

RE-Powering America's Land

Siting Renewable Energy on Potentially Contaminated Properties: Liability Considerations

The U.S. Environmental Protection Agency (EPA) recognizes the overall environmental benefit of siting renewable energy projects on contaminated properties. To help inform renewable energy stakeholders, the EPA developed this fact sheet to address questions frequently raised regarding liability when redeveloping potentially contaminated properties.

What federal laws govern liability for contaminated property?

The two principal federal laws that address the handling, disposal, and cleanup of hazardous waste are the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, commonly known as Superfund), and the Resource Conservation and Recovery Act (RCRA).

CERCLA authorizes the federal government to assess and clean up properties contaminated with hazardous substances. RCRA regulates how solid wastes (both hazardous and non-hazardous) are managed to protect human health and the environment, and includes authorities for the investigation and cleanup of RCRA facilities. Generally, only contaminated properties with significant actual or potential public health and/or environmental impacts or those needing immediate attention are likely to warrant federal cleanup. These may include:

- sites on the Superfund National Priorities List;
- sites where the EPA is undertaking or has completed CERCLA cleanup activities;
- facilities subject to RCRA corrective action or post-closure care;
- contaminated sites in Indian country; and
- federally-owned sites undergoing CERCLA or RCRA cleanups.

Who is generally liable for cleaning up contaminated property?

CERCLA's "polluter pays" liability scheme ensures that parties who are responsible for contamination pay to clean up the contamination. The following categories of persons may be held liable for the costs or performance of a cleanup under CERCLA:

- the owner or operator of a facility;
- an owner or operator at the time of disposal of hazardous substances;
- a person who arranged for the disposal or treatment of hazardous substances ("generator" or "arranger"); and
- a person who accepted hazardous substances for transport and selected the site to which the substances were transported ("transporter").

Will the EPA (or a state) hold a party liable who develops a renewable energy project on a contaminated property?

State and federal cleanup laws have led to the cleanup and reuse of thousands of contaminated properties, in part by ensuring that those actually responsible for pollution are held responsible for cleanups. Generally, CERCLA and the laws in many states include liability protections that may be applicable to address the potential liability concerns of a developer of renewable energy on contaminated property. In appropriate cases, the EPA or a state also may be able to address these potential liability concerns through the use of existing policy or property-specific documents.

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Through the RE-Powering America's Land initiative, the EPA encourages renewable energy development on currently and formerly contaminated land, including landfills and mining sites, when it is aligned with the community's vision for the site.

Assistance for Renewable Energy Stakeholders

This initiative identifies the renewable energy potential of these sites and provides other useful resources for communities, developers, industry, state and local governments or other stakeholders interested in reusing these sites for renewable energy development.

Advantages for Siting Renewable Energy on Contaminated Properties

Currently and formerly contaminated land, including landfills and mining sites, can offer significant advantages over other sites for renewable energy development. These sites may offer developers a unique opportunity for renewable energy deployment due to historical uses. For example, sites may have compatible zoning or reduced land costs that increase project viability. Additionally, sites may have existing electrical or transportation infrastructure that can be leveraged, thereby reducing overall project costs.

Addressing Liability Concerns

The EPA works to address both contamination and liability issues in order to place these properties back into productive use.

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What liability protections may be available?

The vast majority of properties requiring cleanup are most likely to be addressed by state cleanup programs, which generally provide some level of liability protection to new owners or lessees in specific situations. Individual states are the best source of information about their cleanup and revitalization laws and programs; however, the EPA does work with parties to determine which agency has oversight responsibility for a property.

CERCLA includes several self-implementing liability protections for parties who own or acquire contaminated property, but did not cause or contribute to the contamination. The protections apply to “bona fide prospective purchasers” (BFPPs), “contiguous property owners,” and “innocent landowners.” To remain protected from CERCLA liability, these parties must meet and maintain compliance with certain statutory requirements, including taking reasonable steps with regard to contamination at the site after the acquisition of the contaminated property. The BFPP protection is the most widely applicable protection because it applies to parties even if they had knowledge of the contamination. The EPA has issued several guidance documents regarding these liability protections, including enforcement guidance which discusses the potential applicability of the BFPP protection to tenants and the EPA’s intention to use enforcement discretion to treat certain tenants as BFPPs.

Is documentation available to confirm liability protection?

State voluntary cleanup programs may be able to provide property-specific liability protection under state law to entities seeking to purchase, rent, or otherwise become financially involved in reusing contaminated property. For example, the state may provide covenants not-to-sue or no-action letters.

The EPA generally does not need to become involved with property-specific transactions or provide property-specific documents at state-lead sites to address potential CERCLA or RCRA liability. The EPA, however, may work with parties on a renewable energy project at a site of federal interest to determine whether a property-specific document – for example, a comfort letter – is needed for a transaction to go forward, subject to enforcement discretion and resources.

What are the next steps to move forward with a renewable energy project?

The EPA recommends reviewing site-specific information with legal counsel and the appropriate state, tribal or local environmental protection agency before taking any action to acquire, clean up, or redevelop contaminated property. Additional resources are available through the EPA to support such efforts to convert contaminated lands for renewable energy production.

Disclaimer: This fact sheet is provided solely as general information regarding liability in response to questions frequently raised by parties considering the purchase or lease of a potentially contaminated property. It does not provide legal advice, have any legally binding effect, or expressly or implicitly create, expand, or limit any legal rights, obligations, responsibilities, expectations, or benefits for any person. It is the property owner or lessee’s sole responsibility to ensure compliance with applicable local, state, and federal environmental requirements and to ensure that its use of a contaminated property does not interfere with or impede the property’s cleanup or protectiveness, and participation in the EPA’s RE-Powering America’s Land Initiative does not alter this responsibility.

Liability Considerations when Leasing Contaminated Property

Leases & Liability

The execution of a lease does not necessarily trigger CERCLA liability for tenants. The EPA recognizes the uncertainty regarding the potential liability of tenants under CERCLA and the potential applicability of the BFPP provision in light of the explicit reference to “tenants” in CERCLA’s definition of BFPP. Through enforcement discretion guidance, the EPA outlines its intentions regarding tenants that reuse potentially contaminated lands, regardless of owner status.

CERCLA BFPP Treatment for Tenants

In 2012, the EPA issued guidance that discusses the potential applicability of the BFPP provision to tenants, as well as the Agency’s intention to use enforcement discretion to treat certain tenants as BFPPs on potentially contaminated sites. A tenant may wish to seek BFPP treatment in the event of a future federal CERCLA action at the leased property and/or for good environmental stewardship of the property.

State Lessee Protections

Because state laws and policies vary, the EPA recommends contacting the applicable state environmental protection agency to discuss available protections.

For more information on RE-Powering America’s Land visit www.epa.gov/renewableenergyland or contact cleanenergy@epa.gov.

For more information on EPA cleanup enforcement visit www.epa.gov/enforcement/waste/index.html#cleanup.



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