

Brownfields Basics

2024 Pennsylvania Brownfields Conference
State College, PA

Brownfields Basics

- Speakers

- Michael Maddigan, PADEP Harrisburg, PA
 - mmaddigan@pa.gov
- Colleen Costello, Sanborn, Head & Associates, Horsham, PA
 - ccostello@sanbornhead.com
- Steven Miano, Esq. Hangley Aronchick, Philadelphia PA
 - smiano@hangley.com



Overview of Legal Landscape

- Federal and state statutes impose liability for brownfields sites
- Liability issues for soils, groundwater, wastes, and other contaminants
 - Emerging contaminants as well
- Enforcement (civil and criminal) for failure to comply with laws
- Liability concerns drove the passage of Act 2, Act 3 and Act 4

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Overview of Legal Landscape Federal Laws



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Comprehensive Environmental Response Compensation and Liability Act (Superfund)

- Imposes retroactive, joint and several liability for owners/operators and those in chain of title
- Elaborate and expensive process if caught in CERCLA web – including cleanup costs and costs for natural resources damages
- Amendments created liability protections for:
 - » **Innocent Owners**
 - » **Prospective Purchasers**
 - » **Adjacent Landowners**



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RCRA Resource Conservation and Recovery Act

- Imposes “cradle to grave” regulation of “hazardous wastes”
- Regulates treatment, storage and disposal of hazardous wastes
- Typical hazardous wastes at sites include solvents, heavy metals (soils/groundwater), certain structural debris with contaminants (lead paint)
- If hazardous wastes are present on sites, RCRA may impose additional obligations on remediators
- RCRA also contains requirements for USTs



TSCA Toxic Substances Control Act

- Imposes requirements on use, manufacturing, handling, treatment and disposal of certain substances that create “unreasonable risk” to health and the environment
- Typical TSCA substances found at sites include asbestos and polychlorinated biphenyls (PCBs)
- TSCA substances are subject to strict compliance with regulations (handling/removal)

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Clean Water Act

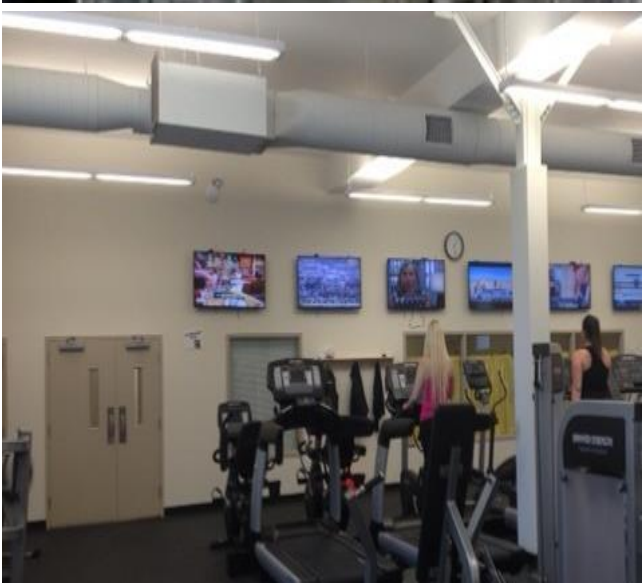
- CWA requires permits for discharges of pollutants to surface waters
- Section 402 requires NPDES permits for point source discharges
- Section 402 regulates stormwater from industrial activities and construction projects
- Section 404 requires permits for discharges to wetlands, including those associated with road crossings



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Overview of Legal Landscape State Laws

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Clean Streams Law

- CSL is PA's equivalent to the Clean Water Act
- Requires permits for discharges of pollutants
- "Pollutant" defined very broadly
- Erosion and sedimentation control; stormwater and point source discharges
- DEP's "catch-all" enforcement statute for unpermitted discharges
- Joint permitting process with feds for wetlands
- CLS includes regulation of groundwater



Solid Waste Management Act

- State equivalent to RCRA
- Regulates both solid and hazardous waste
- Presence of solid/haz waste requires study
- Section 405 requires a description in every deed with a conveyance of property where hazardous waste has ever been disposed
 - Description of surface area size, location and types of wastes disposed



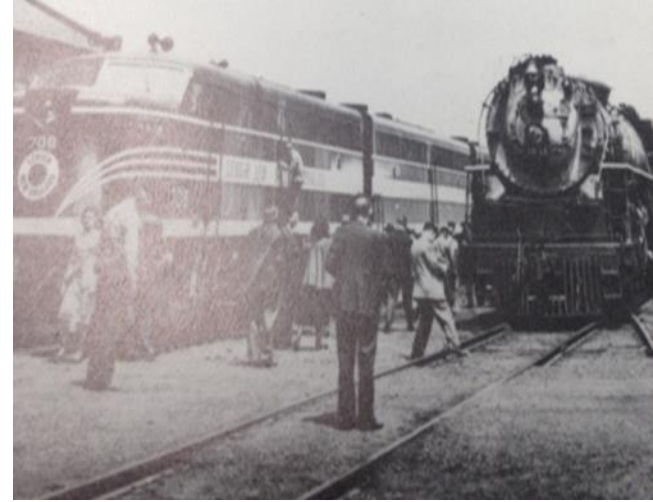
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Proposed Site Layout

Job No. Date

Pennsylvania Storage Tank and Spill Prevention Act

- Regulates most underground and aboveground storage tanks
- Suspected or confirmed releases must follow the corrective action process (“CAP”) in Chapter 245 of the Pennsylvania Storage Tank regulations



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Hazardous Sites Cleanup Act

- PA's version of federal Superfund Law
- Equivalent liability provisions
- Section 512 requires every deed for the conveyance of property on which a hazardous substance has ever been disposed to provide a description and acknowledgment of the hazardous substance disposal
 - Should include surface area size and exact location and description of the type of hazardous substance disposed



Common Law Liability

- Various theories of common law liability
 - Nuisance
 - Negligence
 - Trespass
 - Property valuation
- Various damage claims
 - Personal injury
 - Property damage
 - Vapor intrusion damages



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Environmental Due Diligence & Disclosure for Property Transactions



USEPA's All Appropriate Inquiries (AAI) Rule

- All Appropriate Inquiries (AAI) is the process of evaluating a property's environmental conditions, which may be relevant to assessing potential liability for any contamination
- AAI Rule 40 CFR Part 312– required by 2002 Brownfields Amendments to CERCLA to provide protection for CERCLA liability for:
 - Innocent landowner
 - Contiguous property owner or
 - Bona Fide Prospective Purchaser.
- Who uses the AAI process
 - Purchasers
 - Lenders
 - Insurance requirements
 - Parties who receive grants under EPA's Brownfields Program must comply with the AAI rule when using grant funds



Image Source USEPA, 2022

USEPA's All Appropriate Inquiries (AAI) Rule

What is Required ?

- Interviews with past and present owners, operators and occupants.
- Review of historical sources of information.
- Review of federal, state, tribal and local government records.
- Visual inspection of the facility and adjoining property.
- Review of commonly known or reasonably ascertainable information.
- Assessment of the degree of obviousness of the presence or likely presence of contamination at the property and the ability to detect the contamination
- Identification of environmental cleanup liens, or specialized knowledge to assess price if not contaminated
- Any commonly known or reasonably ascertainable information must be considered

USEPA's All Appropriate Inquiries (AAI) Rule

When should AAI Be Done ?

- If completed more than 1 year before acquisition, needs to be updated to reflect current information
- If completed less than 180 days only certain things need to be updated (e.g. interviews of current and past owners, review of government records, on-site visual inspection and searches for environmental cleanup liens)

Who Can Perform AAI ?

- A state- or tribal-issued certification or license and three years of relevant, full-time work experience, or
- A bachelor's degree or higher in science or engineering and five years of relevant, full-time work experience, or
- Ten years of relevant, full-time work experience.



Using ASTM Phase 1 Guidance to Comply with AAI Rule

- ASTM guides are updated every 8 years, previous version E1527-13 no longer accepted for AAI (as of 2/13/24)
- Complying with ASTM Phase 1 Guidance provides protection under AAI Rule, but does not address requirements under other state or local laws or any federal laws beyond AAI
- E1527-21 has important updates from E1527-13 including
 - Revised Definitions (stronger, clearer)
 - Guidance Language (“Discussion”)
 - Historical Research
 - Site Reconnaissance
 - Report
 - Appendices

ASTM Phase 1 Guidance – Key Items

- **Recognized Environmental Conditions (REC)**
 - the presence of **hazardous** substances or petroleum products in, on, or at the subject property due to a release to the environment
 - the likely presence of **hazardous** substances or petroleum products in, on, or at the subject property due to a release or **likely** release to the environment; or
 - the presence of **hazardous** substances or petroleum products in, on, or at the subject property under conditions that pose a **material** threat of a future release to the environment.
- **PFAS is a Non-Scope Item** - Appendix X6.10 - “contaminant is not within the required scope of a Phase I ESA unless it is listed as a “hazardous substance” under CERCLA”
Emerging contaminants (PFAS) specifically mentioned to be included under Non-Scope items
- **Significant Data Gap** – “ data gap that affects the ability of the environmental professional to identify a recognized environmental condition.”

Completing Phase 1

- Non-Intrusive Investigation
- Phase 1 Components
 - User Responsibilities (i.e. title search)
 - Physical Setting (i.e. USGS maps)
 - Government Records (i.e. NPL sites)
 - Historical Records (i.e. Sanborn maps)
 - Site Reconnaissance
 - Owner/Operator/Occupant Interviews
 - Local Government Interviews
 - Evaluation/Conclusions
- Are there more objectives beyond complying with ASTM Phase 1?
- Is there a potential for Phase 2 ?



Property Title



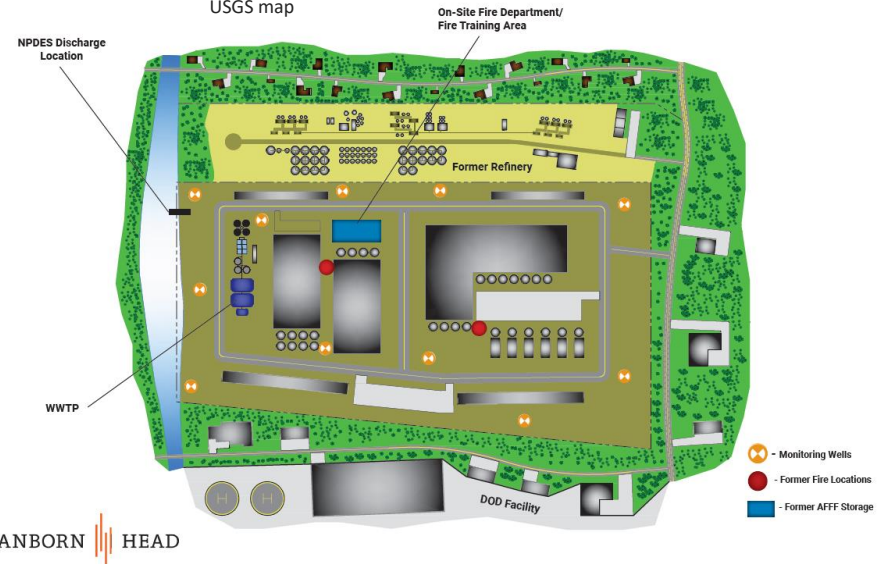
USGS map



Boring log



NPL Listed Sites



Sanborn Maps



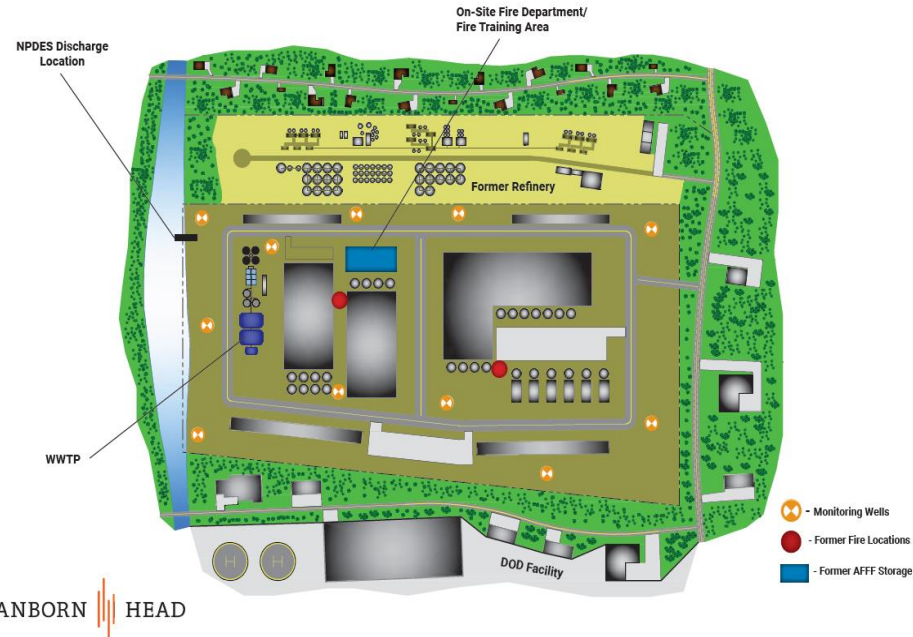
Interviews



Conclusion/Report

Phase 2 Investigation for Transaction/Redevelopment

- Follow up on Phase 1 findings or other information (i.e. potential VI not relating to hazardous substance)
- Clarity on the objective of Phase 2 investigation
 - Regulatory Program
 - End Use (Selected Standard)
- Nature and Extent of Impacts
 - Soil
 - Groundwater
 - Surface Water
 - Sediment
 - Subsurface Vapors
 - Indoor Air
- Consider potential for risk assessment and/or remediation





pennsylvania

DEPARTMENT OF ENVIRONMENTAL PROTECTION



Bureau of Environmental Cleanup & Brownfields

Pennsylvania's Land Recycling Program

2024 PA Brownfields Conference
State College, PA

Josh Shapiro, Governor

Jessica Shirley, Interim Acting Secretary



Program Goals

- Cleanup contaminated sites
- Return sites to productive use
- Create jobs and stimulate economic growth
- Preserve farmland and open space



Four Cornerstones of Land Recycling



The Land Recycling Program

The Land Recycling Program was established by a series of legislation enacted in 1995

ACT 2 - Land Recycling and Environmental Remediation Standards Act

ACT 3 - The Economic Development Agency, Fiduciary and Lender Environmental Liability Protection Act

ACT 4 - The Industrial Sites Environmental Assessment Act

Land Recycling and Environmental Remediation Standards Act

- Act 2 –provides for cost effective cleanups to uniform standards
 - Dependent on future use
- 3 cleanup standards – All provide equal liability protection
- Contains notification and reporting requirements (including public notice)
- Provides broad liability protections
- Act 2 cleanup standards apply to all PA cleanups

Act 2 (continued)

- Liability protection may require long-term obligations
 - Engineering controls (e.g., caps)
 - Institutional controls (e.g., land/GW restrictions)
 - UECA secures these restrictions
- Key documents include:
 - Regulations found at 25 PA Code Chapter 250
 - DEP's Technical Guidance Manual

Act 3

Economic Development Agency, Fiduciary and Lender Environmental Liability Protection Act

- Limits environmental liability for entities taking a financial risk
 - Redevelopment and Industrial Development Authorities
 - Any other Commonwealth or Municipal Authority acquiring title or interest in a property
 - Includes lenders, conservancies, other local non-profits
- Encourages economic development and industrial redevelopment
- Amended in 2009 (Act 26) to better define protections

Industrial Sites Environmental Assessment Act

- Not a liability protection statute
- DEP provided grants to municipal entities and nonprofit economic development agencies to assess industrial sites
- Performance-based loans available to “innocent” applicants for remedial actions

Cleanup Standards

- Background Standard
 - Based on concentrations present on the property but not related to any release at the property
- Statewide Health Standard
 - Medium Specific Concentrations (soil and groundwater)
- Site-Specific Standard
 - Risk based approach tailored to individual sites

Special Industrial Areas

- Abandoned sites or sites in enterprise zones
- Remediator/owner must not have caused or contributed to the contamination
- Property must have previously been used for industrial activity
- Remediator/owner benefits:
 - Limited investigation and cleanup obligations
 - Tax incentives
- Benefits local community and economy

Flexibility of Act 2

- Remediator chooses:
 - Which Act 2 cleanup standard to use...**NOT THE DEP**
 - Which release to address – the entire property may not need to be characterized
 - Which environmental media to address
 - Which contaminants to address
- Liability Relief applies only to area on property where an Act 2 standard has been attained



Act 2 – Step by Step

NIR

- Submit Notice of Intent to Remediate (NIR)
- Publish public notices

Characterize

- Identify Contaminants
- Develop Conceptual Site Model
- Fate & Transport Analysis

POC

- Reassess if selected standard still works
- Establish points of compliance (POC)

Act 2 – Step by Step

Remedy

- Evaluate and select remedy
- Remediate or eliminate pathways

Demonstrate Attainment

- Attainment sampling
- Risk assessment

Final Report AULs

- Submit final report demonstrating attainment
- Maintain any activity and use limitations (AULs)

Liability Protection



- Entities demonstrating compliance with a standard shall be relieved of further remediation of contamination identified in submissions to DEP
- Does not cover third party common lawsuits – toxic tort suits
- Reopeners may apply in specific circumstances but uncommon

Liability Protection

Liability protection applies to:

- Current owner
- Future owners
- Any person who participated in the cleanup
- Developer
- Occupiers
- Successors or assigns
- Public utilities performing work on the property

DEP Assistance

- Regional teams will assist with redevelopment projects
 - Assistant Regional Director, Local Government Liaison, Environmental Cleanup Program Manager
- Permitting (not required by Act 2)
 - Permit Application Consultation Tool (PACT)
 - Pre-Application Conferences
 - Permit may be eligible for priority review



Bureau of Environmental Cleanup & Brownfields

Michael Maddigan

Land Recycling Program Manager

Bureau of Environmental Cleanup & Brownfields

[Land Recycling Program \(pa.gov\)](http://pa.gov)



Doing the Deal



Valuing the Property

- Items Which Could Affect Value:
 - Fear of the unknown
 - Liability
 - Property use limitations
 - Change in regulations
 - Cost overruns
 - Stigma
 - Vapor intrusion issues
 - Long-term stewardship (engineering & institutional controls)

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Managing Risk - Buyer-Seller Agreement – Consent Order

- 3 Party Consent Order and Agreement (COA)
 - Seller – remediation obligations with deadlines
 - Buyer – allow access, maintain engineering controls, record agreement and restrictions with the deed
- Buyer receives some liability protections prior to the remediation being complete through a covenant not to sue
- Once remediation complete, all parties receive full Act 2 protection



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Managing Risk - Buyer-Seller Agreement – Consent Order

- Downsides:
 - Only formal protection is DEP's covenant not to take enforcement action against new owner
 - Does not encompass third party statutory suits or federal action
 - Full Act 2 defenses not valid until full Act 2 protection is conferred through approval of Final Report
- Nevertheless – very useful tool for property deals



Managing Risk – Sales Agreements

- Access to conduct due diligence
- Property description
- Representations and warranties
- As is purchase?
- Releases of liability
- Indemnifications
- Insurance products (limited)
- Incorporation of Act 2 protections
- Procuring Environmental Insurance



Managing Risk – Technical Aspects

Integrated Project Team

- Site Owner
- Legal support
- Technical support
- Financial support
- Agencies
- Community

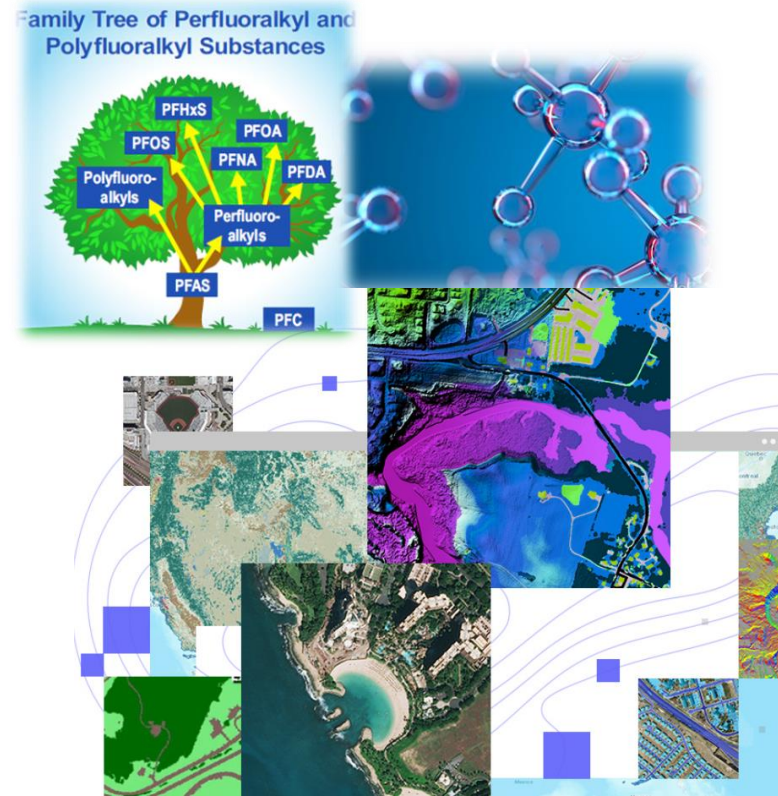


Redevelopment Strategy- Technical Master Plan

- Understand environmental conditions before finalizing site master plan
- Develop contingencies for changing redevelopment plan
- Get agency buy-in early (i.e. Buyer/Seller Agreement, Soil Management Plans)
- Include all appropriate programs, e.g., Act 2, tanks, storm water, solid waste, etc. in planning
- Include community early in process
- Identify AULs and long-term stewardship requirements as soon as possible
- Consensus on regulatory/technical options (i.e. risk assessment, remediation)
- Integrated data management/sharing approach
- Communication is key- include everyone in the discussion

Other Phase 2 Considerations

- Emerging Contaminants
- Changing Regulatory Requirements
- Changing Site Use
- Innovative Site Characterization Tools
- Use of AI/Big Data in Site Remediation
- Climate Change/Remedy Resiliency
- Sustainable Remediation



Questions??????

