

This document has been prepared as part of the implementation project of Legal Pathways to Deep Decarbonization (Michael B. Gerrard and John C. Dernbach, eds. Environmental Law Institute [2019]) (LPDD). For background information on the project, see <https://lpdd.org>

Memorandum

Recommendation — Provide renewables developers an exemption from CERCLA liability if they build on contaminated land and do not disturb the sites more than necessary.

1. Background

Princeton University Zero Lab predicted that the Inflation Reduction Act (IRA) provisions:¹

...could spur record-setting growth in wind and solar capacity, with annual additions increasing from 15 [gigawatts] (GW) of wind and 10 GW of utility-scale solar [photovoltaic] in 2020 to an average of 39 GW / year of wind additions in 2025- 2026 (~2x the 2020 pace) and 49 GW / year of solar (~5x the 2020 pace), with solar growth rates increasing thereafter.²

The model language accompanying this memorandum is intended to help spur significant development of utility-scale U.S. wind and solar capacity at contaminated properties. Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), a majority of contaminated properties will be brownfields sites.³

A brownfields site is “real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.” CERCLA §101(39)(A), 42 USC 9601(39)(A), though certain sites are ineligible for treatment as brownfields sites, such as sites with ongoing EPA action. CERCLA §101(39)(B), 42 USC 9601(39)(B).

The EPA has pre-screened more than 190,000 sites nationwide for renewable energy potential using renewable energy criteria codeveloped with the U.S. Department of Energy National Renewable Energy Laboratory (NREL), with over 40,000 sites from EPA databases, and 147,500 sites from state programs.⁴ Wind and solar energy are expected to provide the majority of renewable energy capacity.⁵

Significant grants flow to brownfields sites.⁶ And brownfields grants criteria include consideration

¹ Inflation Reduction Act, Pub. L. No. 117-169 (August 2022).

² Princeton University, Zero Lab, REPEAT Project, *Preliminary Report: The Climate and Energy Impacts of the Inflation Reduction Act of 2022* (August 2022) 15
https://repeatproject.org/docs/REPEAT_IRA_Preliminary_Report_2022-08-12.pdf

³ CERCLA §§ 101(39), 104(k), 42 USC 9601(39), 9604(k). CERCLA can be found at 42 USC 9601 et seq.

⁴ U.S. Environmental Protection Agency, RE-Powering America's Land Initiative: RE-Powering Mapper Fact Sheet (April 2022) 2
https://www.epa.gov/system/files/documents/2022-04/re_powering_mapper_factsheet.pdf

⁵ Id at 3.

⁶ See U.S. Environmental Protection Agency, *Types of EPA Brownfield Grant Funding*
<https://www.epa.gov/brownfields/types-epa-brownfield-grant-funding> See also U.S. Environmental Protection Agency, *RE-Powering America's Land Initiative: Financing Renewable Energy Projects on Contaminated Lands* (May 2013) <https://www.epa.gov/sites/default/files/2015-06/documents/re->

of the extent the grant would facilitate renewable energy generation or energy efficiency projects.

Though the brownfields grants are federally funded, the brownfields program itself relies primarily on state and Tribal response authorities. EPA indicates that state response programs “continue to be at the forefront of brownfields cleanup and redevelopment...The increasing number of properties entering state programs emphasizes the states’ essential role in brownfields cleanup.”⁷ States tend to offer voluntary cleanup programs or brownfields programs to parties, providing certainty and clarity with regards to state response liability.⁸ EPA notes that “Tribal response programs are also at the forefront of brownfields cleanup and reuse.”⁹

But for prospective generators of utility-scale wind and solar energy on brownfields sites, there remain significant CERCLA liability concerns as well as a lack of certainty as to the role EPA will play with regards to individual utility-scale wind and solar energy generation projects on brownfields sites. Though EPA “encourages renewable energy development on current and formerly contaminated lands, landfills, and mine sites when such development is aligned with the community’s vision for the site,”¹⁰ EPA notes as well that many developers of renewable energy “report hesitation concerning involvement with contaminated properties in fear that they may be liable under federal or state cleanup laws.”¹¹

The intent of the model law is to preclude this reluctance and hesitancy by providing prospective generators of utility-scale wind and solar energy on brownfields sites significant CERCLA liability protection and a marked path away from CERCLA and towards environmental regulation by appropriate state and Tribal response authorities, closer to affected communities. Not only would the model law likely further utility-scale wind and solar energy generation on brownfields sites, it could also serve to complement other state efforts to generate, transport, and store renewable energy, as well as assist in state-wide decarbonization efforts.¹²

[powering financing fact sheet.pdf](#)

⁷ U.S. Environmental Protection Agency, *State Brownfields and Voluntary Response Programs 2014* (December 2016) 5, https://www.epa.gov/sites/default/files/2016-12/documents/brownfields_state_report_2014_508_12-17-14_final_web.pdf See also U.S. Environmental Protection Agency, *Highlights about State and Tribal Brownfields Response Programs*.

<https://www.epa.gov/brownfields/highlights-about-state-and-tribal-brownfields-response-programs>

See also U.S. Environmental Protection Agency, *Profiles of State Programs* (June 2022)

<https://www.epa.gov/system/files/documents/2022-06/epa-re-powering-profiles-state-programs-may-2022%20508.pdf> See also U.S. Environmental Protection Agency, *State Response Programs*,

<https://www.epa.gov/enforcement/state-response-programs>

⁸ See U.S. Environmental Protection Agency, *The Revitalization Handbook - Addressing Liability Concerns at Contaminated Properties* (2022 Edition) 18 <https://www.epa.gov/enforcement/revitalization-handbook>

⁹ Ibid.

¹⁰ U.S. Environmental Protection Agency, *RE-Powering America's Land*, <https://www.epa.gov/re-powering>

¹¹ U.S. Environmental Protection Agency, *Liability Reference Guide for Siting Renewable Energy on Contaminated Properties* (July 2014) 2, <https://www.epa.gov/sites/default/files/2014-07/documents/liability-renew-energy-contamprop-2014.pdf>

¹² See for example, See Sabin Center for Climate Change Law, *Model Laws for Deep Decarbonization in the United States*, *LPDD Model Law: State Law Expediting the Siting of Utility-Scale Renewable Energy Generating Systems*, <https://lpdd.org/resources/lpdd-model-law-state-law-expediting-the-siting-of-utility-scale-renewable-energy-generating-systems/>; *Model Laws for Deep Decarbonization in the United States, RE-Powering America's Land Initiative*, <https://lpdd.org/resources/re-powering-americas-land-initiative/>; *Model Laws for Deep Decarbonization in the United States, Utilizing Disturbed Lands for Renewables Development*, <https://lpdd.org/pathway/utilizing-disturbed-lands-for-renewables-development/>; *Model Laws for Deep Decarbonization in the United States, States and State Governments*,

2. CERCLA liability exemption

Congress has twice amended CERCLA to offer liability protections for parties who wish to develop brownfields sites.¹³ The CERCLA provisions set forth elements those parties must meet in order to attain the liability protections. These elements and related liability protections include protections for landowners who qualify as bona fide prospective purchasers, for contiguous property owners, for innocent landowners, residential property owners, and lenders.¹⁴ Satisfaction of the required elements provides environmental protections desired by surrounding communities,¹⁵ as well as more certainty for the parties seeking liability protections.¹⁶ In addition, EPA has required elements for brownfields grants.¹⁷

Yet, though the liability protections are “self-implementing,”¹⁸ the protections continue to provide EPA discretion in determinations as to individual applicability, and necessarily include the involvement of EPA where a brownfields developer seeks definitive liability protection.¹⁹ Additionally, the liability protection framework does not specifically address liability of utility-scale wind and solar energy generators. The EPA continues its efforts to seek to address concerns with respect to renewable energy development through its RE-Powering America’s

<https://lpdd.org/jurisdiction/states-and-state-governments/>; Michael B. Gerrard, Utility-Scale Renewables, in Michael B. Gerrard and John C. Dernbach, eds., *Legal Pathways to Deep Decarbonization in the United States* (Environmental Law Institute 2019) 47.

¹³ Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. 107–118, 115 Stat. 2356 (2002) and The Brownfields Utilization, Investment, and Local Development (BUILD) Act, Consolidated Appropriations Act, Pub. L. No. 115-141, 132 Stat. 348, Division N, Sec. 11 (2018), CERCLA §104(k)(6)(C)(vii). See U.S. Environmental Protection Agency, *Brownfields Laws and Regulations* <https://www.epa.gov/brownfields/brownfields-laws-and-regulations>

¹⁴ Liability protection includes CERCLA §107(n) liability of fiduciaries, §107(o) de micromis exemption, §107(p) municipal solid waste exemption, §107(q) contiguous properties, §107(q)(1)(C) bona fide prospective purchaser, §107(r) prospective purchaser and windfall lien, and § 107(b)(3) and 101(35)(A) innocent landowner. 42 USC 101(35)(A), 107 (b)(3), (n), (o), (p), (q), and (r). See U.S. Environmental Protection Agency, *Addressing Liability Concerns to Support Cleanup and Reuse of Contaminated Lands*, <https://www.epa.gov/enforcement/addressing-liability-concerns-support-cleanup-and-reuse-contaminated-lands>

See also U.S. Environmental Protection Agency, *Enforcement Discretion Guidance Regarding Statutory Criteria for Those Who May Qualify as CERCLA Bona Fide Prospective Purchasers, Contiguous Property Owners, or Innocent Landowners (“Common Elements”)* (July 29, 2019) <https://www.epa.gov/sites/default/files/2019-08/documents/common-elements-guide-mem-2019.pdf>

¹⁵ See for example 40 CFR 312.20 (all appropriate inquiries). See also U.S. Environmental Protection Agency, *Community Actions that Drive Brownfields Redevelopment* (June 2019) 8, 15 https://www.epa.gov/sites/default/files/2019-06/documents/final_community_actions_that_drive_brownfield_redevelopment_6-3-19_508_compliant.pdf

U.S. Environmental Protection Agency, *Supporting Environmental Justice through EPA Brownfields and Land Revitalization* (October 2021), <https://www.epa.gov/system/files/documents/2021-10/supporting-ej-through-brownfields-10-13-21-508-compliant.pdf>

¹⁶ Standards and Practices for All Appropriate Inquiries, 70 Fed. Reg. 66070, 66103 (Nov. 1, 2005).

¹⁷ U.S. Environmental Protection Agency, *Programmatic Requirements for Brownfield Grants*, <https://www.epa.gov/brownfields/programmatic-requirements-brownfield-grants>

¹⁸ Revitalization Handbook (note 8) 3.

¹⁹ Id at 24 – 29. In contrast, CERCLA contains the petroleum exclusion, which effectively eliminates operation of CERCLA with regards to petroleum, including for crude oil, fractions of crude oil, and natural and synthetic gas. CERCLA §101(14), 42 USC 9601(14).

Land Initiative,²⁰ as well as establishment of a model RE- Powering America's Land Initiative Comfort/Status Letter.²¹

Accordingly, the model law adds a liability exemption for utility-scale wind and solar energy generators at brownfields, in line with liability protection language for bona fide prospective purchasers. The model law also includes the related statutory criteria for the liability protections. CERCLA §101(40)(A) and (B), 42 USC 9601(40)(A) and (B). CERCLA §107(r)(1), 42 USC 9607(r)(1). Because the model law seeks to limit CERCLA authorities, additional federal requirements such as potential federal liens have also been excluded. CERCLA §107(r)(2), 42 USC 9607(r)(2).

Consistent with the generation of utility-scale wind and solar energy, and the purpose of the RE- Powering America's Land Initiative, the model definition of utility-scale wind and solar brownfields site distinguishes between sites whose primary purpose is wind and solar energy generation and those sites which incorporate "renewable energy technologies as part of a project design that will reduce emissions and support energy needs during weather events."²² The latter retain protections provided under landowner liability provisions applicable to brownfields, if met.²³ The landowner categories, along with utility-scale wind and solar energy generation, remain potentially eligible for brownfields grants.²⁴ (The model law utilizes the phrase "energy generation" to mirror the language in the brownfields grant funding language.)

Lastly, the model language limits its liability protections to where necessary for generation of the utility-scale wind and solar energy. This is to preclude expansion of the liability exemption over a broader area than is necessary for utility-scale wind and solar energy generation.

3. Transfer of sites to state response authorities

The second component in providing efficiencies for utility-scale wind and solar brownfields sites and sufficient limitations on liability is an explicit transfer of EPA authority for utility-scale wind and solar brownfields sites to state response authorities.

CERCLA transfers this authority to states through the definition of "eligible response site." CERCLA generally defines an "eligible response site" as including brownfields sites plus a limited number of added categories, and exclusions. CERCLA §101(41)(A) and (B), 42 USC 9601(41)(A) and (B), CERCLA §101(41)(C), 42 USC 9601(41)(C).

Once deemed an eligible response site, a contaminated area is no longer subject to CERCLA liability through enforcement and cost recovery authorities. CERCLA §128(b)(1)(A), 42 USC

²⁰ See note 4. The original initiative was labeled "Brownfields" to "Brightfields," under the Clinton administration. Clinton Administration, White House, *Brightfields Initiative*, <https://clintonwhitehouse4.archives.gov/Initiatives/Climate/brightfields.html>

²¹ U.S. Environmental Protection Agency, *RE-Powering America's Land Initiative Comfort/Status Letter*, https://cfpub.epa.gov/compliance/models/view.cfm?model_id=734

²² U.S. Environmental Protection Agency, *Climate Smart Brownfields Manual* (June 2021) 42 https://www.epa.gov/sites/default/files/2021-06/documents/final_climate_smart_brownfields_manual_6-10-21_508_complaint.pdf

²³ See note 14.

²⁴ Environmental Protection Agency, *FY23 Guidelines for Brownfield Assessment Grants (Assessment Coalition Grants) Requests for Applications*, EPA-OLEM-OBLR-22-07 (July 2022) 23, 26, 38, 44. <https://www.epa.gov/system/files/documents/2022-10/22-07.pdf>

9628(b)(1)(A). Determination as an eligible response site also triggers requirements for EPA deferral. CERCLA §105(h), 42 USC 9605(h).

Brownfields sites are therefore largely addressed under state cleanup authorities.²⁵ The model language further limits CERCLA liability (and EPA discretion as to liability) for utility-scale wind and solar energy generation on contaminated properties through explicit designation of this category of brownfields sites as an eligible response site. However, the model language retains an EPA role where EPA determines it warranted “for particular consideration as identified by regulation, such as sites posing a threat to a sole-source drinking water aquifer or a sensitive ecosystem.” CERCLA §101(41)(C)(2), 42 USC 9601(41)(C)(2).

In addition, the model language maintains the limited CERCLA exceptions which can allow for later federal involvement. CERCLA §128(b)(1)(B) and (D), 42 USC 9628(b)(1)(B) and (D). As an added community protection, these CERCLA liability protections are not excluded, and remain as limited discretionary exceptions.

²⁵ Liability Reference Guide (note 11) 3. See also U.S. Department of Energy, *Database of State Incentives for Renewables & Efficiency (DSIRE)*, <http://www.dsireusa.org/>