

Protections Against Superfund Liability: Guidelines for Property Owners Affected by Mine Waste Within the Bunker Hill Superfund Site

This document is intended to help property owners understand what they must do in order to protect themselves against Superfund liability for mining-related waste on properties within the Bunker Hill Superfund Site.

Change in Superfund Law

Historically, under the Superfund Law the owner or operator of a contaminated property could be held responsible for the property's cleanup based solely on his/her current ownership of the property. In 2002, Congress amended the Superfund Law by adding new landowner liability protections (and clarifying the existing innocent landowner protection).

The liability protections are for landowners/tenants who qualify as:

- bona fide prospective purchasers (BFPPs),
- contiguous property owners (CPOs), or
- innocent landowners (ILOs).

In 2019, EPA released revised guidance on the criteria that must be met to qualify for 2002 Superfund liability protections. Common criteria include the following:

- **All appropriate inquiry** (or AAI) requires prospective purchasers to assess property conditions and research historical uses of the property before acquisition.
- **Reasonable steps** refers to actions an owner must take to address the contamination on-site.
- **Continuing obligations** means complying with certain requirements after acquiring the property.

All Appropriate Inquiries:

All Appropriate Inquiries, or AAI, is the process of evaluating a property's environmental conditions and assessing potential liability for any contamination. AAI's include conducting inquiries into past uses and ownerships of a property and visually inspecting the property to identify conditions indicative of releases and threatened releases of hazardous substances on, at, in, or to the subject property.

AAI must be conducted or updated within one year before the date of acquisition of a property. Certain aspects or provisions of AAI (i.e., interviews of current and past owners, review of government records, on-site visual inspection, and searches for environmental cleanup liens) must be conducted or updated within 180 days before acquiring ownership of a property.

Residential Property: Prior to purchase of property by a non-governmental or non-commercial entity for residential use, a property inspection and title search would meet the requirements of AAI. A home inspection would likely meet the “facility inspection” standard. EPA also expects a purchaser of residential or commercial property within the Bunker Hill Site to check Institutional Controls Program (ICP) property records before acquisition, and to comply with all ICP requirements after acquisition.

Commercial Property: For commercial property, AAI requires that, at a minimum, an ASTM Phase 1 Site Assessment be done within a year before acquisition. An ASTM Phase I Assessment is a specific set of inquiries into past property usage and current conditions set by the American Society for Testing and Materials (ASTM). The assessment should include review of ICP property records before purchase. The purpose of these activities is to make the purchaser aware of the property’s condition related to mine waste and other hazardous substances.

More information on AAI is available on EPA’s *All Appropriate Inquiries* website: <https://www.epa.gov/brownfields/brownfields-all-appropriate-inquiries>

Reasonable Steps:

Congress intended that landowners who seek to establish and maintain liability protections after acquiring property must act responsibly concerning hazardous substances that are present on their property. The amended Superfund Law requires these owners to take "reasonable steps" with respect to hazardous substance releases by doing all of the following:

- Stop continuing releases;
- Prevent threatened future releases; and
- Prevent or limit human, environmental, or natural resource exposure to earlier released hazardous substance releases.

More information on the *reasonable steps* criteria is available on EPA’s Common Elements Guidance Webpage: <https://www.epa.gov/enforcement/common-elements-guidance>

Continuing Obligations:

This common criterion involves the ongoing obligations a landowner must meet in order to achieve and maintain liability protection. These obligations are:

- Demonstrating that no disposal of hazardous substances occurred at the facility after acquisition by the landowner;
- Complying with land use restrictions and not impeding the effectiveness or integrity of institutional controls;
- Taking “reasonable steps to prevent releases” with respect to hazardous substances affecting a landowner’s property;
- Providing full cooperation, assistance, and access to persons who are authorized to conduct response actions or natural resources restoration;

- Complying with information requests and administrative subpoenas; and
- Providing legally required notices.

Within the Bunker Hill site, compliance with the Institutional Controls Program (ICP) is an important “continuing obligation” for all property owners. To achieve and maintain liability protection, property owners must, among other things:

- Comply with the ICP;
- Cooperate with EPA and State cleanup efforts;
- Give EPA and the State access to the property for response actions and monitoring the effectiveness of those actions; and
- Not contribute to the mine waste contamination within the site.

Importance of the Bunker Hill ICP: The ICP is a key tool for owners of property within the Bunker Hill site. ICP property records are a source of information for the required pre-purchase inquiries. The ICP also helps property owners by clearly stating how to meet continuing obligations related to mine waste. After purchase, compliance with the ICP helps the property owner establish that he/she has taken reasonable steps to manage any mine waste contamination on the property.

Questions

For questions on Superfund landowner liability protections at the Bunker Hill site, contact:
Tamara Langton, U.S. EPA Region 10, 206-553-2709 or 1-800-424-4372.

For questions about the ICP, contact:

Andy Helkey, Idaho Department of Environmental Quality, 208-783-5781
<https://panhandlehealthdistrict.org/institutional-controls-program/>

More information:

<https://www.epa.gov/enforcement/landowner-liability-protections>

NOTE: This information sheet was created solely as a guide and is not intended, nor can be relied upon, to create any rights enforceable by any party in litigation with the United States.