's entry into the Brownfields Agreement required by the r is later. The copy of the Notice certified by DEQ must be recorded in the under the names of the owners of the land and, if Prospective Developer is not under the Prospective Developer's name.

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25017-21-060/2023.01.04

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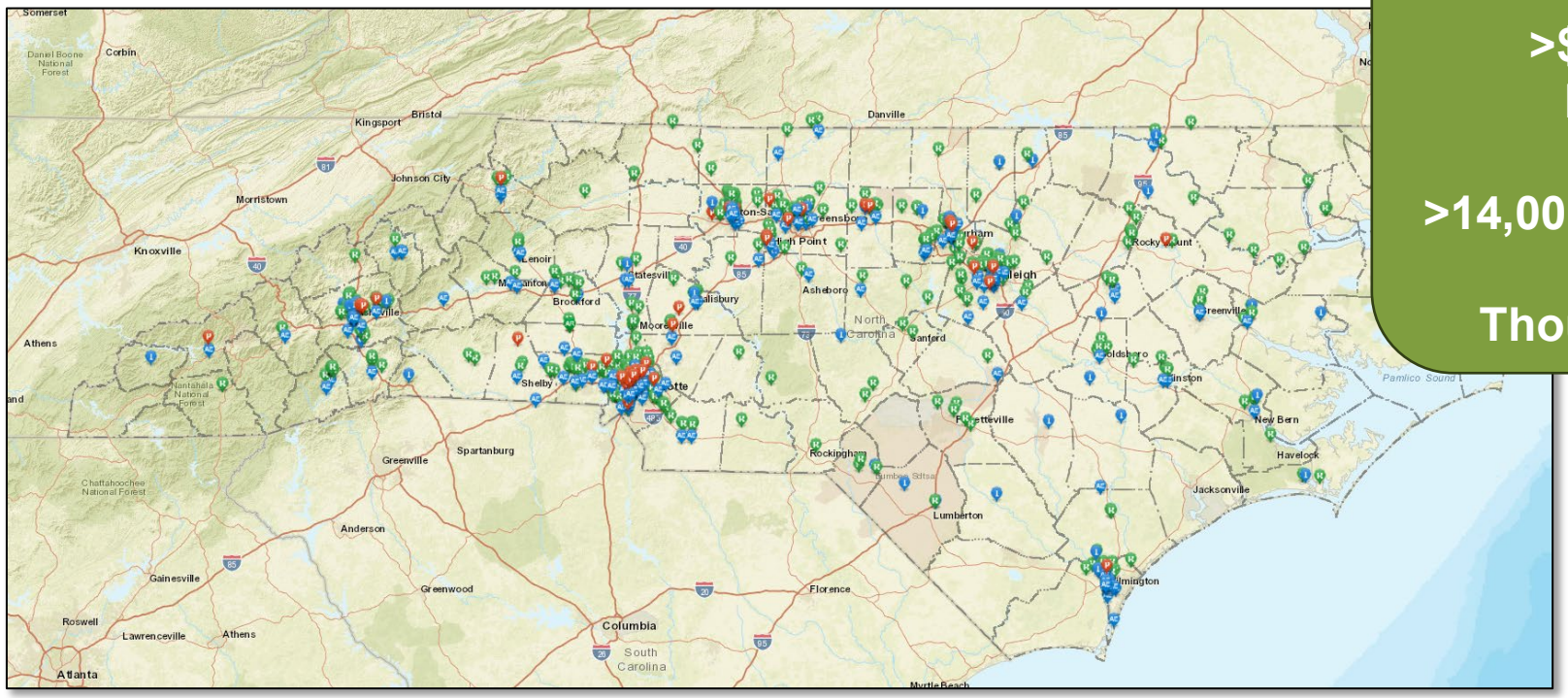
Impact on North Carolina

NC Brownfields



770+ Agreements

>$30 Billion in Investment

>14,000 Acres Recycled

Thousands of jobs

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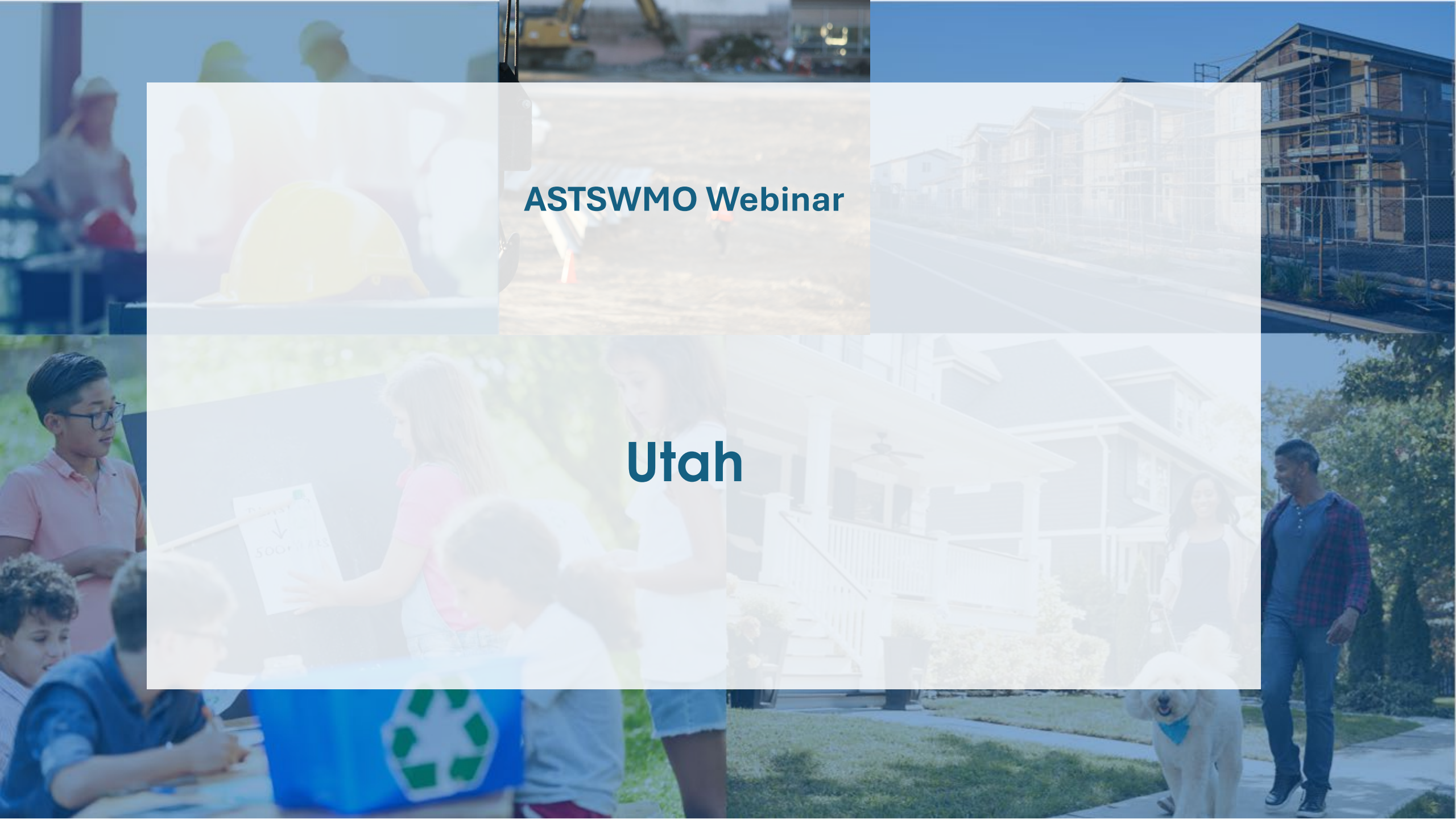

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Utah

Utah DEQ - Enforceable Written Assurance

ASTSWMO Webinar: History of the CERCLA BFPP Liability Defense, Current State Implementation and What's Next

April 30, 2026

by

Bill Rees, VCP/Brownfields Section Manager

Division of Environmental Response and Remediation

Background

- An Enforceable Written Assurance (EWA) is a tool in the DEQ State Response Program and is not the Voluntary Cleanup Program (VCP).
- Authority is in the State's Hazardous Substances Mitigation Act (HSMA) and corresponding rules, which allows issuance of an EWA to a Bona Fide Prospective Purchaser (BFPP). Recipient cannot be a responsible party.
- In short, an EWA is an assurance from the DEQ that grants the holder protection from the imposition of any state law cost recovery and contribution actions under HSMA. The EWA does not provide a liability defense under federal law, only the HSMA.
- Issuance of an EWA affirms the holder's commitment to adhere to Continuing Obligations and Reasonable Steps, which are components of the BFPP defense and included with the EWA letter.
- The EWA is self implementing, unless a party also enters one of the DEQ's oversight programs, such as the VCP.

Key Aspects of an EWA

- The EWA is a pre-acquisition tool used by prospective purchasers, who are not liable for the contamination, to address Recognized Environmental Conditions identified during their All Appropriate Inquiries (AAI) - also known as a Phase I Environmental Site Assessment.

- EWA application is voluntary. There is a formal application process and $500 fee, with an additional hourly charge, consistent with the legislative rate, for personnel time in excess of the application fee.

- To obtain an EWA, a party must meet the requirements of a BFPP and the Evaluation Principles specified in the rule (R311-600).

- The Evaluation Principles include distinct technical criteria the Applicant must meet to ensure the party is sufficiently informed to establish Reasonable Steps.

- An EWA is sometimes required by lenders in Utah as part of a prospective purchaser's land acquisition, if uncertainty exists regarding contamination.

EWA Review Process

- As part of the formal Application review, DEQ evaluates the EWA Applicant's representation that they have met the BFPP requirements - this includes a review of the Applicant's AAI (Phase I ESA).
- DEQ also reviews supporting data/information provided with the Application to determine whether the Evaluation Principles have been met.
- DEQ may request additional information to supplement the review.
- With a complete application, issuance of an EWA takes approximately 60 days so this time frame is typically factored into the Applicant's due diligence and acquisition period.
- Most EWAs are issued at sites with low levels of contamination and implementation of Reasonable Steps ensures there is no unacceptable risk.

Example – Common EWA Reasonable Steps

- If the Applicant encounters contamination or potential contamination in soils or groundwater during construction, utility installation and maintenance, dewatering, general maintenance activities, and/or general use:

  a. Cease the activities and perform sampling as necessary to properly characterize the contamination or potential contamination to evaluate possible impacts.

  b. Notify the Division of Environmental Response and Remediation (DERR) of the sample results if contamination is identified that exceeds Environmental Protection Agency (EPA) Regional Screening Levels, Initial Screening Levels, Vapor Intrusion Screening Levels, or Maximum Contaminant Levels (contaminated material).

  c. Manage and/or dispose of contaminated material that is excavated or removed in a lawful and protective manner, and will otherwise exercise appropriate care with respect to contaminated material.

Commercial Development

An EWA helped facilitate the development of this commercial facility, which has low level groundwater impacts from an adjacent landfill. Reasonable Steps included vapor mitigation and requirements to not access groundwater.

Example – Common EWA Reasonable Steps

- The Applicant will obtain a No Further Action determination through the DERR Leaking Underground Storage Tank Program when the Applicant takes ownership of the Property.

- The Applicant will submit an application to the Department of Environmental Quality for participation in the Voluntary Cleanup Program as soon as reasonably practicable.

- The Applicant will comply with all obligations under the VCP including addressing the nature and extent of contamination, closing all exposure pathways, and submitting and obtaining acceptance of workplans for characterization, remediation and site management.

Hyatt Regency, SLC Convention Hotel – UST Closure

An EWA, with a Reasonable Step to obtain an NFA letter, helped facilitate the cleanup (soil excavation) and development of this hotel in downtown SLC, which was the suspected location of a former gas station.

Mayflower VCP, Wasatch Co.

An EWA, with a Reasonable Step to enter the VCP, led to the cleanup (soil excavation, capping and water management) and initial development of this site and hotel, which is now an extension of the Deer Valley ski resort.

Impacts on the State

- Based on feedback from program applicants, the EWA has been an important tool in the purchase, cleanup and development of property since it provides an assurance from DEQ prior to acquisition, as long as conditions specified in the EWA have been and continue to be met.

- DEQ has issued 176 EWAs since the statute was amended and the rules were adopted in 2005.

- EWAs have helped leverage a number of VCP cleanups and hundreds of millions of dollars (if not more), of redevelopment and investment in Utah.

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California

Background: California Land Reuse and Revitalization Act

- Enacted in 2005
  - Based on 2002 Small Business Liability Relief & Brownfields Revitalization Act
- State-level liability relief pathway for non-polluters
- Removes barriers caused by uncertainty, liability fears

Civil immunity for:

- Liability for cleanup costs imposed by state or 3rd parties
- Contribution or cost recovery claims brought by PRPs
- Claims for natural resource damages

Key Aspects / Site and Applicant Eligibility

Site

- Impacted by hazardous substance release
- Slated for reuse
- Not on the National Priorities List
- Not subject to active enforcement actions
- Investigation and/or cleanup needed

Applicant

- Prospective purchasers, innocent landowners, or contiguous property owners
- Did not cause or contributed to release
- No affiliation with liable parties
- Significant benefit via cleanup of contamination and reuse

Regulatory Review Process

1. Application and eligibility verification
2. Emphasis on significant benefit
3. DTSC oversees work, ensures compliance
4. DTSC is fee for service
   - ~$50,000 - $150,000+
5. Immunities attach at agreement execution
6. Assignment and Assumption for new owners

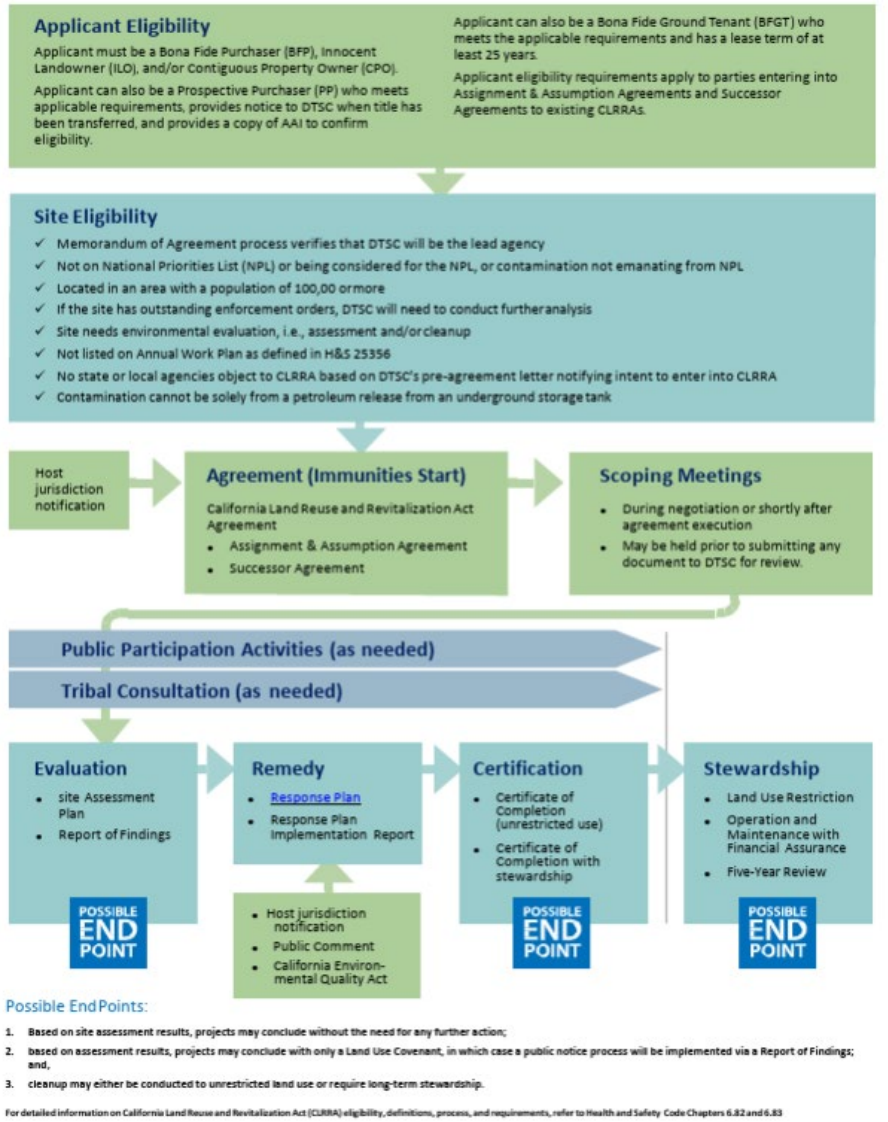
Expectations Under CLRRA

Perform "reasonable steps"

- Due diligence
- Prevent ongoing releases or exposure
- Maintain engineering/institutional controls
- Comply with public participation requirements

Failure to comply will void liability protections

Goal: balance flexibility for redevelopment with accountability for cleanup integrity



Outcomes and Reception

- Widely used by developers and nonprofits for infill projects
- Enhanced certainty for lenders and developers, helping projects secure financing

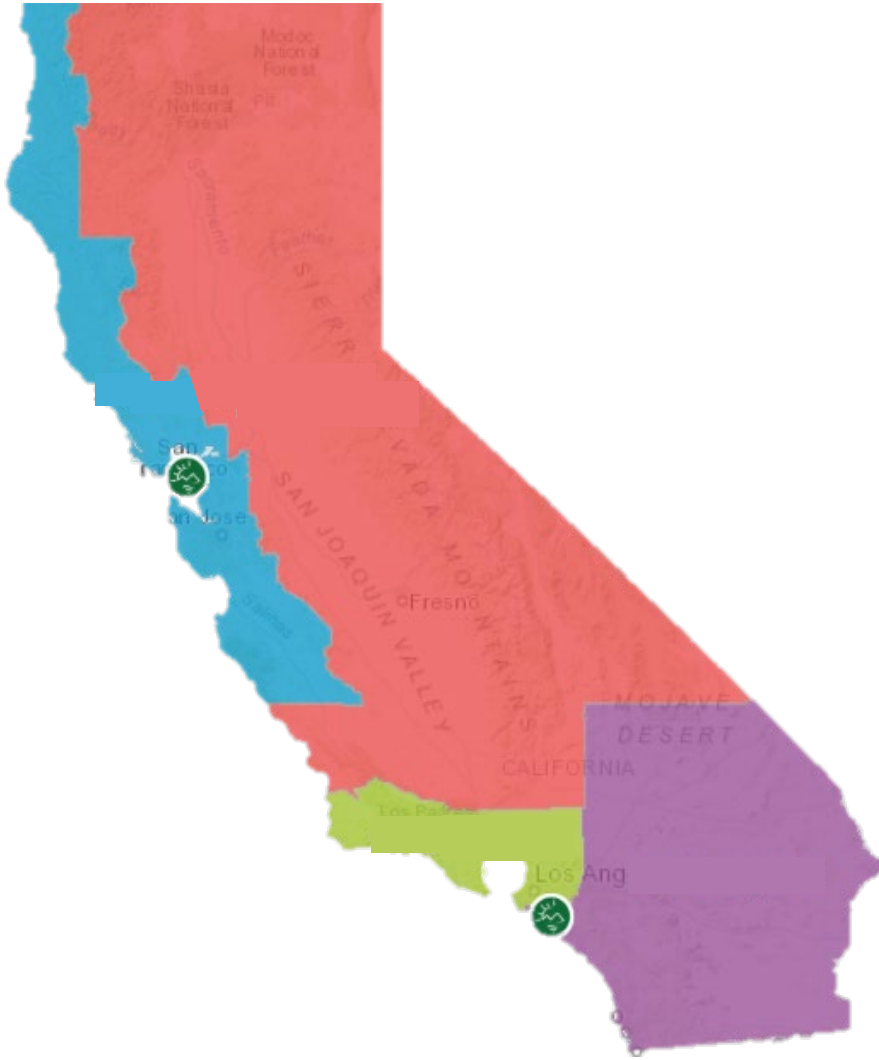
Positive outcomes include:

- Reducing environmental uncertainty and liability
- Faster property transactions
- Increased cleanup-to-reuse conversions
- Encourages investment

Impact on California

Catalyst for Brownfields Redevelopment:

- Hundreds of acres returned to productive use
- Supports California's housing and infill development goals
- Promotes equitable land reuse, aligns with equity objectives
- Builds public-private partnerships and trust in regulatory oversight
- Ongoing evolution



QUESTIONS?

Case Study: Ashley II

- **Claim Overview:**
  - A CERCLA cost-recovery action where the successor-in-interest to the former site owner brought counter claims against parties with past and current connections to the site, including the current landowner (Ashley), alleging additional PRPs.
- **Background:**
  - Ashley purchased portions of historic fertilizer plant operations in Charleston, SC with identified soil and groundwater contamination.
  - Prior to purchase, Ashley commissioned Phase Is for the parcels it intended to purchase. On one of the parcels, the Phase I identified a contaminated wastewater trench and sump system as a REC.
  - Ashley undertook remediation on portions of the site before bringing a CERCLA cost-recovery action, but did not timely address the wastewater system REC.
- **BFPP Defense:**
  - Facing allegations that it was a PRP, Ashley attempted to assert the BFPP defense to liability.
  - As part of the BFPP defense, a person must exercise appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to:
    - (I) stop any continuing release;
    - (II) prevent any threatened future release
    - (III) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance.
    - 42 U.S.C. § 9601(40)(B)(iv)
- **Court Holding:**
  - By failing to properly remediate the wastewater system identified in the Phase I, Ashley did not exercise “appropriate care” with resect to hazardous substances.
  - Ashley was found liable as a PRP, defeating the BFPP defense.

Citation: *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, 791 F. Supp. 2d 431 (D.S.C. 2011), aff'd on other grounds, *PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161 (4th Cir. 2013), cert. denied, 571 U.S. ___, 134 S. Ct. 514 (2013).

Case Study: Hathaway Homes

- **Background:**
  - Hathaway Homes was looking to purchase and subsequently develop low-income housing units in Illinois. As part of development, Hathaway commissioned Phase Is to take advantage of certain tax credits.
  - As a result of three Phase Is that did not identify RECs, Hathaway purchased the site and began initial excavation.
  - Initial site excavation revealed buried foundation and construction debris, which was excavated and stored on-site.
  - Due to a dust complaint, a local solid waste inspector reviewed the excavated materials, identifying transite panels containing asbestos.
  - Hathaway was assessed violations by Illinois EPA, where it agreed to remediate the violations.
  - Excavation work was stopped, and the site was then capped and sold in 2021.
- **Court Proceedings:**
  - Hathaway brought claims of breach of contract, negligence/professional malpractice, and negligent misrepresentation against its consultant.
  - While the two tort claims were dismissed in summary judgment, the breach of contract claim was allowed to proceed.
  - Hathaway's breach of contract claim was based on the consultant failing to comply with the ASTM standard by:
    - Failure to properly review/verify historical site information (even though the consultant reviewed a standard database report)
    - Failure to make reasonable attempts to interview state and/or local government officials (even though FOIA requests were sent)
    - Failure to have entire inquiry conducted by an environmental professional (even though the ultimate report writer was an environmental professional)
- **Conclusion:**
  - While the case was ultimately settled in June 2023, this is an example of the risk developers face when performing environmental diligence; and a cautionary tale for consultants engaged in performing Phase Is.

Citation: Hathaway Homes, Phase II Ltd. P'ship v. Natura Architectural Consulting, LLC, No. 1:22-CV-23, 2023 WL 3816896 (W.D. Mich. Apr. 24, 2023

Questions & Conversation

- What's Next? Is there more guidance coming from EPA? (appropriate care guidance being updated in 2025? Per EPA BF conf)
- To the regulators: Each of you works in a state with a different approach to purchase and redevelopment of property. What aspects of your state's program have worked best?
- To the regulators: Each of your states approaches financial incentives to Brownfields developments differently. In your view, what approaches have worked best? And do you see approaches used in other states that might be worth trying in your state?
- To the regulators: We've seen state Brownfields program step in and provide guidance to the regulated community where the understanding of environmental risks has moved more quickly than new regulatory programs. A good example of this is management of vapor intrusion risk. Do you see other places where states could serve a similar role?
- To the regulators: What are your thoughts on management of environmental risks through look up tables vs. evaluating development projects on a site-by-site basis?
- To Franchina: What does the business community look for when it evaluates management of environmental risk in property acquisition and development?