

The Bona Fide Prospective Purchaser Defense and the use of Comfort Letters

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CERCLA and Brownfield Redevelopment

Historically, CERCLA has been an obstacle to brownfield redevelopment

- Lender Liability
- 3rd Party Defense
- Innocence is no defense—Innocent Landowner Defense



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Limiting Liability

- Bona Fide Prospective Purchaser Defense (“BFPP defense”)
- Comfort Letters



BFPP Defense

To meet the statutory criteria for liability protection, a landowner must meet certain threshold criteria and satisfy certain continuing obligations



INITIAL OBLIGATIONS

- (1) Disposal Occurred Prior to Acquiring
- (2) All Appropriate Inquiry
- (3) Affiliation



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DISPOSAL OCCURRED PRIOR TO ACQUISITION

Requirement #1



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Disposal Prior to Acquisition

- A landowner must prove that all disposal of hazardous substances occurred pre-acquisition
- A tenant must prove all disposal took place prior to commencement of lease

CERCLA 101(40)(A)



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ALL APPROPRIATE INQUIRY

Requirement #2



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All Appropriate Inquiry

- Interviews with past and present owners, operators, and occupants;
- Reviews of historical sources of information;
- Reviews of federal, state, tribal, and local government records;
- Visual inspections of the facility and adjoining properties;
- Commonly known or reasonably ascertainable information; and
- Degree of obviousness of the presence or likely presence of contamination at the property and the ability to detect contamination

CERCLA §§ 101(40), 101(35)
40 C.F.R. 312

Mem. from EPA on Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability (Mar. 6, 2003), at 4 – 5.



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All Appropriate Inquiry

- Inquiries must be conducted or updated within one year of the date of acquisition
- Certain aspects on the inquiry must be updated if AAI's are conducted more than 180 days prior to the acquisition date

40 C.F.R. § 312



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All Appropriate Inquiry

- In the case of abandoned properties, the Final Rule requires the inquiry of the environmental professional to include interviews with one or more owners or occupants of neighboring or nearby properties.
- More than a Phase I ESA may be required vs you may have to rein in your environmental consultant



All Appropriate Inquiry

- Don't assume your consultant knows what's required for an ASTM compliant Phase I ESA



AFFILIATION

Requirement #3



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Affiliation

- Party must not be potentially liable or affiliated with any person who is potentially liable for response costs
- “affiliation” not explicitly defined, but appears to be broadly interpreted
 - Direct and indirect familial relationships
 - Many contractual, corporate, and financial Relationships

CERCLA §§ 101(40)(H)

Mem. from EPA on Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability (Mar. 6, 2003), at 5 - 6.



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Affiliation

- Focus is on relationships created to avoid CERCLA liability
- EPA will consider:
 - Whether or not the BFPP is otherwise a potentially reliable party (PRP)
 - Whether the BFPP is in fact the same entity as a PRP
 - Whether the BFPP is the result of a reorganization of a liable party through bankruptcy or other corporate restructuring
 - Whether a party with whom the BFPP is associated is an actual PRP

CERCLA § 101 (40)(H)

Mem. from EPA on Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability (Mar. 6, 2003), at 5 - 6.



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Affiliation

- Exceptions
 - Instruments by which title to the facility is conveyed or financed
 - Contracts for the sale of goods or services
- Generally exempt relationships include:
 - Relationships at other properties
 - Post-acquisition relationships
 - Relationships created during title transfer
 - Relationships established between a tenant and owner during leasing process

CERCLA § 101(40)(H)

Mem. from EPA on Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability (Mar. 6, 2003), at 5 - 6.

Mem. from EPA on Enforcement Discretion Guidance Regarding the Affiliation Language of CERCLA's Bona Fide Prospective Purchaser and Contiguous Property Owner Liability Protections (Sep. 21, 2011), at 6.



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Continuing Obligations

- (4) Complying with Restrictions & Controls
 - (5) Reasonable Steps
 - (6) Cooperation, Assistance, and Access
 - (7) Compliance with Information Requests
 - (8) Providing Legally Required Notices



COMPLYING WITH RESTRICTIONS & CONTROLS

Requirement #4



Complying with Restrictions and Controls

- Must be in compliance with any land use restrictions established or relied on in connection with a response action

CERCLA § 101(40)(F)

Mem. from EPA on Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability (Mar. 6, 2003), at 6 – 8.



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Complying with Restrictions and Controls

- Institutional Controls:
 - Administrative and legal controls that minimize the potential for human exposure to contamination, and
 - Protect the integrity of remedies by limiting land or resource use and/or providing information to modify behavior

CERCLA § 101(40)(F)

Mem. from EPA on Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability (Mar. 6, 2003), at 6 – 8



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Complying with Restrictions and Controls

- Required to comply even if restrictions have not been properly implemented
 - Control is never, or has yet to be, implemented;
 - Property owner or other using property impede the effectiveness of a control and the party responsible for enforcement neglects to take sufficient measures to bring those persons in compliance; or
 - A court finds those controls unenforceable

CERCLA § 101 (40)(F)

Mem. from EPA on Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability (Mar. 6, 2003), at 6 - 8.



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Complying with Restrictions and Controls

- Must not impede the effectiveness or integrity of any institutional control
 - For example:
 - EPA and state programs often use notices to convey information regarding site contamination rather than actually restricting land use.
 - If an owner removes notices from land records, the removal would impede the effectiveness of an institutional control

CERCLA § 101 (40)(F)

Mem. from EPA on Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability (Mar. 6, 2003), at 6 - 8.



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REASONABLE STEPS

Requirement #5



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Reasonable Steps

- Will be a site-specific analysis aimed to:
 - Stop continuing releases
 - Prevent threatened future releases, and
 - Prevent or limit, human, environmental, or natural resource exposure to earlier hazardous substance release.

CERCLA § 101(40)(D)

Mem. from EPA on Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability (Mar. 6, 2003), at 9 – 12.



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Reasonable Steps

- The pre-purchase inquiry will most likely inform the BFPP as to the nature and extent of contamination
- This requirement only relates to contamination for which the BFPP is not responsible
 - More than reasonable steps will likely be required from the landowner if there is new hazardous substance contamination for which he is responsible

CERCLA § 101 (40)(A)

Mem. from EPA on Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability (Mar. 6, 2003), at 9 – 12



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Reasonable Steps

- EPA or IDEM may provide a comfort/status/continuing obligation letter addressing reasonable steps at a specific site

Stay tuned for more information from Kyle Hendricks on this subject!

62 Fed. Reg. 4,624 (1997)

Mem. from EPA on Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability (Mar. 6, 2003), at 9 – 12.



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COOPERATION, ASSISTANCE, AND ACCESS

Requirement #6



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Cooperation, Assistance, and Access

- BFPP must provide full cooperation, assistance, and access to persons authorized to conduct response actions.

CERCLA § 101 (40)(E)

Mem. from EPA on Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability (Mar. 6, 2003), at 12.



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COMPLIANCE WITH INFORMATION REQUESTS

Requirement #7



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Compliance with Information Requests

- In particular, EPA expects timely, accurate, and complete responses from all recipients of Section 104(e) information requests

CERCLA § 101 (40)(G)

Mem. from EPA on Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability (Mar. 6, 2003), at 13.



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PROVIDE LEGALLY REQUIRED NOTICES

Requirement #8



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Providing Legally Required Notice

- BFPP must provide all legally required notices with respect to the discovery or release of any hazardous substance at the facility
- Ensures that EPA and others are made aware of hazardous substance release in a timely manner
- BFPP has the burden of ascertaining what notices are legally required in a given instance
- Regions may require landowners to self-certify that they have provided or will provide all legally required notices

CERCLA § 101 (40)(C)
Mem. from EPA on Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability (Mar. 6, 2003), at 13.



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BFPP Decisions



BFPP Decisions

- Importance of meeting and documenting all 8 BFPP Elements
- BFPP Defense is burden-bearing, fact-specific & self-executing



Ashley II

- Current owner of Brownfield site (Ashley) brought suit under CERCLA § 107 (42 U.S.C. § 9607) to recover remediation costs from former site owners
- Defendant and former site owner (PCS Nitrogen) counterclaimed, contending owner had also contaminated site
- Ashley raised BFPP defense

Ashley II of Charleston, LLC v. PCS Nitrogen, Inc., 791 F. Supp. 2d 431 (D.S.C. 2011), aff'd, 714 F.3d 161 (4th Cir. 2013).



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Ashley II

- Ashley acquires 27.62 acres from Holcombe and Fair in 2003 for development
- In the purchase contract, Ashley **indemnifies Holcombe and Fair for environmental liabilities**
- EPA information requested in 2004 – Ashley collected 452 soil samples
- 2006: Ashley discovers stained soil and trash pile on Site
 - Tests for soil, but only for lead and arsenic
 - Fails to remove trash pile



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Ashley II

- Ashley also acquires 2.99 acres from Allwaste in 2008:
- Environmental assessment - **identifies sumps as recognized environmental conditions (RECs)**
- Demolition of above-ground buildings -- **runoff collects in pads, sumps and trench**
- Investigation of sumps in 2009:
 - Investigators observe water level and analyze depth of cracks in sumps, but do not take underground samples
 - Conclude water loss due to evaporation



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BFPP Analysis of Ashley II

Was Ashley able to prove all 8 BFPP Criteria?

- 1) Disposal occurred prior to acquisition – **No** (accumulation in sumps, failure to test)
- 2) All Appropriate Inquiry – **Yes**
- 3) Affiliation – **No** (indemnity and discourage EPA enforcement against prior owner)
- 4) Compliance with Continuing Obligations and Requests – **Yes**
- 5) Reasonable Steps (Care) – **No** (failure to clean and fill sumps)
- 6) Cooperation, Assistance, and Access – **Yes**
- 7) Compliance with Information Requests – **Yes**
- 8) Provided Legally Required Notices – **Yes**



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Ashley II 4th Circuit Appeal

- Court of Appeals affirmed lower court.
- Ashley “failed to demonstrate that it exercised ‘appropriate care’ at the site.” Failure of one factor was enough to deny Ashley BFPP protection.
- Court ***did not*** address two other BFPP elements:
 - Improper affiliation due to indemnification of PRPs
 - Proof that all disposal of hazardous substances occurred prior to site acquisition.



3000 E. Imperial

- Current owner sought recovery under CERCLA
- Defendants counterclaimed under CERCLA seeking contribution and cost recovery
- Owner/Plaintiff raised BFPP defense

3000 E. Imperial, LLC v. Robertshaw Controls Co., No. CV 08-3985 PA (Ex.), 2010 WL 5464296 (C.D. Cal. Dec. 29, 2010).



3000 E. Imperial

- Former manufacturing plant, various munitions
 - underground storage tanks (USTs) leaked and contaminated soil
- 2006: Imperial (Plaintiff and current owner) purchases Property
 - Aware of chemical contamination
 - Discovers benzene and TCE in the soil and groundwater
 - Demolishes above-ground buildings



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3000 E. Imperial

- Issue was whether Imperial took “reasonable steps aka due care” post acquisition.
 - 2007: Sampled USTs; Discovered chemicals in samples; Emptied contents from USTs
 - 2009: Excavated USTs and discovered oily substance
- Defendant’s Argument: Waiting 2 years to excavate USTs was unreasonable delay



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3000 E. Imperial

Eight BFPP Requirements:

- 1) Disposal occurred prior to acquisition – **Yes**
- 2) All Appropriate Inquiry – **Yes**
- 3) Affiliation – **Yes**
- 4) Compliance with Continuing Obligations and Requests – **Yes**
- 5) Reasonable Steps (Care) – **Yes**
- 6) Cooperation, Assistance, and Access – **Yes**
- 7) Compliance with Information Requests – **Yes**
- 8) Provided Legally Required Notices – **Yes**

• Since Plaintiff had the USTs emptied soon after learning that they contained a hazardous substance, the Court found that the Plaintiff took reasonable steps to stop any continuing leak or to prevent any future leaks



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SPS Limited Partnership LLLP

- Maryland District Ct. interpretation of “affiliation”
 - Former owner subsidiary owns 15% of “select above-grade assets” of current owner
 - Court held no affiliation for purposes of BFPP
 - ownership is only 15% of “select above-grade assets” is not sufficient to consider the two entities affiliated
 - No evidence sale was done to avoid environmental liability

SPS Ltd. P'ship LLLP v. Sparrows Point, LLC, No. CV JFM-14-589, 2017 WL 3917153, at *1 (D. Md. Sept. 6, 2017)



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Now, for more on...

COMFORT LETTERS



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Informal 2013 survey of states re comfort letters

State	Yes	No	Alternative
Alaska		x	Prospective Purchaser Agreement
California	x		Occasionally may issue letter, but frowned upon
Colorado		x	
Delaware	x		
Georgia	x		
Hawaii	x		
Idaho		x	
Illinois		x	
Indiana	x		
Iowa	x		
Kentucky		x	Notice of Eligibility
Louisiana	x		
Maryland		x	
Michigan		x	Baseline Environmental Assessment
Mississippi		x	Brownfield Agreement Letter
Missouri		x	
Nevada		x	

- Delaware issues a Brownfield Certification Letter.
- Georgia issues a Limitation of Liability Certification.
- Louisiana will issue a Comfort Letter if one is requested but tries not to issue these letters.
- Maryland's Brownfields program is currently inactive.
- At one time, Nevada did offer Comfort Letters but no longer does so.



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Informal 2013 survey of states re comfort letters

State	Yes	No	Alternative
New Hampshire		x	Covenant Not to Sue/Validation of Prospective Purchaser
New Jersey		x	
New Mexico		x	Voluntary Remediation Program/Covenant Not to Sue
New York		x	Release from Liability
North Carolina	x		
North Dakota	x		
Ohio		x	Voluntary Action Program
Oklahoma		x	
Oregon		x	Prospective Purchaser Agreement under State Law
Pennsylvania		x	Buyer-Seller Agreement
Rhode Island		x	Remedial Decision Letter/Remedial Agreement
South Carolina		x	
South Dakota	x		
Tennessee		x	No Further Action Letter
Texas		x	
Utah		x	Enforceable Written Assurance
Vermont	x		
Virginia		x	Voluntary Remediation Program
West Virginia	x		
Wyoming	x		

-Wyoming has not received any requests for a Comfort Letter but would likely issue one if asked.



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Environmental Stewardship. Economic Development.



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Who we are

- Indiana Finance Authority (IFA) – Environmental Programs
- Created by 2005 legislation (SEA 578); IC 13-11-2-19.3
- Works in partnership with U.S. EPA
- Funded by state appropriations & federal funds



What we do

- **Voluntary - not regulatory**
- **No fees**
- **Non-responsible parties**
- **Property transfers and/or financing**
- **Use existing laws, regulations, and/or policies**
- **Assistance**
 - Financial
 - Grants
 - Loans
 - Legal
 - Comfort Letters
 - Technical
 - Closure Letters
 - Comment Letters
 - Educational
- **Coordination**
 - U.S. EPA
 - Other IDEM Programs
 - Voluntary Remediation Program
 - State Cleanup



Legal Comfort Letters

- **No cost**
- **Not a responsible party**
- **Comfort Letter:**
 - o Qualify for an applicable exemption to liability found in Indiana law or IDEM policy; not a legal release from liability
 - government entity
 - creditor, lender, fiduciary
 - not the statutory owner of a UST
 - nonprofit corporation
 - Bona Fide Prospective Purchaser (BFPP) and All Appropriate Inquiry (AAI)
 - Contaminated Aquifer or Property containing contaminated aquifer
 - o Explains the applicable liability exemption, or defense, or IDEM's exercise of enforcement discretion per IDEM policy.



Comfort Letter BFPP

- **Bona Fide Prospective Purchaser (BFPP) Defense**
 - Meet AAI requirements – Phase I ESA (ASTM1527-13)
 - Self Implementing - Not needed
 - Can be issued after purchase
 - No RECs or Historical RECs and/or **no** contamination
 - o Site does not qualify for a Comfort Letter
 - o Comment Letter
 - Due Care and Reasonable Steps
 - Phase II Investigation
 - o Identified RECs should be investigated
 - o IBP to comment on due care/continuing obligations
 - o No contamination – Comment Letter



Comfort Letter - BFPP Phase I ESA

- **Phase I Environmental Site Assessment (ESA)**
 - ASTM1527-13 – AAI compliant
 - One year shelf life
 - Viability date: **180 days** from the earliest of the date of the following conducted activities **prior to closing**:
 - interviews
 - liens
 - government record reviews
 - visual inspections
 - re-declaration by the Environmental Professional



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Comfort Letter - BFPP Phase I ESA

- **User Questionnaire**
 - Federal and state regulations require the user to provide to the environmental professional (EP) material/information (if available) that may assist the EP in identifying recognized environmental conditions (RECs). Failure to provide this information could result in a determination that "*all appropriate inquiry*" is not complete.
 - ASTM E1527-13 Standard (Appendix X3) provides a sample user questionnaire to assist the EP and user to meet the requirements of the federal and state regulations.
 - Failure to provide information listed in the User Questionnaire can question whether the user ever made the appropriate internal inquiry.
 - Program recommends a signed and dated form.



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Comfort Letter - BFPF Phase I ESA

- **RECs vs CRECs vs HRECs**

- **Recognized Environmental Condition**

"...the presence or likely presence of any hazardous substances or petroleum products in, on, or at a property: (1) due to any release to the environment; (2) under conditions indicative of a release to the environment; or (3) under conditions that pose a material threat of a future release to the environment."

- **Controlled REC**

"...a recognized environmental condition resulting from a past release of hazardous substances or petroleum products that has been addressed to the satisfaction of the applicable regulatory authority (for example, as evidenced by the issuance of a no further action letter or equivalent, or meeting risk-based criteria established by regulatory authority), with hazardous substances or petroleum products allowed to remain in place subject to the implementation of required controls (for example, property use restrictions, activity and use limitations, institutional controls, or engineering controls)."

- **Historical REC**

"...a past release of any hazardous substances or petroleum products that has occurred in connection with the property and has been addressed to the satisfaction of the applicable regulatory authority or meeting unrestricted use criteria established by a regulatory authority, without subjecting the property to any required controls (for example, property use restrictions, activity and use limitations, institutional controls, or engineering controls)."



Comfort Letter - BFPF Phase I ESA

- **Other ASTM Terms**

- **De Minimis Condition**

"...a condition that generally does not present a threat to human health or the environment and that generally would not be the subject of an enforcement action if brought to the attention of appropriate governmental agencies. Conditions determined to be de minimis conditions are not recognized environmental conditions nor controlled recognized environmental conditions."

- **Common Non-Scope Issues**

- Asbestos Containing Materials (ACM)
 - Lead-Based Paint (LBP)
 - Business Environmental Risks (BERs) – often misused or not used



Comfort Letter - BFPP VEC

■ Vapor Encroachment Condition (VEC)

- *migrate/migration*—for the purposes of this practice, “migrate” and “migration” refers to the movement of *hazardous substances* or *petroleum products* in any form, including, for example, solid and liquid at the surface or subsurface, and **vapor** in the subsurface. See Note 4.
 - NOTE 4—Vapor migration in the subsurface is described in ASTM Guide E2600-15; however, nothing in this practice should be construed to require application of the Guide E2600 standard to achieve compliance with all appropriate inquiries.
- Vapor intrusion must be considered the same as soil and ground water
- Vapor intrusion discussions are often left out of Phase I ESAs
- Vapor intrusion drives most cleanups
- Best interest of all parties to evaluate the presence or likely presence of vapor-phase chemicals of concern in soil at the subject site that might result from contaminated soil and/or ground water either on or near the subject site as part of an AAI-compliant Phase I ESA
- As a part of the Phase I ESA, the Program would like to see the report clearly state a determination or conclusion as to whether there are potential VECs and/or existing contaminant vapor migration pathways at the subject site.



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Comfort Letter - BFPP Phase II ESA

• Phase II Environmental Site Assessment (ESA)

- Investigate RECs identified in the Phase I ESA
 - Soil borings
 - Ground water monitoring wells
 - Soil Gas
 - Indoor Air
 - Exposure Risks
 - Soil - direct contact residential, commercial/industrial, excavation worker scenarios
 - Ground water – drinking and vapor
 - Soil gas – vapor outside building or beneath slab
 - Indoor air – vapor in the building
 - More information, better letter



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Comfort Letter Contaminated Aquifer

- Non-Rule Policy - *Property Containing Contaminated Aquifers W0047-NPD1997*
- Indiana Code § 13-14-1-11.5(a)
- **Applicant must provide evidence**
 - Established Site history – No on-site source
 - Data from on-Site wells/GW results, not a source of same contamination coming from off-Site source
 - Data from off-site suspect/known source
 - **Must** know ground water flow direction



Comfort Letter Lender

- **Lender Liability**
 - Issued to an entity whose sole role is that of a fiduciary agent – not involved in day-to-day management
 - Title search required to determine ownership history
 - No Phase I needed
 - No ERC generated
 - Provides guidance on potential foreclosure
 - Can issue to lender that acquired site through foreclosure
 - Must have followed post-foreclosure activities
 - ERC may be issued in this instance



Comfort Letter Submittals

All Comfort Letter requests should include a **completed**:

1. *Comfort/Site Status Letter Request Form*,
2. *Comfort/Site Status Letter Supplemental Information Request Form*, **AND**
3. *Comfort/Site Status Letter Submittal Checklist*, **AND**

All supporting documentation to ensure your request is complete; an incomplete submittal will delay staff review of your request. **Please submit a paper copy and CD (or other secure electronic transmission) of each form/document/report as part of your request.** Current forms can be found here:

<https://www.in.gov/ifa/brownfields/2364.htm>



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Comfort Letter Common Request Issues

- Entity requesting Comfort Letter:
 - Not on application
 - Not listed as having reliance in the Phase I ESA
 - User Questionnaire not completed by an authorized representative
 - Not created yet (Program checks Secretary of State's database)
- Phase I and/or Update out-of-date
- Deed or legal description does not cover and/or apply to the Site (in whole or part) (Reviewed by IDEM GIS)
- No vapor discussion
- No sampling data –cannot determine Due Care Provisions
- Contaminated Aquifer – no ground water data
- Small Business Administration
 - Not all comfort letter are the same
 - Decisions made in centralized location



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Technical Closure Letters

- **Site Status Letter**
 - Non-responsible party
 - Demonstrate **current** contaminant levels substantially meet IDEM screening levels
 - Concludes that current site conditions do not present a threat to human health or the environment and that IDEM does not plan to take or require a response action at the brownfield site
 - Does not address the potential liability
- **No Further Action (NFA)**
 - Non-responsible and responsible parties
 - Only for incidents such as spills
 - Petroleum sites and an occasional hazardous site
 - Similar to the Site Status Letter



Technical Comment Letter

- **Technical review**
 - No RECs identified in Phase I
 - Phase II does not identify contamination
 - Assistance for the following:
 - Further investigation
 - Remediation Work Plan



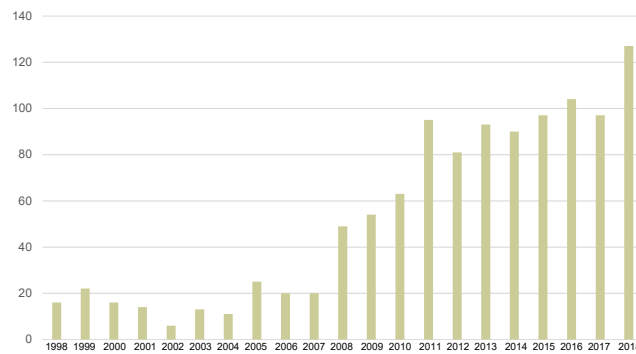
Other Letters

- **Reasonable Steps**
 - Updates Comfort Letters to address obligations of a new purchaser
 - Purchaser provides additional investigation
 - Can provide revision of ERC
- **Petroleum Eligibility**
 - Access federal funds
 - Requested as eligibility for assessment and remediation sites using U.S. EPA funds
- **Brownfields Determination**
 - Access federal funds
 - Documents conditions if a site is a brownfield for HUD funding and some state funding
 - This federal funding is no longer viable
 - If future funding is available for brownfield consideration, then the Program will issue again
- **Project Status**
 - To close out funding such as 128(a) \$ from U.S. EPA
 - To address on-going landfill issues
 - To explain status of site conditions



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Comfort/Closure Letter Issuance History 1998 to 2018



Totals	SFY
16	1998
22	1999
16	2000
14	2001
6	2002
13	2003
11	2004
25	2005
20	2006
20	2007
49	2008
54	2009
63	2010
95	2011
81	2012
93	2013
90	2014
97	2015
104	2016
97	2017
127	2018

1,113 TOTAL



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Environmental Restrictive Covenant (ERC)

- **Land Use Restrictions**
 - Drafted by the Program
 - Recorded/Attached to property deeds
 - Detail property conditions
 - Contaminants – levels and locations
 - Affected media – soil, ground water, surface water, soil gas, and/or indoor air
 - Describe land use restrictions deemed necessary for proposed use - residential, commercial, industrial
 - Modifications can be made as property conditions change or more information is gathered



Comfort Letter Timeline & Process

- Letters are typically issued within a **minimum of 120 days** from the time the Program receives all pertinent documentation and information.
- Length of the time varies based on:
 - the number of other requests already in the queue
 - the volume of data/reports associated with the subject site that require review
- Reminder, BFPP liability defense is self-implementing, a stakeholder need not have an IDEM Comfort Letter in hand at the time of site transfer/closing to be eligible for the liability defense.



Success Stories



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Former Tube Factory Warehouse Indianapolis

Former Tube Processing
Big Car Collective – The Tube
BFPP Comfort Letter
ERC - ground water restriction

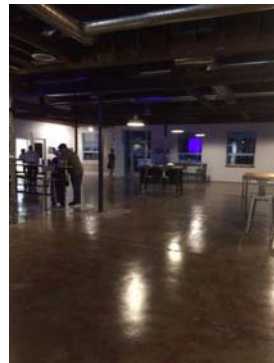
\$600,000
2.76 acres
12,000 ft²



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Former Tube Factory Warehouse Indianapolis



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Penrose on Mass Indianapolis

Fire Department & Credit Union
501/555 N. New Jersey Street
Indianapolis, Marion County

- **Redevelopment Plans**
 - \$50 million/450,000 sq. ft.
 - 236 apartments,
 - 40,000 square feet of retail space and a
 - 379-space parking structure
- **Significant Historical Uses**
 - auto repair shop
 - machine shop
 - cleaners
 - printing companies
- Ground water contaminated with chlorinated solvents



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Penrose on Mass Indianapolis

VAPOR INTRUSION WORKPLAN (AUGUST 2016)

- Engineering Evaluation
 - ventilation system design for proposed building subsurface parking area
 - IDEM concurred that the proposed design should eliminate the VI exposure risk
- Confirmation Sampling Plan before occupancy



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Penrose on Mass Indianapolis

VAPOR INTRUSION WORKPLAN (AUGUST 2016)

- Approved September 2016
- Conditional Residential Use/Land Use Restrictions
 - Not occupy the newly-constructed building until determining the presence or absence of VI
 - Not use the ground water
 - Document findings per the VI Work Plan



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Former Aztec/ Crown Laundry Indianapolis

Site Information

- 2.6-acre five parcel site in Indianapolis
- Laundry from early 1900s - 1970s (later auto repair shop)
- 2007 – 2011 investigations confirmed chlorinated and petroleum contamination in ground water and soil
- 2011 EPA emergency removal of drums, containers, 13 underground storage tanks, and ~ 13,580 tons of contaminated soil

IBP Support (multiple letter recipients)

- 2010 Comfort Letter to city and land bank to facilitate remediation
- 2012 Supplemental Environmental Project (SEP) funding - \$23,760
- 2013 Comfort Letter to city
- 2013 & 2014 128(a) site assessment funding - \$47,010
- 2015 Comfort & Closure Letter to Phase I developer
- 2016 Brownfields Determination Letter to developer in support of tax credit application for Phase II
- 2017 Comfort Letter to Phase II developer

Summary (to date): 5 letters issued and \$70,770 invested



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Former Aztec/ Crown Laundry Indianapolis

Three Phases of Redevelopment

1. 2016 Grand opening held for 30-unit Oxford Place Senior Apartments – Phase I
~ \$7.5M total project costs
\$570,032 Rental Housing Tax Credits (RHTCs), \$356,181 Development Fund Loan
2. 2018 planned opening 39-unit Oxford Integrated Apartments – Phase II
~ \$7.4M anticipated total project costs
\$557,814 RHTCs, \$490,000 Housing Trust Fund funding, \$500,000 Development Fund Loan
3. 2019 planned opening apartments and retail space – Phase III

**Return on IFA Investment (to date)
\$106:\$1**



Phase I Oxford Place Senior
Apartments



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Financial

- Phase I Environmental Site Assessments
 - Available to municipalities
 - Bid to pool of consultants
- 128a Funding
 - U.S. EPA
 - Municipalities
 - Assessment or Cleanup-Program prefers assessment due to time constraints and funding
- Petroleum Orphan Site Initiative (POSI)
 - Municipalities
 - Responsible Parties & New Owners prove inability to pay
- Supplemental Environmental Project (SEP)
 - IDEM Enforcement
 - In lieu of penalty or penalty reduction
 - Set aside for brownfields
- Loans
 - Revolving Loan Fund (RLF)
 - State Revolving Loan Fund (SRF)
 - Low Interest Loan (LIL)

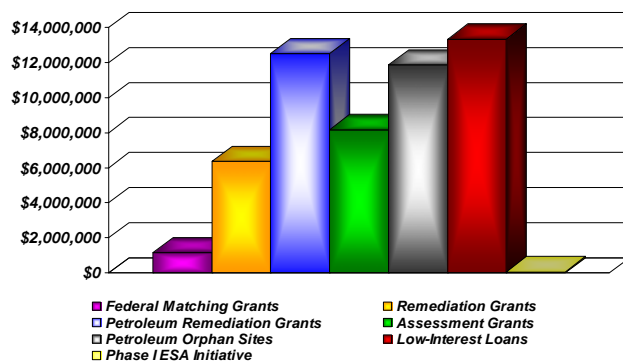


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State Funding Awards FY 1997-2018

\$53,484,750



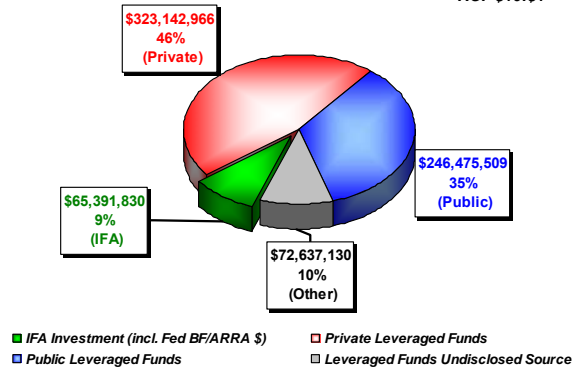
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Project Funding Mix 1997 - 2018

Actual Funds Leveraged for IFA-funded Projects

ROI \$10:\$1

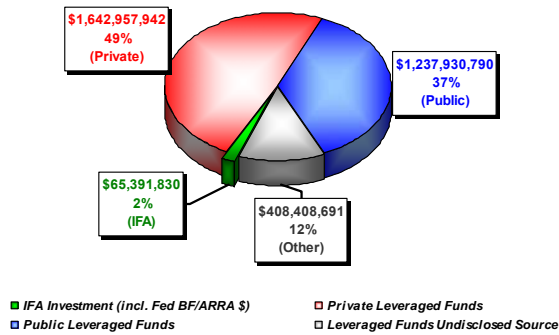


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Project Funding Mix 1997 - 2018

Actual Funds Leveraged for All Projects

ROI \$50:\$1



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Check out the Indiana Brownfields Program web site at: www.brownfields.in.gov

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Environmental Stewardship. Economic Development

