



# Becoming (and Remaining) a Bona Fide Prospective Purchaser

*LESSONS AND BEST PRACTICES FROM THE FIRST TWO  
DECADES OF THE BFPP DEFENSE*

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# CERCLA (Superfund)



*Love Canal, New York (1978)*

Enacted in 1980, imposes **joint and several, strict, and retroactive** liability—to both private parties and the government—on several categories of persons, including **blameless current owners** of facilities at which hazardous substances have been released in the past.

Unintended consequences...



*A (partial) solution:*

Federal Small Business Liability Relief and Brownfields Revitalization Act of 2002 (Brownfields Law) which established the Bona Fide Prospective Purchaser (“BFPP”) Defense:

**Current owners that would otherwise be liable under CERCLA are not liable if they meet certain criteria set forth in the Brownfields Law (and expounded upon by EPA regulations).**

***BFPP is the only means by which a party can knowingly buy a contaminated property yet avoid CERCLA liability!***

## **BFPP is not a status, but rather a legal defense:**

- You're not a BFPP unless a federal court says you are
- Party asserting the defense has the burden of proving that it qualifies as a BFPP
- The analysis is fact-dependent, which means it often cannot be resolved until after some amount of discovery has been conducted

Primary objective of a party acquiring a contaminated property:  
***Prevent litigation or enforcement action against it by bolstering its BFPP claim to the greatest extent practicable***

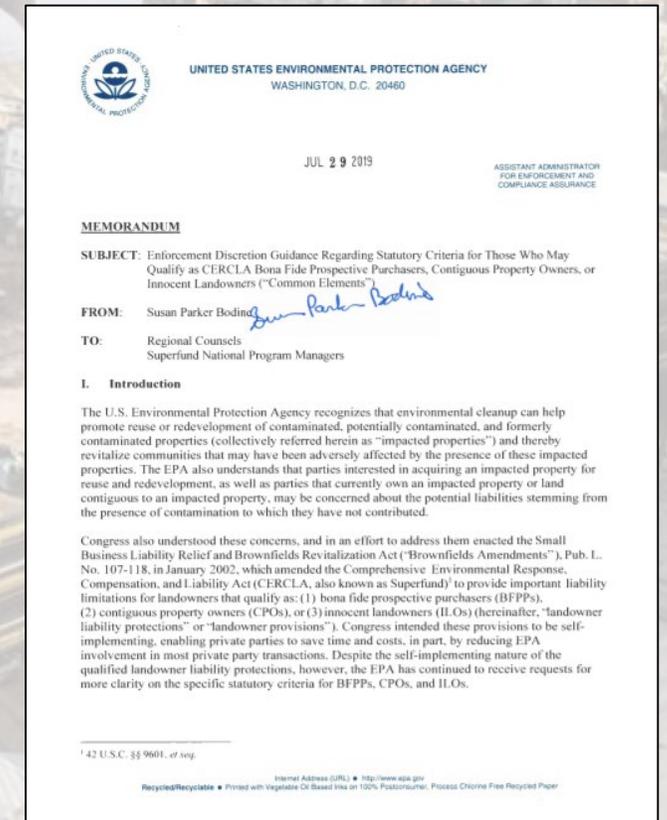
- Thorough
- Proactive
- Transparent and communicative
- Comprehensive and detailed documentation
- Involvement of capable and experienced environmental consultants and counsel

## To qualify as a BFPP, a party must establish eight criteria:

1. Prior to acquisition, “made all appropriate inquiries into previous ownership and uses...”
2. “All disposal of hazardous substances...occurred [before they acquired] the facility.”
3. Has provided “all legally required notices with respect to the discovery or release of any hazardous substances at the facility.”
4. Party has exercised “appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to (I) stop any continuing release; (II) prevent any threatened future release; and (III) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance.”
5. Has provided “full cooperation, assistance, and access to persons that are authorized to conduct response actions” at the facility.
6. Has complied “with any land use restrictions” and has not “impeded the effectiveness or integrity of any institutional control” in place at the facility.
7. Has complied with “any request for information or administrative subpoena” issued by EPA
8. Is not “affiliated with any...person that is potentially liable” for response costs at the facility.

# EPA “Common Elements” Guidance

- <https://www.epa.gov/enforcement/common-elements-guidance>
- **Revised:** July 29, 2019 (originally released March 2003)
- Product of Superfund Task Force Goal 3, Strategy 3, to “optimize tools and realign incentives to encourage third-party investment,” and to “support the cleanup and reuse of contaminated sites.”
  - Recommendation 29 – Revise “Common Elements” based on case law developments and lessons learned by EPA and the private sector.



# All Appropriate Inquiry

- Title 40, Chapter I, Subchapter J, Part 312 [CERCLA Section 101(35)(B)].
- ASTM E1527-13: Standard for Phase I.
- ASTM E2247-16: Standard Phase I for Forestland or Rural Property.
  - Area(s) of environmental interest.
- Phase I does not complete AAI.

**“Springboard” for maintaining BFPP.**

# All Appropriate Inquiry

- Needs to be done before property acquisition.
- Collaborative process between...
  - User
  - Environmental professional
- Responsibility for completing AAI does not fall exclusively on the environmental professional.

# User Responsibilities for AAI

- In whole or part...
  - Env. cleanup liens (§312.25).
  - **Specialized knowledge (§312.28).**
  - Purchase price and relationship to fair market value (§312.29).
  - Commonly known or reasonable ascertainable information (§312.30).
  - **Identify Key Site Manager / Site Contact (E1537-13: 3.2.47).**
  - User Questionnaire (E1527-13: Appendix X3).
  - **Clearly indicate the property.**
  - **Selecting the environmental professional / Quality of Phase I.**

# Specialized Knowledge or Experience

- ASTM E1527-13: 6.3.
  - Knowledge that is material to releases or RECs at the property.
- AAI (§312.28)
  - “...any other experience relevant to the inquiry...”
- Communicate before the site reconnaissance.
  - Releases or RECs.
  - Property and surrounding area.
  - Business operations.
  - Materials / waste usage.
  - **Business experience.**

# Interviews and Key Site Manager

- Commonly presented to the environmental professional by the User.
- Party with good knowledge of the uses, hazardous substances, and physical characteristics of property.
- Env. Professional should evaluate their level of knowledgeable.
  - Data Gap?

**Environmental professional is not required to locate a knowledgeable Key Site Manager.**

# Business Environmental Risks

- Can have material environmental or environmentally-driven impact on business associated with the current or planned use of a site.
- Site specific. What is User's plans for the site?
- **BER definition is very broad.**
  - Waste / materials removal
  - Receptors
  - Air permits
  - Open regulatory compliance issues
  - Other...

# Location of Property

- User should know the property and communicate that property clearly to the environmental professional.
- Address, Tax Parcel, Figure.
- Cannot perform complete AAI or Phase I if the full extent of the property is not know or is undefined.
- Cannot simply “add” new parcels.
  - New FOIA, RTKL, OPRA, etc.
  - Inspection, interviews.

# Quality of Phase I

- Simply having a Phase I is not sufficient to satisfy AAI.
- Experienced Users and/or their counsel are often able to assess the quality of a Phase I.
  - Accept whatever level of quality is provided?
  - Pressure to remove RECs?
  - Eliminate or ignore recommendation for sampling?
  - Shop for Phase I's based on price?

# Phase II

- Unlike the Phase I/AAI, Phase II is not strictly required to attain BFPP...

**BUT**

- Courts have found that w/o Phase II, party did not perform the “reasonable steps” necessary to maintain the BFPP.
- Cannot determine presence or magnitude of impact w/o investigation.
- Have all RECs been evaluated to assess impact from each?

“All disposal of hazardous substances occurred” before acquisition

- In other words: no “disposal” can have occurred after the party claiming to be a BFPP acquired the property.
- “Disposal” defined: “the discharge, deposit, injection, dumping, spilling, leaking, or placing” of any hazardous substances.

## ***U.S. v. CDMG Realty Co., 96 F.3d 706 (3d Cir. 1996)***

- Passive migration of existing contamination is not disposal
- Disposal “includes not only the initial introduction of contaminants ... but also the spreading of contaminants due to subsequent activity” (i.e., secondary disposal)
- The “dispersal of contaminants need not reach a particular threshold level in order to constitute disposal.”
- In order to establish that disposal had occurred as the result of a soil investigation, the investigation must have been conducted negligently.
- The “investigation at issue here was not meant to discover the presence of contamination but was aimed at assessing the land's ability to support construction. However, we conclude that the purpose of the investigation is irrelevant.”

## Judicial Interpretation of CERCLA “Disposal” in Other (non-BFPP) Contexts, Very Generally:

- Introduction of new contamination = disposal
- Dispersal of pre-existing contamination = likely disposal  
*(Although less likely if the dispersal happened as a result of non-negligent site investigation)*
- Passive leaking = possibly disposal
- Passive migration = likely not disposal

*Cranbury Brick Yard, LLC v. United States*, No. CV-15-2789, (D.N.J. Oct. 3, 2018), *aff'd*, 943 F.3d 701 (3d Cir. 2019)

- Court ruled party is not a BFPP because its contractor ruptured a UST, releasing ~20 gallons of “unknown petroleum product”
- Contaminated soil later used as fill, but, the court pointed to the rupture itself as constituting the disqualifying “discharge”
- The court ruled that the puncturing of the tank need not be negligent to constitute a “discharge” because the contractor was performing construction work, not soil investigation/remediation



*Cranbury Logistics Center on former Unexcelled Chemical Corporation Site, Cranbury, NJ*

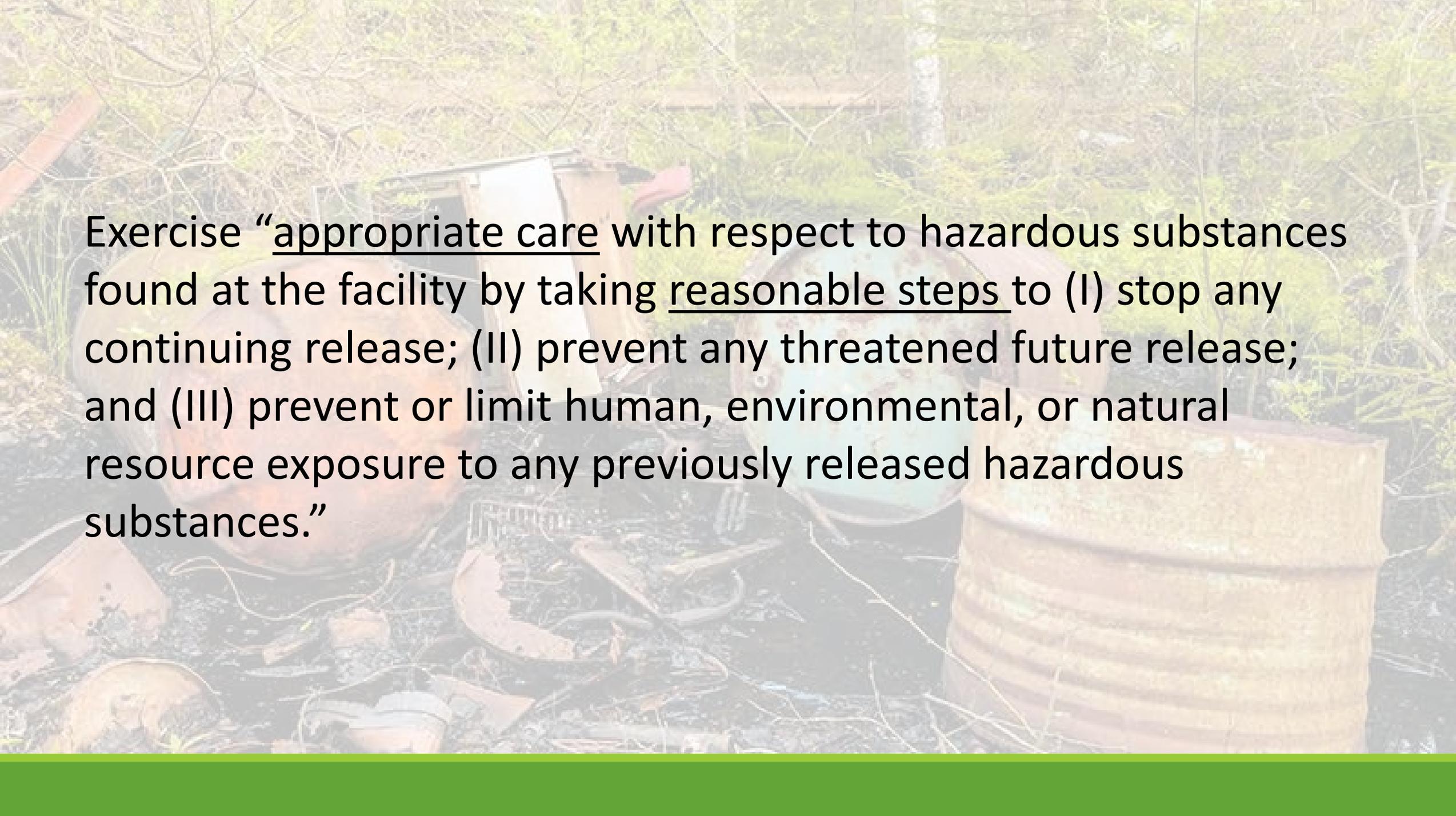
# Common Elements Guidance on “Disposal”

- New section in the Common Elements Guidance
- Requirement for BFPPs that **all disposal of hazardous substances at the facility occurred before the person acquired the facility.**
- Pre-acquisition language, but results in continuing obligation (party will lose relevant protection if any disposal occurs after acquisition.)
- Stakeholders voiced concerns that landowners could lose BFPP status if activities (including performing “reasonable steps” to manage releases) involve any type of disposal or spreading of contaminants.
- As noted, courts have found “disposals” in various situations:
  - Initial introduction of hazardous substances into environment
  - Active dispersal of contaminants during site redevelopment
  - Passive movement of contaminants (i.e. leaking tanks/drums)
- Initial disposals (new deposits/discharges) should not give rise to exercise of EPA enforcement discretion

# Disposal After Acquisition – Enforcement Discretion

Section provides guidance by describing illustrative examples of situations that could warrant exercise of EPA enforcement discretion; harmonizes requirement to take “reasonable steps” to manage “releases” with no “disposal” after acquisition requirement.

- “Secondary disposals” where landowner moves/disperses already-once disposed hazardous substances through earthmoving or construction activities – Possible Enforcement Discretion
  - Landowner takes steps to manage existing on-site contamination via “reasonable steps” (i.e. conducting reasonable soil investigations)
  - Landowner performs other redevelopment activities (i.e. excavation/grading, digging foundation)
- Existing hazardous substances spill/leak/migrate, even with no direct human conduct (i.e. new/continued leaking from UST) – Possible Enforcement Discretion

A photograph of a hazardous waste site. In the foreground, there are several large, rusted metal drums (barrels) scattered on the ground. Some drums are upright, while others are lying on their sides. The ground is covered with debris, including pieces of metal, wood, and other unidentifiable waste. In the background, there is a small, dilapidated structure with a corrugated metal roof. The overall scene is one of environmental neglect and potential contamination.

Exercise “appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to (I) stop any continuing release; (II) prevent any threatened future release; and (III) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substances.”

A landscape photograph of an industrial site, likely a mining or processing area. In the foreground, there are large piles of dark, tangled material, possibly waste or debris, with some green vegetation growing around them. In the middle ground, there is a large, flat, dark area that could be a pond or a large pile of material. In the background, there are several large, conical mounds of material, possibly ore or waste, under a cloudy sky. The overall scene suggests a site of environmental concern.

**CERCLA is “the lawyer employment act.”**

*ASARCO v. Atlantic Richfield*, 73 F.Supp.3d 1285, 1291 (D. Mont. 2014)

- Consistent with Phase II recommendations, owner removed and disposed of all USTs and associated contaminated soils at the site and performed verification sampling of the excavations. **YES!**

*Von Duprin LLC v. Moran Electric Service*, 2019 WL 535752 (S.D. Ind. Feb. 11, 2019)

- Consistent with state cleanup program, soon after it conducted sampling and learned that the USTs contained a hazardous substance, plaintiff emptied USTs but left them in the ground. **YES!**

*3000 E. Imperial, LLC v. Robertshaw Controls*, 2010 WL 5464296 (C.D. Ca. Dec. 29, 2010)

- Owner demolished building, which exposed PCE concentration, of which the owner had been aware, to the elements, and took no steps to remove the contaminated soil or limit the spread of PCE. **NO!**

*Voggenthaler v. Maryland Square LLC*, 724 F.3d 1050 (9th Cir. 2013)

# ***PCS Nitrogen v. Ashley II of Charleston, 714 F.2d 161 (4<sup>th</sup> Cir. 2013)***

- Held: “appropriate care ... at least as stringent as ‘due care’ under [CERCLA’s] innocent landowner defense”, and suggested that it is an even higher standard.
- Thus, the court “borrow[ed] standards from CERCLA’s due care jurisprudence to inform [its] determination of what ‘reasonable steps’ must be taken to demonstrate ‘appropriate care’.”
- **Due care: ‘whether a party took all precautions with respect to the particular waste that a similarly situated reasonable and prudent person would have taken in light of all the relevant facts and circumstances.’**



*Location of former fertilizer plant at issue in Ashley II (Charleston, SC)*

# Appropriate Care/Reasonable Steps

Provide better clarity on reasonable steps obligations to reflect congressional intent/EPA practices and update reasonable steps section (including overview and comfort/status letter discussions) and Reasonable Steps Attachment with relevant case law.

- **Update Case Law:** Relevant holdings on due care (guides appropriate care analysis) and reasonable steps included in both the reasonable steps overview and attachment (Attachment B) to provide meaningful clarity to parties.
- **Address Comfort/Status Letters:** Section updated to reflect current EPA policy. Stand-alone “Sample Federal Superfund Interest Reasonable Steps Letter” removed.
- **Provide Better Certainty for Responsible Landowners:** Help ease stakeholder concerns by better reflecting the legislative intent of the Brownfields Amendments to promote responsible redevelopment and put contaminated properties back into use.



# Appropriate Care/Reasonable Steps - Guidance

- The statute protects landowners from CERCLA liability while recognizing that these landowners should act reasonably. Site-specific, fact-based.
  - “The EPA believes Congress did not intend to create, as a general matter, the same types of response obligations that exist for a CERCLA liable party (e.g., removal of contaminated soil, extraction and treatment of contaminated groundwater).” But, “can’t ignore potential dangers...”
  - BFPPs may be in a better position to evaluate appropriate reasonable steps.
- “Due care” case law may be useful reference point, but is not dispositive in a reasonable steps analysis.
  - Section identifies recent “appropriate care” case law.
- Analysis should take into account the different elements of the landowner liability protections (i.e. ICs, cooperation/access).
- EPA may be able to provide additional information if party has “reasonable steps” concerns. EPA may issue reasonable steps comfort/status letters (links to updated 2019 Comfort/Status Letter Policy: <https://www.epa.gov/enforcement/comfortstatus-letters-guidance>)

# Appropriate Care/Reasonable Steps – Attachment B

- “Reasonable Steps Categories and Examples” - Identifies/outlines main categories of “reasonable steps” obligations described by courts and recommended in finalized EPA comfort/status letters; also includes “due care” jurisprudence.

## Categories

- Timely Notify Appropriate Authorities of Contamination
- Comply and Cooperate with Authorities
- Prevent Public Exposure by Restricting Site Access
- Contain Releases by Maintaining Existing Elements of a Response Action
- Timely Mitigate Newly Discovered Releases and Address Environmental Conditions
- Appropriately Assess/Inspect the Extent of Contamination Once Aware/Upon Discovery
- Prevent the Exacerbation of Contaminated Site Conditions
- Monitor Lessee Conduct and Address Improper Practices

# Land Use Restrictions/Institutional Controls

Update to provide better clarity to landowners on meeting the requirements of [complying with land use restrictions](#) and [not impeding the effectiveness or integrity of institutional controls](#). Language from more recent guidance documents (i.e., 2012 PIME Guidance) incorporated into this section.

- Further define/clarify “land use restrictions” to provide greater clarity, utilizing language in the current PIME Guidance.
  - Compliance with LURs unrelated to AAI obligations - AAI includes search of government records, filed ICs, historical documents (incl. chain of title documents)
- Maintain/clarify the obligation to cooperate and assist with the implementation of necessary institutional controls.
- New section on monitoring activities to assist in satisfying land use restriction and institutional control obligations.



**Questions?**