

Title: Consideration of Contaminated Properties including Brownfields
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Issued by the Office of Planning and Environment (TPE)

1. Purpose

This document provides guidance on assessment and acquisition considerations for potentially contaminated properties, including brownfields, and contaminated properties, as part of the environmental review process.

2. Applicability/Scope

This guidance applies to property being considered for acquisition for FTA-funded projects, with an emphasis on property that is or may be contaminated, and is limited to the property considerations taking place during the environmental review process conducted pursuant to the National Environmental Policy Act (NEPA). For property appraisal and acquisition guidance, see FTA's circular on grant management requirements (latest version 5010.1D).

3. Responsibilities

FTA Regional staff, with assistance from FTA Headquarters and FTA Regional Counsel, as appropriate, must ensure that the condition of the property being considered for acquisition is as thoroughly assessed as possible prior to approval of the final environmental document. FTA Regional staff should coordinate with real estate staff in FTA's Office of Program Management (TPM) to ensure that grantees follow the appropriate appraisal process.

4. Background Information

4.1. Definitions.

- **Brownfield:** 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.¹
- **Contaminants:** Any element, substance, compound, or mixture that, after release into the environment and upon exposure, ingestion, inhalation, or assimilation into any organism, will or may reasonably be anticipated to cause illness, death, or deformation in any organism.
- **Environmental Site Assessment (ESA):** The assessment or evaluation of a property to identify potential environmental contamination and assess potential liability for any contamination present at the property.
- **Hazardous Substance:** A broad term that includes all substances that can be harmful to people or the environment; toxic substances, hazardous materials and other similar terms are subsets of hazardous substances.

¹ Note that this is a descriptive definition. There is not an official "list" of brownfields maintained by the Federal government.

- **Phase I Environmental Site Assessment:** A standard research study/record search intended to gather sufficient information to assess the environmental condition of the property and identify actual or potential areas where contaminants may have been released to the environment.
- **Phase II Environmental Site Assessment:** An intrusive study where actual physical environmental samples are collected and analyzed to characterize the type, distribution, and extent of contaminants in the environment. Normally completed if recommended based on Phase I Environmental Site Assessment.
- **Phase III Environmental Site Assessment:** This Phase refers to the full characterization of contamination, and the design and implementation of remediation.
- **Real Property:** Land, including affixed improvements, structures, and appurtenances. It does not normally include movable machinery and equipment.
- **Remediation:** Any action, developed in consultation with appropriate regulatory agencies in accordance with Federal, State and local law, to reduce, remove, or contain contamination.

4.2. FTA policy on brownfields.

FTA supports the use of brownfields in transportation projects as part of efforts to improve communities through FTA transportation investments. FTA's policy allows for the use of brownfields for FTA-funded projects if:

- The use of such sites is consistent with the purpose and need of the transit project;
- The costs of remediation are expected to be reasonable in comparison with the overall cost and public benefit of the project; and
- Liability concerns are minimized by following proper due diligence for all potential real estate acquisitions.

The legal responsibility for hazardous material cleanup and disposal rests with parties within the property title chain and with parties responsible for the placement of the material on the property. Project sponsors must attempt to identify and seek legal recourse from those potentially responsible parties or substantiate the basis for not seeking reimbursement.

In light of the policy, FTA encourages project sponsors to consider using brownfield sites when identifying project sites despite potential inhibiting factors (e.g., liability concerns, financial barriers, and cleanup timelines). Transit facilities are particularly suitable for reusing brownfield sites because transit facilities:

- Tend to be located in urban areas where most brownfields are found;
- Are not designed for continuous human occupancy;
- May enhance economic redevelopment potential of an area; and,
- May fall within a less restrictive land use category for purposes of site remediation.

While encouraging the use of brownfields for projects, FTA should also encourage proper due diligence prior to selecting and purchasing properties through complete assessment of potential contamination during the environmental review process. To encourage the complete assessment of contamination prior to project decision-making, FTA generally will not participate in the remediation of contamination discovered during construction.

5. Standard Procedures

5.1. Environmental review process.

Construction of a transit project on a brownfield may cause adverse impacts primarily through the exposure of existing hazardous substances or contaminants and their potential release into the environment. For example, the construction may result in a contaminant being carried by wind or trucks into the surrounding neighborhood or stormwater runoff carrying contaminated sediment into the neighborhood or into larger bodies of water. If there are soil contamination issues on a site, even if the contaminants may not be exposed or disturbed during construction, the site may need to be remediated because of the potential for that contaminant to migrate into the groundwater table and to downstream properties or water bodies. Therefore, the contaminant and concentration of contamination, including its nature and associated short-term and long-term remediation, must be determined and considered during the environmental review process.

If potential impacts from the hazardous substances are identified, FTA Regional staff may suggest that the transit agency consider alternative sites during the environmental review, notwithstanding the FTA policy, if the cost of the required remediation would be excessively high, especially as compared to the initial projected cost for the transit project. Where cost of remediation cannot be accurately determined prior to purchase, the transit agency will need to consider the risk of acquiring the site.

5.1.1. Due diligence/site assessments.

The first step during the environmental review process is to conduct a Phase I ESA, in accordance with EPA's All Appropriate Inquiries Rule(40 CFR part 312), on any property considered for the project. The Phase I ESA identifies the potential presence of contaminants on a property and provides potential defenses to liability if the project sponsor acquires the property. A Phase I ESA will evaluate prior uses and ownership of a property in order to assess conditions at the property that may be indicative of releases or threatened releases of hazardous substances at, on, in, or to the property, known as recognized environmental concerns (REC). The Phase I ESA consists of a thorough historical records search and a site visit conducted by an ESA professional. If the current property owner refuses to grant right-of-entry to the ESA professional and state law doesn't allow for limited right-of-entry, then the property can be visually inspected offsite or from overhead. If the property is so large and covered that it cannot be visually inspected from offsite or from overhead, an initial site assessment consisting of all elements of the Phase I ESA that do not require right-of-entry would be conducted.

If a property is suspected to have contaminants through the identification of RECs in the Phase I ESA, and the project sponsor wants to continue considering purchasing the property for the project, then a Phase II ESA must be conducted. A Phase II ESA, which often consists of soil and/or groundwater sampling, will confirm the presence and extent of contamination on the property as much as possible. This will then allow for development of a remediation plan and cost estimate of the remediation necessary for the proposed use of the site. The costs associated with the remediation should be provided to the appraiser to determine the impact on the fair market value. If the current property owner refuses to grant right-of-entry to the ESA professional and state law does not allow for limited right-of-entry, commitment to remediate to the level required by State law for the intended use of the site

must be incorporated into the NEPA decision document for the project, and the findings of the Phase II ESA investigation may require a re-evaluation or supplemental environmental review. In instances such as those, where the transit agency has chosen to take on the risk of acquiring property where the type and degree of contamination is uncertain, some transit agencies have succeeded in negotiating purchase and sale agreements that allow for the termination of the sale based on the outcome of the Phase II ESA.

5.1.2. ESA timing.

The Phase I ESAs should be completed on a per parcel basis during the draft environmental impact statement (DEIS) development process, with the results presented for parcels with potential contamination in the DEIS so that the community, the responsible State agency, and EPA are informed and have the opportunity to comment on the results. The Phase II ESAs, if necessary, and the corresponding consultation with the State agency on remediation are conducted during the Final EIS (FEIS)/Record of Decision (ROD) development process with the remediation commitments for the preferred alternative appearing in the FEIS/ROD.

For projects requiring an environmental assessment (EA), the EA would present the results of the Phase I ESAs on a per parcel basis for parcels with potential contamination (and Phase II ESAs, if necessary), and the finding of no significant impact (FONSI) would commit to the appropriate remediation. For a categorical exclusion (CE), the CE documentation should include the results of any ESAs conducted and indicate that the remediation is standard, such as the removal of leaking underground storage tanks (LUSTs) at a former gas station. If the ESA indicates that the contaminants present may require significant remediation it may be necessary to consider elevating the NEPA class of action. When possible, appropriate ESAs should be completed before the appraisal of property so that the results can be communicated to the appraiser.

5.1.3. Mitigation (remediation) commitments in environmental decision documents.

After determining the presence and nature of any contamination, the next step is to determine the appropriate remediation. Remediation planning involves:

- Consideration of the recommendations within the ESA report(s);
- Consultation with the responsible State agency and possibly EPA; and,
- Consideration of comments by the affected community, if appropriate.

EPA's State Voluntary Cleanup Programs provides useful information on the remediation expectations in each participating State. For a transit use of a brownfield, some States allow remediation that results in a higher residual level of contamination because the human exposure on the site is short-term and the chance of coming into contact with contaminated media is minimal. For example, a transit rider at a transit center built on a former brownfield spends little time there waiting for the bus to arrive. Some elements of transit projects, such as park-and-ride lots and bus storage lots, place an impermeable surface of pavement over the contaminated property that would prevent human contact with the contamination and also may prevent infiltration by rainwater that might carry the contamination offsite in a groundwater plume.

Some forms of contamination, such as LUSTs at former gasoline stations, are so common that firms with extensive experience in remediating such sites now exist. If the transit project requires the demolition of an older building that contains asbestos insulation or lead-based paints, companies that specialize in removal of these contaminants prior to demolition can usually be found.

Construction measures (commonly referred to as “best management practices”) may include strict control of dust and stormwater, such as the use of covered trucks to haul contaminated soil to a State-approved disposal site, washing down the loaded truck before it leaves the project site, and a more robust than usual stormwater management system to prevent stormwater runoff from carrying contamination offsite.

5.2. Real estate acquisition and cost considerations during environmental review and beyond.

5.2.1. Costs.

The potential costs associated with locating a transit project on a brownfield include the cost of property acquisition, the cost of remediation, the potential cost of litigation against responsible parties, and the long-term liability costs. Acquisition costs are governed by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (Uniform Act) and implementing regulation 49 CFR Part 24, but the transaction may be complicated by appraisals that consider the fair market value of the property as if it were clean, the cost of remediation, and State law dictating which of the parties involved in the transaction, if either, are legally responsible for the cleanup. During the environmental review process, the project sponsor will have considered the estimated cost of appropriate remediation, as well as having considered and taken action regarding the short and long-term liabilities associated with locating the project on the brownfield, if applicable. Potential liability costs to the transit agency are minimized or eliminated by compliance with EPA’s All Appropriate Inquiries Rule (40 CFR part 312).

Project sponsors that wish to use FTA funds for remediation must attempt to identify and seek legal recourse from those parties potentially responsible for the contamination or substantiate the basis for not seeking reimbursement. The reality is that many brownfields are abandoned, tax-delinquent properties, and the potentially responsible parties (i.e., the corporations) have dissolved and no longer exist. FTA will not participate in paying for remediation that is the legal responsibility of another party, unless:

- The brownfield site was previously utilized for transportation use and the transit agency is legally responsible for all cleanup activity; or
- Seeking and obtaining compensation from potentially responsible parties would involve excessive litigation and project delay, the cost of which would likely exceed the remediation cost, and which would be contrary to the public interest.

In addition, FTA generally will not participate in the remediation of contamination discovered during construction, except where it has been demonstrated that appropriate environmental studies were performed, the results communicated to the appraiser prior to

the appraisal, and the recommendations followed. The transit agency must also have met one of the two exceptions above.²

Note that if the transit project requires demolition of a building containing asbestos or lead paint, the remediation cost would be a project responsibility of the transit agency because the cleanup is necessitated by the demolition. If the building was not being demolished for the project, the cleanup would not be required. Information on any such contamination should be provided to the appraiser as soon as possible, and the appraiser may take the building condition into consideration in the determination of market value.

5.2.2. Acquisition.

FTA's circular on grant management requirements (latest version 5010.1D) describes the process that a project sponsor must follow if it wants to acquire property for an FTA-assisted project that is contaminated with hazardous substances. The project sponsor needs to document these efforts to demonstrate that they made a good faith effort to identify those parties that are legally responsible to pay for cleanup (if any) under State law. If the project sponsor is not able to identify potentially responsible parties to pay for the cleanup or provides acceptable justification for not seeking reimbursement, then the project sponsor must seek to ensure that the appraised value reflects appropriate remediation (i.e., remediation for the intended use and no more) costs to the extent allowed by State law. All documentation supporting remediation cost estimates should be submitted to FTA real estate staff and the appraiser, including all ESAs that were conducted as a part of the environmental review process.

6. References

- [Brownfields](#) (EPA website)
- [The Revitalization Handbook](#) (EPA)
- [Brownfields: All Appropriate Inquiries](#) (EPA website)
- EPA's All Appropriate Inquires Rule, [40 CFR part 312](#)
- [State Voluntary Cleanup Programs](#) (EPA website)
- Grant Management Requirements, [FTA Circular 5010.1D](#)
- [Hazardous Materials and Brownfields](#) (FTA website)

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² State law sometimes prohibits an appraiser from considering certain aspects of contamination when doing the appraisal. Further, in some cases, there may be little information on the potential contamination at the time of the appraisal available through no fault of the project sponsor. The purpose of this policy is to ensure that a transit agency does any due diligence it can on potential contamination and ensure that is communicated to the appraiser in a timely fashion so that if State law allows it, that can be considered to the extent possible in the appraisal.