What are the risks? Managing Potential Environmental Liability at a Brownfield Site

Meredith Gramelspacher,
General Counsel, Indiana Brownfields Program

Thomas Baker, Attorney,
Hatchett & Hauck LLP

Introductions

- Meredith Gramelspacher,
  - General Counsel, Indiana Brownfields Program
- Thomas Baker, Attorney,
  - Hatchett & Hauck LLP

Issue: Fear of potential liability is often cited as a primary obstacle to the redevelopment and reuse of a brownfield

Reality: "At least 99% of all the potential brownfield properties across the country will *not* require federal EPA action." *EPA Brownfields Handbook: How to Manage Federal Environmental Liability Risks*, p.12. The reality is that EPA has taken action at very few brownfield properties.

Scope of this session

- Review federal & state laws that most affect cleanup and reuse of brownfields
- Review most relevant statutory exemptions & defenses to liability found in federal & state law
- Review state policies designed to provide comfort to parties at risk of taking on liability through redevelopment of a brownfield site

Statutes that most commonly affect brownfield sites

Federal: CERCLA (Superfund)
RCRA (to a lesser extent)

State: State Cleanup (state Superfund)
Petroleum Releases Law
Leaking Underground Storage Tank (LUST) Corrective Action
Voluntary Remediation Program (VRP)

CERCLA- *Comprehensive Environmental Response, Compensation and Liability Act*, 42 U.S.C. § 9601 et. seq. (1980)

CERCLA authorizes EPA to:

- Respond to environmental emergencies involving hazardous wastes or pollutants and contaminants
  - Generally not triggered by municipal solid waste
  - "Pollutant or contaminant"
    - Broadly defined as any substance that is reasonably anticipated to cause illness or deformation in any organism
    - Does <u>not</u> include petroleum or natural gas
    - E.g., chlorides, anthrax

Statutes that most commonly affect brownfield sites- CERCLA

CERCLA authorizes EPA to:

- Initiate investigation and cleanups
- Take enforcement action against responsible parties
- Also authorizes State to recover its costs
- Trust fund financed by taxes on the manufacture and import of chemicals and petroleum

Statutes that most commonly affect brownfield sites- CERCLA

PRPs (potentially responsible parties) are liable for cleanup costs at site (*See* § 107) PRPs include:

- Current owners and operators
- Owners and operators of the facility at the time of disposal of hazardous substances
- Generators of the hazardous substances or those that arranged for disposal
- Transporters of the hazardous substances, if they selected the site

Statutes that most commonly affect brownfield sites - CERCLA

Liability is:

- Strict: liable even if did not act negligently or in bad faith
- Joint & several: may be held liable for entire cost of cleanup unless a party can show injury or harm at the site is divisible
- Retroactive: liable even if release occurred pre-enactment in 1980

Applicable regulation: National Contingency Plan (NCP), 40 C.F.R. Part 300

- PRPs are ineligible to receive grants or loans from U.S. EPA or the state unless they qualify for liability protection through an exemption

RCRA- *Resource Conservation and Recovery Act*, 42 U.S.C. § 9601 et. seq. (1976)

RCRA authorizes EPA to:

- Control hazardous waste from the "cradle-to-grave" including the generation, transportation, treatment, storage, and disposal of hazardous waste (Subtitle C)
- Sets forth a framework for the management of non-hazardous solid wastes (Subtitle D)
- Sets forth management requirements for underground storage tanks (USTs) that contain petroleum or hazardous substances (Subtitle I)
- Programs are mostly implemented at state level

Statutes that most commonly affect brownfield sites - RCRA

- Focuses only on active and future facilities and does not address abandoned or historical sites
- Operation of RCRA facilities (those permitted to treat, store or dispose) can result in release of hazardous wastes into soil, groundwater, surface water and air
- Subtitle C requires investigation and cleanup of hazardous waste releases (corrective action program)
  - Scope of substances covered by CERCLA is broader
  - CERCLA cleanup will cover RCRA, but not visa versa

Statutes that most commonly affect brownfield sites - RCRA

- Requirement to remediate contamination released through current *or past* activities at facility is a condition of operating permit
  - Conduct investigations
  - Conduct a thorough cleanup of the release
  - Monitor cleanup to ensure it complies with all applicable state and federal requirements

Statutes that most commonly affect brownfield sites - RCRA

Liability:

Who's liable?

-owners and operators of facility

-prior owners/past generators at facility

Liability is:

-strict: liable even if did not act negligently or in bad faith

Statutes that most commonly affect brownfield sites - RCRA

Applicable regulations:

- Subtitle C (hazardous waste) – 40 CFR Part 260-279
- Subtitle D (solid waste) – 40 CFR Part 257, 258
- Subtitle I (USTs) - 40 CFR Part 280
- Risk Integrated System of Closure (RISC) (state nonrule policy document)
  - No federal corrective action regulations

State Cleanup (state Superfund)- *Hazardous Substances Response Trust Fund law*, Indiana Code (IC) 13-25-4 (1987)

- **State administered program created to manage hazardous waste cleanups that are excluded from the federal Superfund Program**

- **Authorizes IDEM to:**
  - respond to environmental emergencies involving hazardous wastes or pollutants and contaminants
  - Initiate investigation and cleanups
  - Take enforcement action against responsible parties

- **Hazardous Substances Response Trust Fund (HSRTF)** established in 1981 for multiple purposes including emergency response, financing EPA contracts, 10% cost-share at federal-lead Superfund site cleanups

Statutes that most commonly affect brownfield sites – State Cleanup

- **Liability:** based on CERCLA § 107 liability, including defenses and exemptions
- **Regulation:** follows aspects of the federal National Contingency Plan (NCP) as well as the reporting structure from the Risk Integrated System of Cleanup (RISC)
- PRPs are ineligible to receive grants or loans from the state unless they qualify for liability protection through a statutory exemption

Petroleum Releases Law - IC 13-24-1

- **State administered program created to manage projects that involve petroleum contamination at a "petroleum facility"**
  - Defined in IC 13-11-2-161
  - Does <u>not</u> include an underground storage tank or consumer product in consumer use

- **Authorizes IDEM to:**
  - respond to environmental emergencies involving petroleum contamination
    - Fills gap created by limitation of Superfund to hazardous substances and limitations of corrective action under leaking underground storage tank (LUST) program
  - Initiate investigation and cleanups
  - Take enforcement action against responsible parties

Statutes that most commonly affect brownfield sites – Petroleum Releases

Liability:

- Owner or operator:
  - Current owner or operator
  - Person who owned, operated or otherwise controlled immediately prior to involuntary acquisition by a political subdivision
- Responsible person- caused a release at a petroleum facility

Applicable regulation:

- RISC (nonrule policy document)

Leaking Underground Storage Tank (LUST) Corrective Action- IC 13-23-13

- State administered program created to manage cleanup of contamination resulting from leaking tanks containing regulated substances, primarily petroleum tanks at gas stations

Statutes that most commonly affect brownfield sites - LUST

Liability:

- **Owner:**

  -for UST in use on November 8, 1984 or brought into use after November 8, 1984: a person who owns the UST

  -for UST in use before November 8, 1984 but no longer in use on November 8, 1984: person who owned the tank immediately before the discontinuation of the tank's use

  -Person who owned the UST immediately before conveying ownership or control to a political subdivision through its involuntary acquisition

Statutes that most commonly affect brownfield sites - LUST

Liability:

- **<u>Not</u> an Owner if:**
  - Does not participate in the management of UST
  - Otherwise not engaged in production, refining, marketing
  - Holds as primarily as security interest
    - Caution re: foreclosure – may result in inapplicability of secured interest exemption
  - Political subdivision that acquires involuntarily (unless caused or contributed to the release)

Statutes that most commonly affect brownfield sites - LUST

Applicable regulations:

- 329 IAC 9 (UST)
- 328 IAC 1 (Excess Liability Trust Fund)
- 40 CFR Part 280 (federal technical standards and corrective action requirements)
- IC 22-12-9 Heating Oil Tank Closure
- RISC (nonrule policy document)

Statutes that most commonly affect brownfield sites - LUST

328 IAC 1 (Excess Liability Trust Fund)

- Provides a mechanism for the reimbursement of monies spent by UST owners and operators on the cleanup of petroleum released from USTs
- A means of providing financial assurance for owners and operators of petroleum USTs and providing a source of money for the indemnification of third parties

Voluntary Remediation Program (VRP) IC 13-25-5

- Strictly voluntary (not a “regulatory” program)
- Remediation of hazardous substances and/or petroleum
- No sites under enforcement in another state program
- No imminent or substantial threat
- Applicant is not necessarily the responsible party
- IDEM recovers its oversight costs by agreement
- Certificate of Completion (COC)
  - scope of remediation work plan
- Covenant Not to Sue
  - Release of liability to state (except RCRA and natural resource damages); no protection against federal liability
  - Covers liability to 3rd parties (citizen suits and contribution actions)

Statutes that most commonly affect brownfield sites - VRP

- **VRP MOA:** For any site receiving a Certificate of Completion from VRP, U.S. EPA will not plan or anticipate any federal action under CERCLA, unless it poses an imminent and substantial threat to human health or the environment
  - does not apply to sites on the National Priorities List (NPL) or sites currently subject to orders of enforcement under Superfund

Statutes that most commonly affect brownfield sites - VRP

- **VRP MOU on RCRA:** between U.S. EPA Region 5 and IDEM in order to implement RCRA Subtitle C Corrective Action requirements and to facilitate brownfield redevelopment at subject facilities in Indiana
  - Region 5 has determined that the use of RISC standards and process requirements, or RAGS for non-default risk assessment guidance, under the VRP at RCRA facilities will result in cleanups that meet the CA objectives
    - does not apply to sites on the National Priorities List (NPL) or sites currently subject to orders of enforcement under Superfund

Mechanisms to minimize and manage the risks of reusing brownfields

CERCLA defenses & exemptions:

- Original: act of God, act of war, act or omission of a third party (innocent landowners)
- Contiguous property owners & bona fide prospective purchasers
- Secured creditor
- Fiduciary/lender
- Government entities that acquire property involuntarily (political subdivision or unit of federal or state government)
- Other: de micromis, service station dealer, municipal solid waste

CERCLA – 2002 landowner liability exemptions

- **2002 Small Business Liability Relief and Brownfields Revitalization Act (SBLRBRA)**
  - Required EPA to develop regulations establishing standards and practices for how to conduct “all appropriate inquiry”
  - Expanded/clarified Superfund liability relief
    - Added bona fide prospective purchaser (BFPP) exemption
    - Added contiguous property owner (CPO) exemption
    - Revised existing innocent landowner defense

CERCLA – 2002 landowner liability exemptions

- **CPO exemption, BFPP definition, innocent landowner defense and definition of "contractual relationship" all contain the following common obligations which persons seeking these exemptions must meet (Common Elements):**
  - Conduct AAI prior to purchase
  - Not be potentially liable or affiliated with any person potentially liable
  - Exercise appropriate care by taking reasonable steps to
    - Stop any continuing release
    - Prevent any threatened future release
    - Prevent or limit human, environmental or natural resource exposure to previously released hazardous substances

CERCLA – 2002 landowner liability exemptions

- **Common Elements continued:**
  - Provides full cooperation, assistance and access to all parties that are authorized to conduct response action
  - Comply with all governmental information requests
  - Comply with land use restrictions and not impede the performance of institutional controls; and
  - Provide all legally required notices regarding releases of hazardous substances

CERCLA – 2002 landowner liability exemptions - BFPP

Bona Fide Prospective Purchaser (BFPP)

- Exemption in § 107(r), defined in §101(40)
- Significant because allows purchaser to buy *with* knowledge of contamination
- Threshold Requirements (CERCLA §101(40)):
  - Acquired ownership after January 11, 2002
  - Made appropriate inquires into the previous owners and uses of the property prior to acquisition of the property
  - Is not otherwise potentially liable or affiliated with any person who is potentially liable
  - All disposal of hazardous substances occurred prior to acquisition of the property

CERCLA – 2002 landowner liability exemptions - BFPP

Continuing obligations (CERCLA §101(40)):

- Exercise appropriate care with respect to hazardous substances found at the facility by stopping any continuing release, preventing any threatened future release, and preventing or limiting human, environmental or natural resource exposure
- Provides all legally required notices with respect to the hazardous substances found on the property
- Provides full cooperation, assistance and access to all parties that are authorized to conduct response action
- Complies with land use restrictions
- Does not impede the integrity of any institutional control

CERCLA – 2002 landowner liability exemptions – All Appropriate Inquiry

What is **all appropriate inquiry (AAI)**?

Federal rule effective November 1, 2006

- Appropriate inquiry into the previous owners and uses of the property was made *prior* to acquisition of the property
- Applies to BFPP& CPO exemptions and innocent landowner defense (and grant eligibility)
- EPA's Common Elements Guidance very useful in understanding applicability of AAI

CERCLA – 2002 landowner liability exemptions – All Appropriate Inquiry

10 statutory components of All Appropriate Inquiry found in CERCLA § 101(35)(B)(iii):

1. Inquiry by an environmental professional

Consultant's responsibility:

2. Review of government records
3. Review of historical records
4. Interviews
5. Visual inspections
6. Degree of obviousness of contamination

CERCLA – 2002 landowner liability exemptions – All Appropriate Inquiry

Statutory components of All Appropriate Inquiry continued:

User's responsibility (person seeking exemption):

7. Commonly known information about the property
8. Searches for environmental cleanup liens
9. Specialized knowledge or experience
10. Purchase price vs. value of the property if not contaminated

CERCLA – 2002 landowner liability exemptions – reasonable steps

What are reasonable steps?

- Fact/site specific; be a responsible property owner with respect to users of the property and controlling off-site impacts
- *See* EPA's "Common Elements" guidance
- At a minimum: EP opinion that any Recognized Environmental Conditions are not causing harm/off-site exposure
- May include:
  - abating a continuing release
  - removal of drums or hot spot removal
  - securing of a site through fencing or other means
  - cap maintenance
  - vapor mitigation
- Refer to existing case law interpreting due care as a reference

CERCLA – 2002 landowner liability exemptions – reasonable steps

<u>What "reasonable steps" is not</u>:

- Full-blown CERCLA cleanup a liable party would be expected to undertake
- Might be more onerous for BFPP because buying with knowledge vs. innocent landowner or contiguous property owner that did not know about contamination at time of purchase
- EPA guidance includes a "reasonable steps" comfort letter can be requested for sites where there is substantial federal involvement or the specter of superfund liability is impeding redevelopment
- IDEM is issuing combination comfort and comment letters that provide a technical opinion on reasonable steps

CERCLA – 2002 landowner liability exemptions - CPO

Contiguous Property Owner (CPO)

- Exemption in § 107(q)
- Exempt from CERCLA owner/operator status if no knowledge or reason to know of release at time of property acquisition (time undertook all appropriate inquiry)
  - If did know about it, may still qualify as BFPP if acquired after January 11, 2002
  - EPA Contaminated Aquifer Policy (1995) still applies; arguably broader
    - State also has two contaminated aquifers policies

CERCLA – 2002 landowner liability exemptions - CPO

- **Person who owns property that is contiguous to property that is or may be contaminated and is not owned by that person shall <u>not</u> be considered an "owner or operator" if:**
  - Impacts to groundwater or soil result solely from a release from "contiguous or similarly situated" property
  - Owner is not potentially liable for response costs and is not affiliated with a PRP through family or financial relationship
  - Owner exercises appropriate care by taking **reasonable steps**
  - Does <u>not</u> obligate CPO to conduct groundwater investigations or remediate groundwater contamination

CERCLA – 2002 landowner liability exemptions - CPO

- **Continuing obligations continued:**
  - Owner provides full cooperation, assistance, and access to those authorized to conduct a response action or natural resource restoration
  - Owner complies with all land use restrictions and does not impede the effectiveness of any institutional controls at the facility
  - Owner complies with information requests and administrative subpoenas under CERCLA
  - Owner provides all legally required notices regarding discovery or release of hazardous substances

CERCLA defenses & exemptions – innocent landowner

Innocent landowner- not a new defense (1986), but changed because compliance with AAI rule now required

- Owns contaminated property
- Impacts result from pre-acquisition releases by unrelated parties
- Third party defense to CERCLA liability if no knowledge or reason to know of release at time of property acquisition
  - Act or omission of a third party:
    - With whom the person had no direct or indirect contractual relationship
    - On or before date of acquisition, carried out AAI into the previous ownership and uses of the facility
    - Took reasonable steps to stop any continuing release, prevent any threatened future release, and prevent or limit any human, environmental or natural resource exposure

State implementation of AAI

State brownfields program will be using the federal rule

- After November 1, 2006, parties must comply with the requirements of the federal All Appropriate Inquiries Final Rule, or follow the standards set forth in the ASTM E1527-05 Phase I Environmental Site Assessment Process, to satisfy the statutory requirements for conducting all appropriate inquiries
- No state distinctions at this time
- No current understanding with EPA that demonstrating compliance with AAI to the state will similarly satisfy EPA

State implementation of AAI

- **Indiana Brownfields Program (IBP) applicability:**
  - **Grant/loan eligibility**
    - State-funded Phase I/Phase II
    - Remediation Grant
    - Low interest loan
  - **Comfort and site status letter eligibility**
    - Comfort letter based on landowner liability exemption
    - Site status letter
    - Comfort letter based on contaminated aquifer nonrule policy document (recommended)

State implementation of AAI

- **Indiana Brownfields Program (IBP) applicability:**
  - **Continuing obligations (reasonable steps) to satisfy AAI**
    - IBP will issue “comfort and comment” letters that outline IDEM’s technical opinion as to what constitutes “reasonable steps” at a site
      - Advisory only; ultimately burden of person claiming exemption to demonstrate undertaking reasonable steps

CERCLA enforcement bar – 2002 amendment

Federal enforcement bar found in CERCLA § 128(b)

- U.S. may not require cleanup and may not recover response costs against a party at an "eligible response site" (§ 101(41)) that is "conducting or has completed a response action" that is "in compliance with the State program that specifically governs response actions for the protection of public health and the environment."
- Regardless of nature of any "agreement" with the state
- Response actions commenced after February 15, 2001
- Some limited exceptions: e.g., imminent and substantial endangerment, state requests EPA assistance

Other defenses & exemptions

CERCLA Secured Creditor Exemption:

- Through definition of “owner or operator”
  - Excludes a person that is a lender that, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect the security interest of the person in the vessel or facility

Other defenses & exemptions

Fiduciary/Lender Exemption:

- Codified through Asset Conservation, Lender Liability, and Deposit Insurance Protection Act (1996)
- Clarified situations in which “lenders” will and will not be protected from CERCLA liability
  - Followed litigation over EPA’s Lender Liability Rule

Fiduciary/Lender Exemption:

Fiduciary/Lender Exemption:

- Cannot “participate in management” by:
  - Exercising decision-making control over environmental compliance related to the facility, thereby undertaking responsibility for hazardous substance handling or disposal practices
  - Exercising control at a level similar to a manager of the facility
    - Day-to-day decision making on environmental compliance
    - All or substantially all of the operational functions of the facility

Fiduciary/Lender Exemption:

Foreclosure:

-Risk of ownership enters here for lenders

-If did not “participate in management” prior to foreclosure, may generally:

- Maintain business activities
- Wind up operations
- Take action to preserve, protect or prepare the property for sale through commercially reasonable means in a reasonably expeditious manner; 12-month safe harbor generally (not bright line)

Other defenses & exemptions

State Secured Creditor/Lender/Fiduciary Exemption:

State Cleanup:

-IC 13-25-4-8(c): includes lender, secured or unsecured creditor, or a fiduciary

-IC 13-25-4-8(d): liability of a fiduciary is limited to the assets held by the fiduciary in the same estate or trust that gives rise to the liability

Petroleum Releases and LUST:

-excluded through definitions of owner/operator

State Political Subdivision Exemption

Applicable definitions:

"Political Subdivision" IC 36-1-2-13 = municipal corporation or special taxing district

"Municipal corporation" IC 36-1-2-10 = unit, school corporation, library district, local housing authority, fire protection district, public transportation corporation, local building authority, local hospital authority or corporation, local airport authority, special service district, or other separate local governmental entity that may sue and be sued. The term does not include special taxing district.

State Political Subdivision Exemption

Applicable definitions:

"Special taxing district" IC 36-1-2-18 = a geographic area within which a special tax may be levied and collected on an ad valorem basis on property for the purpose of financing local public improvements that are:

(1) not political or governmental in nature; and

(2) of special benefit to the residents and property of the area.

"Unit" IC 36-1-2-23 = county, municipality, or township.

State Political Subdivision Exemption

IC 13-25-4-8(e): political subdivision or unit of federal or state government is not liable to the state for costs or damages associated with hazardous substances on, in or at a property acquired because of:

- Bankruptcy
- Foreclosure
- Tax delinquency
- Abandonment
- Exercise of eminent domain
- Receivership
- Other circumstances of involuntary acquisition because of function as sovereign
- Transfer from another political subdivision, or
- Any other means to conduct remedial actions on a brownfield

State Political Subdivision Exemption

- **Federal distinctions:**
  - Federal law does *not* include eminent domain as involuntary acquisition, however, may have an affirmative defense if exercise due care and take precautions against foreseeable acts after purchase (innocent landowner)
  - Federal law does *not* include taking title for tax delinquency through a deed (in lieu of foreclosure) as involuntary acquisition

State Political Subdivision Exemption

- Liability remains with immediate preceding owner or operator
- Does <u>not</u> apply if political subdivision causes or contributes to the release or threatened release
- Property donated to the municipality is <u>not</u> considered an involuntary acquisition; *but see* IC 13-25-4-8(e)(9)
  - query whether this counts as acquisition by "any other means to conduct remedial actions on a brownfield"

State Political Subdivision Exemption

Similar exemption for:

- LUST liability (IC 13-23): found in definition of “owner” in IC 13-11-2-150(c)
- Petroleum releases liability (IC 13-24-1): found in definition of “owner” in IC 13-11-2-151(b)

Tort Claims Act liability exemption: **IC 34-13-3-3(23)**

Scope:

- Immunity of governmental entity or employee acting in scope of employment for an act taken to investigate or remediate hazardous substances, petroleum, or other pollutants associated with a brownfield unless:
  (A) the loss is a result of reckless conduct; or
  (B) the governmental entity was responsible for the initial placement of the hazardous substances, petroleum, or other pollutants on the brownfield

CERCLA defenses & exemptions

What liability remains?

- Liability for petroleum contamination
- RCRA obligations and other federal liability
- Common law claims (toxic tort, nuisance)
- Worker exposure
- Continuing obligations/reasonable steps

State mechanisms to minimize and manage the risks of reusing brownfields

State mechanisms to manage risk:

- “Brownfields Program Comfort and Site Status Letter Policy” IDEM Nonrule Policy Document W-0051 (April 18, 2003)
- “Property Containing Contaminated Aquifers” IDEM Nonrule Policy Document W-0047 (January 30, 1997)
- “Property Containing Contaminated Aquifers/Underground Storage Tanks” IDEM Nonrule Policy Document Waste-0038-NPD (April 20, 2000)

State mechanisms to minimize and manage the risks of reusing brownfields

State mechanisms to manage risk:

- “Risk Integrated System of Closure (RISC” IDEM Nonrule Policy Document W-0046 (February 15, 2001) (Technical and User’s Guide)
  - 2004 Update: January 1, 2004 update to default closure tables
  - 2006 Update: February 1, 2006 proposed update to default closure tables, effective August 1, 2006
  - Risk-based cleanup standards
- “No Further Action” letters from remedial programs

Comfort & Site Status Letters

ELIGIBILITY: Stakeholder has to demonstrate to IDEM's satisfaction that:

- No state or federal enforcement action is pending at the site
- No federal grant requires an enforcement action at the site
- No imminent and substantial threat to human health or the environment
- Neither the stakeholder nor an agent or employee of the Stakeholder caused, contributed to, or knowingly exacerbated the release or threat of release of any hazardous substance or petroleum at the site; and,
- Either the stakeholder is eligible for an applicable exemption to liability founded in Indiana law or IDEM policy (comfort letter) <u>or</u>
- Current levels of contaminants at the site meet current cleanup criteria as established by IDEM (RISC) (site status letter)

Comfort & Site Status Letters

Comfort letter:

- If based on exemption, will explain that IDEM is prohibited from pursuing stakeholder by law
  - Governmental entity/political subdivision
  - Secured creditor/lender/fiduciary
  - BFPP, CPO or innocent landowner
    - Will include technical comment on “reasonable steps” to satisfy continuing obligations of AAI rule
- If based on policy, will explain IDEM’s exercise of enforcement discretion
  - Contaminated aquifer policies

Comfort & Site Status Letters

Site status letter:

- Will explain the current site conditions do not present a threat to human health or the environment and that IDEM does not plan to take a response action

Comfort & Site Status Letters

Conditions:

- Cannot have caused, contributed to or knowingly exacerbated the release through act or omission
  - Failure to take affirmative steps to mitigate or address contaminants will not, in the absence of exceptional circumstances, constitute an “omission”
- No ownership interest any party that caused, contributed to or knowingly exacerbated the release
- No alternative basis for liability (i.e., generator) or by reason of a new release
- May be conditioned upon Stakeholder’s acceptance of recorded land use restrictions

Comfort & Site Status Letters

What the letters do not cover:

- Not a release from liability like a covenant not to sue
- Not an assurance that site is safe or fit for a particular use
- Determinations limited to known contaminant levels
- No liability relief for contribution actions, cost recovery by EPA, RCRA, criminal liability or liability for natural resource damages
- Revocable if IDEM learns the information provided to IDEM was inaccurate
  - IDEM may then pursue any responsible party

Contaminated Aquifer Policies

- **Contaminated Aquifers Policies:**
  - One for subsurface migration of petroleum or hazardous substances
    - Based on CERCLA 3rd party defense in § 107(b)(3)
  - One for subsurface migration of petroleum or hazardous substances from an underground storage tank

Contaminated Aquifer Policies

ELIGIBILITY:

Stakeholder has to demonstrate to IDEM that:

- The hazardous substance or petroleum has come to be located on the property solely as the result of subsurface migration in an aquifer from a source outside the boundaries of the property; and
- Landowner did not cause, contribute to, or exacerbate the release or threat of release of hazardous substance or petroleum

Contaminated Aquifer Policies

Conditions:

- Cannot have caused, contributed to or knowingly exacerbated the release through act or omission
  - Failure to take affirmative steps to mitigate or address groundwater contamination, such as conducting groundwater investigations or installing a remediation system, will not, in the absence of exceptional circumstances, constitute an “omission”
  - May not apply where existence or operation of an on-site well may affect migration of contamination in the affected aquifer

Contaminated Aquifer Policies

Conditions:

- Person who caused the release is not an agent or employee of the landowner and was not in a direct or indirect contractual relationship with the landowner
- If acquired site directly or indirectly from person who caused the original release, cannot, at the time of acquisition, have known or had reason to know of the disposal that gave rise to the contamination
- No alternative basis for liability (i.e., generator) or by reason of a new release

Contaminated Aquifer Policies

- **Distinctions of UST-specific policy**
  - Knowledge of contamination at time of acquisition is not an issue
  - No connection to CERCLA 3rd party defense in terms of exercise of due care
  - Alternative basis of liability would be based on contribution to groundwater contamination from another source on the landowner's property

Risk Integrated System of Closure (RISC)

- **RISC guidance manual (nonrule policy document)**
  - Created to establish cost-effective closure standards and closure options that result in negligible risk to human health and the environment
  - Describes:
    - How to achieve consistent closure of contaminated soil and groundwater
    - How to determine contaminants present at a site
    - Remedial objectives and options to attain them
    - How to use exposure prevention as a closure option
    - What to do if contamination threatens drinking water or environmentally sensitive areas

Private tools to minimize and manage the risks of reusing brownfields

***Indemnification provision*:** private contract mechanism in which one party promises to shield another from liability

-shortcoming: effective between private parties but not as to potential liability to the State

Private tools to minimize and manage the risks of reusing brownfields

***Environmental insurance policies*:** insurance industry products intended to allocate and minimize liability exposures among parties involved in brownfields redevelopment

- Cost cap, pollution legal liability and secured creditor policies
  - Seek assistance of skilled insurance broker and legal counsel to seek appropriate coverage

Conclusions

- Viable options to minimize liability vary depending on the party's risk tolerance
- Encouraged to contact the Indiana Brownfields Program staff to inquire about applicable options to minimize your potential liability given your situation
- Any Questions?

Contacts

Indiana Brownfields Program

- Meredith Gramelspacher, General Counsel
  233-1430 or mgramels@ifa.in.gov
- Kevin Davis, Technical Review Coordinator
  233-2415 or kdavis@ifa.in.gov
- Michele Oertel, Outreach Coordinator
  234-0235 or moertel@ifa.in.gov

Tom Baker, Hatchett & Hauck LLP

464-2624 or tom.baker@h2lawyers.com