

Welcome to the CLU-IN Internet Seminar

Tenant Liability Considerations for Siting Renewable Energy on Contaminated Lands

Sponsored by: Office of Enforcement and Compliance Assurance

Delivered: February 4, 2013, 1:00 PM - 2:00 PM, EST (18:00-19:00 GMT)

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- This event is being recorded
- Archives accessed for free <http://clu.in.org/live/archive/>



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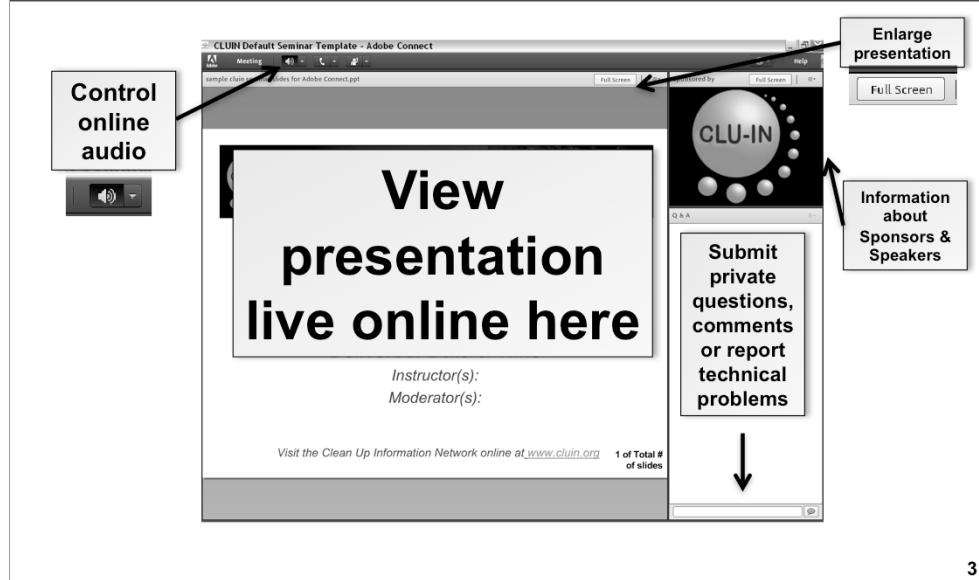
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With that, please move to slide 3.

New online broadcast screenshot





RE-Powering America's Land Initiative



Tenant Liability Considerations for Siting Renewable Energy on Contaminated Properties

RE-Powering America's Land

Topics



- RE-Powering America's Land Initiative
- 2012 Technical Guidance
- Model Comfort / Status Letters
- Tools & Resources
- Q&A

Update



RE-POWERING AMERICA'S LAND

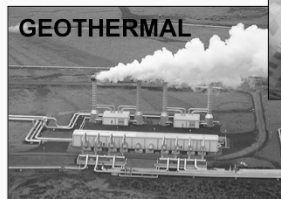
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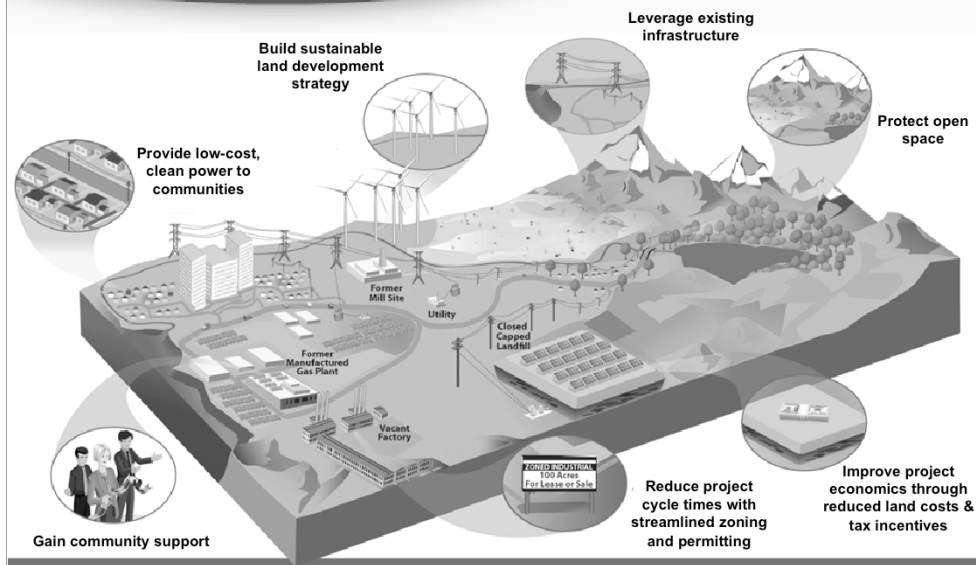
RE-Powering America's Land Initiative



EPA's RE-Powering America's Land Initiative encourages renewable energy development on current and formerly contaminated land and mine sites when aligned with the community's vision for the site.



Why Renewables on Potentially Contaminated Lands

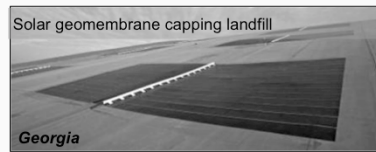
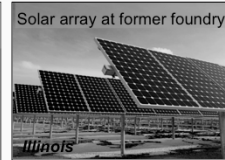
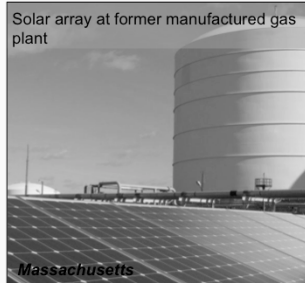
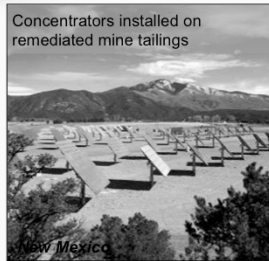


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RE-Powering America's Land

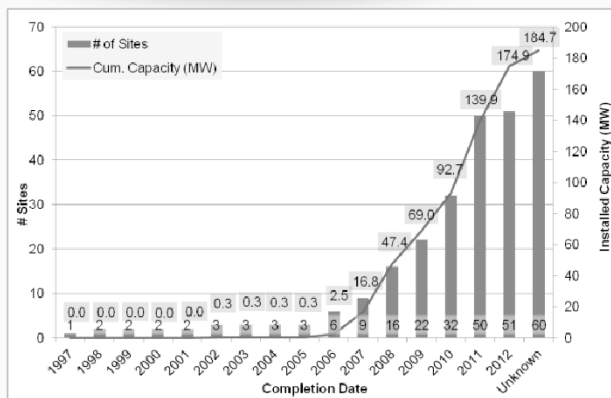
Projects installed nationwide



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Project Tracking

National tracking of trends for RE on CL



RE-Powering Installations

	# Sites	Installed Capacity (MW)
NY	6	67.2
SC	1	20.0
WY	1	16.5
MA	11	15.6
NJ	7	14.7
NV	1	14.2
CA	8	12.1
IL	2	10.9
CO	4	5.4
PA	1	3.0
RoUS	18	5.0
	60	184.7

EPA Priority to Return Lands to Productive Reuse



- Renewable energy is seen as a productive and viable reuse for contaminated lands, landfill, and mine sites
- RE-Powering partnered with Office of Enforcement and Compliance Assurance to further enable this reuse opportunity at broader range of sites



FEDERAL LIABILITY CONSIDERATIONS

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Federal Laws Addressing Cleanup of Contaminated Property



Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, commonly known as Superfund)

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- Authorizes the federal government to assess and clean up properties contaminated with hazardous substances
- Provides authority for emergency response involving hazardous materials
- Establishes a comprehensive liability scheme to hold certain categories of parties liable to conduct and/or pay for cleanup of such releases

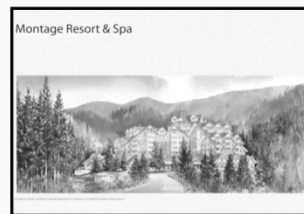
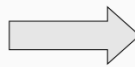
Resource Conservation and Recovery Act (RCRA)

- Regulates the management of solid wastes (both hazardous and non-hazardous) to protect human health and the environment
- Includes authorities for the investigation and cleanup of RCRA facilities

Balancing Enforcement and Reuse



- EPA's cleanup enforcement program strives to balance:
 - Primary mission of ensuring that "polluters pay" for cleanups through an "enforcement first" approach
 - Strong support for EPA's contaminated site reuse goals



Sites Subject to Federal Cleanup Actions



- Sites on the Superfund National Priorities List (NPL)
- 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
- Federally-owned sites undergoing CERCLA or RCRA cleanups

Parties Potentially Liable Under CERCLA



- Current owner or operator of a facility
- 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")
- A person who accepted hazardous substances for transport and selected the site to which the substances were transported ("transporter")

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CERCLA Statutory Liability Protections



- CERCLA includes liability protections for parties seeking to redevelop contaminated properties:
 - Bona Fide Prospective Purchasers (BFPPs)
 - Contiguous Property Owners (CPOs)
 - Innocent Landowners (ILOs)
- These protections are self-implementing – EPA's involvement is not needed

BFPP Protection



- Purchaser acquires ownership after January 11, 2002
- All disposal of hazardous substances at the facility occurred prior to acquisition
- Purchaser conducted all appropriate inquiry (AAI) into the previous ownership and uses
- Purchaser provides legally required notices
- Purchaser takes reasonable steps with respect to hazardous substance releases
- Purchaser provides cooperation, assistance, and access
- Purchaser complies with land use restrictions and institutional controls
- Purchaser complies with information requests and administrative subpoenas
- Purchaser is not potentially liable for response costs at the facility or "affiliated" with any such person
- Purchaser does not impede any response action or natural resource restoration

Tenants Under CERCLA



- Execution of a lease does not necessarily trigger CERCLA¹⁹ liability as an owner or operator for tenants
- Definition of a BFPP includes “a person (or a tenant of a person) that acquires ownership of a facility after [January 11, 2002]”



EPA GUIDANCE ON THE TREATMENT OF TENANTS UNDER THE BFPP PROVISION

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EPA Enforcement Discretion Guidance



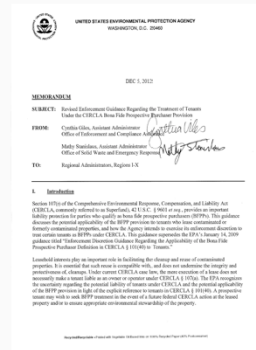
- Guidance is intended to be applied by EPA Regions on a site-specific basis
- Enforcement discretion guidance is not the same as a statutory protection, e.g., it does not provide protection against third party suits

EPA's Enforcement Guidance Addressing Tenants



- 2009 Guidance
 - Tenants who might be potentially liable as owners under CERCLA
 - Tenants of BFPPs who may derive BFPP status
- 2012 Revised Guidance
 - Tenants of BFPPs who may derive BFPP status
 - Tenants of owners who do not qualify as BFPPs (e.g., the owner of the property is a PRP)

<http://www.epa.gov/enforcement/cleanup/documents/policies/superfund/tenants-bfpp-2012.pdf>



Tenant of a BFPP Owner



- Tenant may derive BFPP status from an owner who satisfies the BFPP criteria and:
 - all disposal of hazardous substances at the facility occurred prior to acquisition
 - the tenant does not impede any response action or natural resource restoration
- If the owner loses its status through no fault of the tenant, the EPA may exercise its enforcement discretion to treat the tenant as a BFPP if the tenant itself meets the BFPP provisions (with the exception of the AAI provision)

Tenant of a Non-BFPP Owner



- EPA may exercise its enforcement discretion on a site-specific basis **24** to treat a tenant as a BFPP when:
 - Lease executed after January 11, 2002
 - All disposal of hazardous substances at the facility occurred prior to execution of the lease
 - Tenant conducted AAI prior to execution of the lease
 - Tenant provides legally required notices
 - Tenant takes reasonable steps with respect to hazardous substance releases
 - Tenant provides cooperation, assistance, and access
 - Tenant complies with land use restrictions and institutional controls
 - Tenant complies with information requests and administrative subpoenas
 - Tenant is not potentially liable for response costs at the facility or affiliated with any such person
 - Tenant does not impede any response action or natural resource restoration

How Does This Apply to RE Projects?



Anticipated Applications

- Redevelopment projects that require a long-term lease
- Renewable energy installations on
 - ... Landfills
 - ... Contaminated industrial sites
 - ... Munitions response sites
 - ... Mine sites
 - ... Any contaminated property

What do I need to do to use this policy?

- CERCLA Statutory Protection in § 107(r) (1) is **self-implementing**
- EPA generally will not be involved with facility-specific transactions or determinations of BFPP status

In some cases, EPA may determine that it would be necessary and appropriate to address a tenant's concerns at a particular property through an existing tool

- Comfort Letters
- Prospective Lessee Agreements (*requires coordination with DOJ*)



MODEL COMFORT/STATUS LETTERS

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Enforcement Tool Overview



- Site-specific enforcement tools (e.g., comfort letters, agreements) have been effective in facilitating transactions and revitalization when perceived liability remains an obstacle to redevelopment and EPA involvement is critical
- Letter provides “comfort” by providing an interested party with the information EPA has about a property and what it means, and by helping an interested party to better understand the potential for or actual EPA involvement at a site
- Requests for EPA enforcement assistance with contaminated property transactions should be the exception
 - 2002 BFPP provisions are self executing
 - EPA involvement at one property creates an expectation or perceived need for EPA involvement at other properties and can become a barrier to their cleanup and reuse overall.

Why Does EPA Issue Comfort Letters?



- To facilitate the cleanup and reuse of contaminated or formerly contaminated properties when there is a realistic perception or probability of Superfund liability and when no other mechanism adequately addresses a party's concerns
- To equip an interested party with enough information to make an informed decision regarding the purchase and/or development of a property



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What is Included in a Comfort Letter?



- Provides information that EPA has about the property and the cleanup progress at the site
- Clarifies the likelihood of EPA involvement at a property
- Identifies statutory protections and enforcement discretion guidance that may be potentially available at the property
- Suggests “reasonable steps” that should be taken at a site
- Offers links to additional resources and tools that may be useful or pertinent to the redevelopment effort

What is Not Included in a Comfort Letter?



- Determination of liability
- No action assurance

Does a Comfort Letter Serve as
EPA Approval for a Given Project?



- In issuing a comfort letter EPA does not provide explicit approval for a project design or end use
- EPA's RE-Power model comfort letters do include a general endorsement for environmentally-responsible renewable energy projects

Renewable Energy Model Comfort/Status Letters



- **1996 Comfort/Status Letter Policy**
 - <http://epa.gov/compliance/resources/policies/cleanup/superfund/comfort-let-mem.pdf>

- **2012 Model Renewable Energy Comfort / Status Letters**
 - No Previous Federal Interest
<http://www.epa.gov/enforcement/cleanup/documents/policies/superfund/prev-fedint-cf-mod-2012.pdf>
 - State Action
<http://www.epa.gov/enforcement/cleanup/documents/policies/superfund/stateact-cf-mod-2012.pdf>
 - Federal Superfund Interest and No Current Federal Superfund Interest
<http://www.epa.gov/enforcement/cleanup/documents/policies/superfund/fedint-cf-mod-2012.pdf>

For more information on cleanup enforcement, please visit: [Enforcement - Cleanups web page](#).

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Support for RE on Contaminated Lands

To facilitate this beneficial reuse, EPA will work to address potential liability issues and to determine whether a property-specific document from EPA may be needed

Existing Liability Protections

CERCLA includes a number of liability protections and generally prohibits federal CERCLA enforcement against parties who are cleaning up lower risk properties in compliance with a state response program that specifically governs cleanups.

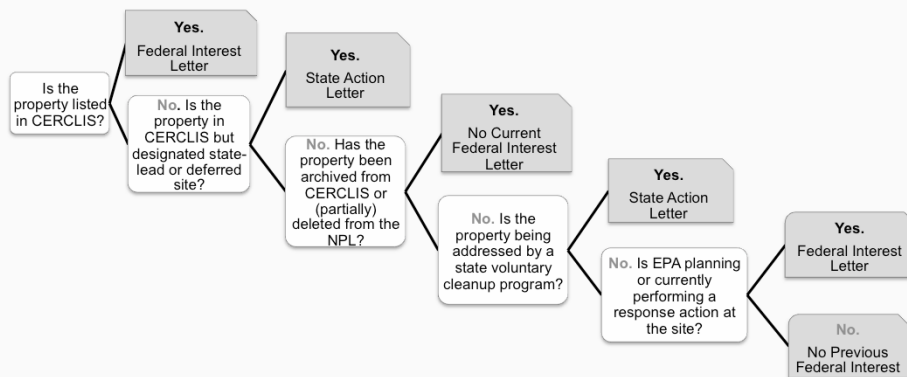
Leases & Responsibility

Not all leases trigger CERCLA liability for lessees. In some cases, lessees can obtain BFPP status to secure protections.

Due Diligence

Consult with legal counsel and the appropriate state, tribal or local environmental protection agency before taking any action to acquire, cleanup, or redevelop contaminated property

Which Comfort Letter Applies?





OTHER EPA TOOLS & RESOURCES

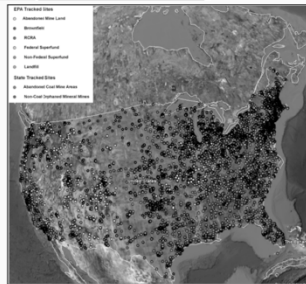
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RE-Powering Tools & Resources



Handbook on Siting Renewable Energy Projects While Addressing Environmental Issues



Handbook on Siting Renewable Energy Projects While Addressing Environmental Issues

Opportunities for siting renewable energy projects while addressing environmental site issues during all phases of cleanup

Best Practices for Siting Solar PV on Landfills

Current best practices unique to siting solar systems on landfills associated with system design, construction, O&M

Currently finalizing document

Other tools & resources

- RE-Powering Google Earth Screening Tool
- EPA-NREL feasibility studies
- Liability factsheets
- Success stories & case studies
- Quarterly webinars & newsletters
- Topic-specific workshops

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Liability Considerations Fact Sheet



Introduction to liability considerations

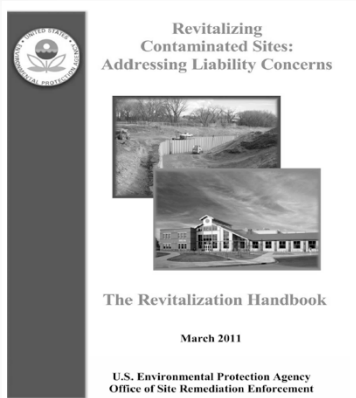
- What federal laws govern liability for contaminated property?
- Who is generally liable for cleaning up contaminated property?
- Will the EPA (or a state) hold a party liable who develops a renewable energy project on a contaminated property?
- What liability protections may be available?
- Is documentation available to confirm liability protection?
- What are the next steps to move forward with a renewable energy project?

<http://www.epa.gov/enforcement/cleanup/documents/superfund/re-liab-2012-fs.pdf>

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Brownfields Handbook



<http://www.epa.gov/compliance/resources/publications/cleanup/brownfields/handbook/index.html>

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Resources & Feedback

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U.S. EPA Technical Support Project Engineering Forum
Green Remediation: Opening the Door to Field Use Session C (Green Remediation Tools and Examples)
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