

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>

# CERCLA Liability Limitation for Renewable Energy and Carbon Capture Projects<sup>\*</sup>

## Introduction

This bill would amend the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA” or “Superfund”), 42 U.S.C. § 9601-28, to limit liability for persons who own, operate, lease property for, construct or finance certain renewable energy and carbon capture projects.

## Current Law

CERCLA and United States Environmental Protection Agency (“EPA”) policy currently offer a number of tools to protect developers, including renewable energy developers, operators and lenders, from CERCLA liability. See EPA, [RE-Powering America’s Land: How to Develop Sites: Potential Liability](#); EPA, [The Revitalization Handbook: Addressing Liability Concerns at Contaminated Properties](#) (2022); Charles Howland, [Brightfields: Sustainable Opportunities for Renewable Energy Projects on Environmentally Impaired Lands](#), 29 Nat. Res. & Env’t 41 (2014). These tools include:

- secured creditor liability exemption, 42 U.S.C. §§ 9601(20)(F)-(H);
- contiguous property owner liability protection, 42 U.S.C. § 9607(q);
- bona fide prospective purchaser liability protection, 42 U.S.C. §§ 9601(40), 9607(r);
- bar against federal enforcement at eligible response sites enrolled in state and tribal response programs, 42 U.S.C. §§ 9601(39), 9601(41) 9628(b); and
- EPA policies on comfort/status letters.

The secured creditor, contiguous property owner and bona fide prospective purchaser protections are “self-implementing.” No EPA involvement or approval is needed to get protection from liability under these provisions. This saves time and EPA resources.

---

<sup>\*</sup> This model law and accompanying memorandum were prepared by Frank Fritz, Senior Fellow and Adjunct Professor at the UNLV William S. Boyd School of Law

To bar federal CERCLA enforcement at an “eligible response site” (roughly, a kind of brownfield—less contaminated than a National Priorities List site), the site must be enrolled in a State or Indian tribe response program (aka “voluntary cleanup program”). State response programs have been relatively efficient at processing sites and providing liability protection.

However, the self-implementing provisions (e.g., secured creditor, bona fide prospective purchaser, contiguous property owner) have been criticized as too complicated and risky for developers. Courts, not EPA, decide if a developer has met all the requirements for liability protection. Few judicial decisions have construed these provisions; some have gone against developers. See, e.g., [PCS Nitrogen, Inc. v. Ashley II of Charleston LLC](#), 714 F.3d 161 (4th Cir. 2013). Lack of decisions and perceived unpredictability of courts may concern some developers. Under the self-implementing provisions, the risk of making a mistake during development falls on the developer or bank; a mistake can result in CERCLA liability.

EPA has attempted to reduce uncertainty and risk by offering comfort/status letters to developers.

“Comfort/status letters provide a prospective purchaser with the information the EPA may have about an impacted property and the potential applicability of statutory provisions, regulations, and the EPA guidance to that purchaser. The ‘comfort’ comes from hearing directly from the Agency, near to the time of the potential property transaction, about the EPA’s knowledge of the property based on information known or provided to the EPA at the time of the letter.”

EPA, [The Revitalization Handbook: Addressing Liability Concerns at Contaminated Properties](#) 24. Comfort/status letters are not “no action” assurances; i.e., they are not assurances that EPA will not take an enforcement action in the future.

EPA has developed a relatively efficient process for issuing comfort letters to developers. It also has an initiative, [RE-Powering America’s Land](#), that encourages renewable energy development on current and formerly contaminated lands, landfills, and mine sites when development is aligned with the community’s vision for the site. RE-Powering America’s Land has [assigned staff and management](#). Similarly, state response programs have long experience and assigned staff and management.

This bill aims to shift some of the risk of CERCLA liability away from renewable energy and carbon capture developers. Under the bill, a developer who wants to construct and operate a renewable energy or carbon capture project on or adjacent to contaminated property (e.g., a brownfield, Superfund site, abandoned mine) would ask for a determination from EPA, a State or Indian tribe. The developer would provide information about the property and renewable energy or carbon capture project. The EPA, State or Indian tribe would determine whether constructing and operating the project on the property (1) is consistent with protecting human health and the environment from hazardous substances, pollutants or contaminants at the property, and (2) will

not impede the performance of a state or Federal cleanup or natural resource restoration. As long as the developer acts in accordance with the determination, and all conditions in it, the developer is not liable as an owner or operator under CERCLA § 107.

If a developer violates a condition in a determination and, for example, causes a release of hazardous substances, the developer would be liable under CERCLA for costs of response. However, if EPA, for example, mistakenly does not include a condition in the determination (e.g., don't put a footing in area X), and the developer puts a footing in area X and causes a release of hazardous substances, the developer is not liable. The cost of responding to the release might fall on the EPA, a State or Indian tribe, other PRPs, the Superfund Trust Fund or, ultimately, taxpayers. In this case, the Superfund Trust Fund and taxpayers could be viewed as insurers. We want renewable energy and carbon capture projects on contaminated land; we're willing to pay taxes to insure against certain mistakes.

## The Bill

### Limitation of Liability

Section 2 is the heart of the bill. It provides that:

- A person who owns, operates, leases property for, constructs or finances
- a renewable energy or carbon capture project
- on or adjacent to a facility, as defined in CERCLA, 42 U.S.C. § 9601(9),
- is not liable as an owner or operator of the facility under CERCLA § 107, 42 U.S.C. § 9607, as long as
- the “determining authority” (the Administrator of EPA, a State or Indian tribe)
- determines that constructing and operating the renewable energy or carbon capture project
  - is consistent with protecting human health and the environment from hazardous substances, pollutants or contaminants at the facility, and
  - will not impede the performance of a response action or natural resource restoration,
- and the person acts in accordance with all conditions in the determination.

The limitation of liability in Section 2 is not available to any person who is, with respect to the facility:

- a potentially responsible party,
- affiliated with a potentially responsible party, or
- a reorganization of a potentially responsible party.

## Definitions

Section 1 defines terms.

A “renewable energy project” generates energy from wind or solar energy.

A “carbon capture project” captures carbon oxides from industrial operations or the atmosphere using mechanical, chemical or biological technologies. Underground injection and geologic sequestration are excluded and not eligible for limitation of liability under this bill.

To be eligible for limitation of liability, all property boundaries of a renewable energy or carbon capture project must be more than 1000 feet from disadvantaged communities, as defined in Section 50121 of the Inflation Reduction Act.

Note that CERCLA § 128(a)(1)(B)(iv), 42 USC 9628(a)(1)(B)(iv), already provides a definition of “disadvantaged area,” which EPA, States and Indian tribes use to administer the brownfields grant program. It may be more consistent and appropriate—and easier for EPA, States and Indian tribes—to use the CERCLA definition of disadvantaged area instead of the Inflation Reduction Act definition of disadvantaged community.

A “determining authority” determines whether constructing and operating the carbon capture or renewable energy project

- is consistent with protecting human health and the environment from hazardous substances, pollutants or contaminants at the facility, and
- will not impede the performance of response actions or natural resource restoration.

The determining authority is either the Administrator of EPA, a State or Indian tribe, as specified in regulations promulgated by the Administrator.

The Administrator shall by regulation specify the determining authority for different categories of facilities, including brownfields and facilities where the EPA, a State or Indian tribe is the lead agency for response actions. For example, the regulation could specify that the Administrator is the determining authority for proposed renewable energy and carbon capture projects on or adjacent to facilities in which there is a significant federal interest. An example would be a facility on the National Priorities List where the EPA is the lead agency for response actions. Other examples of facilities and land units of significant federal interest are listed in 42 U.S.C. §§ 9601(39)(B) & 9628(b)(1)(B).

By contrast, the Administrator may by regulation specify that a State or Indian tribe is the determining authority at brownfields and facilities where the State or Indian tribe is the lead authority for response actions.

The regulation shall specify that the Administrator is the determining authority for a renewable energy project or carbon capture project on a facility subject to the jurisdiction, custody or control of a Federal department, agency or instrumentality. The Administrator must consult with the head of the Federal department, agency or instrumentality.

## Regulations

Under Section 3, the Administrator of EPA may prescribe regulations necessary to carry out Sections 1 and 2.

As noted above, the regulations shall specify the determining authority for different categories of facilities, including brownfields and facilities where the EPA, a State or Indian tribe is the lead agency for response actions.

The regulations could also include procedures and criteria for:

- applying for a determination under Section 2;
- reviewing, granting or denying an application;
- making a determination under Section 2 and including conditions to assure that constructing and operating a renewable energy project or carbon capture project
  - is consistent with protecting human health and the environment from hazardous substances, pollutants or contaminants at the facility, and
  - will not impede performance of a response action or natural resource restoration;
- assuring that a person who owns, operates, leases property for, constructs or finances a renewable energy or carbon capture project acts in accordance with all conditions in the determination, through reporting requirements and other means;
- submitting new information to the determining authority after a determination has been made; and
- modifying or revoking a determination, including conditions in it.

For the regulations, the Administrator may borrow from or adapt provisions of existing CERCLA liability protections and related EPA regulations and guidance, e.g.,

- secured creditors, 42 U.S.C. §§ 9601(20)(F)-(H);
- third party and innocent landowner defenses, 42 U.S.C. § 9607(b);
- contiguous property owners, 42 U.S.C. § 9607(q);
- bona fide prospective purchasers, 42 U.S.C. §§ 9601(40), 9607(r);
- eligible response sites, state response programs and federal enforcement bar or “safe harbor,” 42 U.S.C. §§ 9601(39), 9601(41), 9628(b);
- state and local governments, 42 U.S.C. §§ 9601(20)(D), 9607(d)(2), 9623; and
- related EPA guidance, e.g., EPA, [The Revitalization Handbook: Addressing Liability Concerns at Contaminated Properties](#).

For example, the Administrator may, by regulation, require a person applying for a determination under Section 2 to demonstrate, by information acceptable to the Administrator, that the following conditions, based on the bona fide prospective purchaser provision, have been met and/or will be met in the future:

- All disposal of hazardous substances must have occurred prior to acquisition;
- Applicants must conduct appropriate inquiries into previous ownership and uses of the property;
- Applicants must provide all required notices of discovery or release of hazardous substances;
- Applicants must exercise appropriate care with respect to hazardous substances (stop and prevent releases or threatened releases; prevent or limit exposure to releases);
- Applicants must provide cooperation, assistance and access to persons authorized to conduct response actions;
- Applicants must comply with and not impede effectiveness or integrity of institutional controls;
- Applicants must comply with subpoenas and information requests; and
- Applicants must not impede the performance of response actions or natural resource restoration.

The Administrator should be careful to avoid adjudicating the scope of CERCLA liability in a regulation. See [Kelley v. EPA](#), 15 F.3d 1100 (D.C. Cir. 1994) (vacating EPA lender liability regulation).

The regulations should prohibit a renewable energy or carbon capture developer from seeking both a comfort letter and a determination under Section 2 for the same project at the same time.

## Challenges

This bill may create problems that undermine its effectiveness.

In particular, EPA, States and Indian tribes may become bottlenecks, with limited staff to make determinations under Section 2. This problem could be reduced with an appropriation and grant program to fund additional EPA, State and tribal employees to process determinations. Section 60115 of the [Inflation Reduction Act](#) might help. It provides \$40 million to EPA to develop “efficient, accurate, and timely reviews for permitting and approval processes through the hiring and training of personnel” and other measures. The determination process in this bill would need to fall within the meaning of “permitting and approval processes” in Section 60115.

As noted above, this bill shifts some risk away from renewable energy and carbon capture developers. That risk, and potential response costs, may fall on EPA, a State or Indian tribe, other PRPs, the Superfund Trust Fund and, ultimately, taxpayers. The Superfund Trust Fund and

taxpayers could be viewed as insurers. The Superfund is not currently funded with this kind of insurance in mind. PRP groups may object. EPA, DOJ, States and Indian tribes may fear making mistakes, and ask developers for more information and assurance, which may delay determinations.

Finally, creating a new liability protection process for renewable energy and carbon capture projects, which roughly parallels existing liability protection programs, may cause confusion. Brownfield developers may object to a special process just for renewable energy and carbon capture developers.

## Bill Text: CERCLA Liability Limitation for Renewable Energy and Carbon Capture Projects

### 1. Definitions

- a. “Carbon capture project” means a project that captures carbon oxides from industrial operations or the atmosphere using mechanical, chemical or biological technologies. “Carbon capture project” does not include underground injection or geologic sequestration of carbon oxides. For purposes of the limitation of liability in Section 2, all property boundaries of a “carbon capture project” must be more than 1000 feet from disadvantaged communities, as defined in Section 50121 of the Inflation Reduction Act.
- b. Determining authority
  - i. “Determining authority” means either the Administrator, a State or Indian tribe, as specified in regulations promulgated by the Administrator.
  - ii. The Administrator shall by regulation specify the determining authority for different categories of facilities, including brownfields and facilities where the United States Environmental Protection Agency, a State or Indian tribe is the lead agency for response actions.
  - iii. The Administrator is the determining authority for a renewable energy project or carbon capture project on a facility subject to the jurisdiction, custody or control of a Federal department, agency or instrumentality. The Administrator must consult with the head of the Federal department, agency or instrumentality.
- c. “Renewable energy project” means a project that generates energy from wind or solar energy. For purposes of the limitation of liability in Section 2, all property boundaries of a “renewable energy project” must be more than 1000 feet from disadvantaged communities, as defined in Section 50121 of the Inflation Reduction Act.

## 2. Limitation of Liability for Renewable Energy and Carbon Capture Projects

- a. A person who owns, operates, leases property for, constructs or finances a renewable energy project or carbon capture project on or adjacent to a facility, as defined in 42 U.S.C. § 9601(9), is not liable as an owner or operator of the facility under 42 U.S.C. § 9607 as long as the person acts in accordance with all conditions in a determination under Section 2.b.
- b. The determining authority may determine that constructing and operating a renewable energy project or carbon capture project:
  - i. is consistent with protecting human health and the environment from hazardous substances, pollutants or contaminants at the facility, and
  - ii. will not impede the performance of a response action or natural resource restoration.
- c. A determination under Section 2.b must include conditions to assure that the renewable energy project or carbon capture project meets and will continue to meet the requirements in Sections 2.b.i and 2.b.ii. Conditions may include data and information collection, reporting, and other requirements.
- d. The limitation of liability in this Section is not available to any person who is, with respect to a facility:
  - i. potentially liable for response costs at the facility, or
  - ii. affiliated with any other person that is potentially liable for response costs at the facility through—
    - 1. any direct or indirect familial relationship; or
    - 2. any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by the instruments by which title to the facility is conveyed or financed, by a tenancy, by the instruments by which a leasehold interest in the facility is created, or by a contract for the sale of goods or services); or
  - iii. the result of a reorganization of a business entity that was potentially liable for response costs at the facility.

## 3. Regulations

The Administrator may prescribe such regulations as may be necessary to carry out Sections 1 and 2.