

Questions/Issues for EPA-FDEP-FBA discussion

RE: Whether Superfund Sites Can Participate in the Florida Brownfields Program

This is a preliminary list of questions to better understand and frame the issues. It is intended to provide some background and context for Florida's program, but is expected to be a "living" document to which we all can add questions and eventually answers.

Background Information: participation in the Florida Brownfields Program (FBP) has two possible components:

- A. Designation of one or more properties as a "Brownfield Area" which then allows a Person Responsible for Brownfield Site Rehabilitation (PRFBSR) to enter into a Brownfield Site Rehabilitation Agreement (BSRA) for voluntary cleanup and redevelopment of the Brownfield Site subject to the BSRA. There are several incentives tied directly to this type of participation with an executed BSRA, most notably liability protection for the PRFBSR and eligibility for Voluntary Cleanup Tax Credits (VCTC) for "site rehabilitation" [i.e., includes assessment and cleanup of contamination as defined by Florida's statutes and rules including Chapters 62-780 and 62-777, Florida Administrative Code (F.A.C.)];

and/or

- B. Sites receiving Brownfields Grant funding through FDEP's State Response Program (SRP) Grant from EPA, which is primarily for site assessment, but sometimes covers actual site cleanup too.

The relevant statutory provisions for this discussion are found in Section 376.82, Florida Statutes (F.S.), and the following excerpts are at issue:

376.82 Eligibility criteria and liability protection.—

(1) ELIGIBILITY.—Any person who has not caused or contributed to the contamination of a brownfield site on or after July 1, 1997, is eligible to participate in the brownfield program established in ss. 376.77-376.85, subject to the following:

(a) Potential brownfield sites that are subject to an ongoing formal judicial or administrative enforcement action or corrective action pursuant to federal authority, including, but not limited to, the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. ss. 9601 et seq., as amended; the Safe Drinking Water Act, 42 U.S.C. ss. 300f-300i, as amended; the Clean Water Act, 33 U.S.C. ss. 1251-1387, as amended; or under an order from the United States Environmental Protection Agency pursuant to s. 3008(h) of the Resource Conservation and Recovery Act, as amended (42 U.S.C.A. s. 6928(h)); or that have obtained or are required to obtain a permit for the operation of a hazardous waste treatment, storage, or disposal facility; a postclosure permit; or a permit pursuant to the federal Hazardous and Solid Waste Amendments of 1984, are not eligible for participation unless specific exemptions are secured by a memorandum of agreement with the United States Environmental Protection Agency pursuant to paragraph (2)(g). A brownfield site within an eligible brownfield area that subsequently becomes subject to formal judicial or administrative enforcement action or corrective action under such federal authority shall have its eligibility revoked unless specific exemptions are secured by a memorandum of agreement with the United States Environmental Protection Agency pursuant to paragraph (2)(g).

(b) Persons who have not caused or contributed to the contamination of a brownfield site on or after July 1, 1997, and who, prior to the department's approval of a brownfield site rehabilitation agreement, are subject to ongoing corrective action or enforcement under state authority established in this chapter or chapter 403, including those persons subject to a pending consent order with the state, are eligible for participation in a brownfield site rehabilitation agreement if:

1. The proposed brownfield site is currently idle or underutilized as a result of the contamination, and participation in the brownfield program will immediately, after cleanup or sooner, result in increased economic productivity at the site, including at a minimum the creation of 10 new permanent jobs, whether full-time or part-time, which are not associated with implementation of the brownfield site rehabilitation agreement; and

2. The person is complying in good faith with the terms of an existing consent order or department-approved corrective action plan, or responding in good faith to an enforcement action, as evidenced by a determination issued by the department or an approved local pollution control program.

(2)(g) The Legislature recognizes its limitations in addressing cleanup liability under federal pollution control programs. In an effort to secure federal liability protection for persons willing to undertake remediation responsibility at a brownfield site, the department shall attempt to negotiate a memorandum of agreement or similar document with the United States Environmental Protection Agency, whereby the United States Environmental Protection Agency agrees to forego enforcement of federal corrective action authority at brownfield sites that have received a site rehabilitation completion or "no further action" determination from the department or the approved local pollution control program or that are in the process of implementing a brownfield site rehabilitation agreement in accordance with this act.

Questions:

1. Does everyone agree that an amended MOA between EPA and FDEP is required to allow Superfund Sites to participate in the Florida Brownfields Program?
2. Does either EPA or FDEP think that a statutory change is required to amend Florida Statutes to allow Superfund Sites to participate in the Florida Brownfields Program?
3. In the context of Barbara Alfano's 12/11/19 email to Michael Goldstein (attached), will EPA elaborate on when a site that achieves Site Wide Ready for Anticipated Use (SWRAU) can participate in the Brownfields Program? What are the criteria for SWRAU?
4. Is EPA willing to allow a site that has not yet achieved SWRAU to participate in the Florida Brownfields Program? The reason this is important in Florida is that the primary economic incentive—the VCTC—is only available for site assessment and cleanup costs, but not for costs of *redeveloping* a site. Therefore, if the site has to achieve SWRAU first before it can participate in the Brownfields Program, the majority of assessment and cleanup costs will have already been incurred in past years and will not be eligible for VCTC. Once SWRAU is achieved there

might only be minimal O&M costs of continued groundwater monitoring, for example. But the larger expense items like site assessment and source removal will have been done already.

5. Would EPA be willing to allow Superfund Sites to participate in the Category A Brownfields Program (i.e., enter into a BSRA to receive liability protection, VCTC and other state incentives)?
6. Would EPA be willing to allow Superfund Sites to participate in Category B Brownfields Program (i.e., receive EPA grant funds through FDEP's SRP Grant) if the PRFBSR is an "innocent participant" –in other words, not the polluter or other PRP?
7. FDEP currently has a RCRA-BSRA to address the additional requirements specific to the Federal RCRA Program. Would something similar (i.e., a CERCLA-BSRA) satisfy EPA to allow Superfund Sites to participate in Florida's Brownfields Program?
8. Per Florida's Brownfields Law re: the MOA, the EPA needs to agree to forego enforcement of federal corrective action authority at brownfield sites that have received a Site Rehabilitation Completion Order (SRCO). Is EPA willing to agree to this? Is EPA willing to agree to this for sites that receive a *Conditional* SRCO (C-SRCO) based on the use of Institutional or Engineering Controls?
9. Could FDEP's existing "Institutional Control/Engineering Control Audit Program" (ICECAP)¹ replace the need for EPA's Five-Year Review for Superfund Sites?
10. Is FDEP still implementing the ICECAP? Are sites still audited on a five-year cycle?
11. If the answers to questions #8 and #9 are no, then would EPA and FDEP consider proposed statutory changes to the "forego enforcement" language to better reflect how EPA would be willing to delegate or forego enforcement authority at Brownfield Sites in Florida? The concept might include statutory "re-openers" for EPA similar to the ones that exist in current law for FDEP. See Section 376.82(3), F.S.
12. Florida Law (excerpted above) allows even persons who are subject to ongoing corrective action or enforcement under state authority to enter into a BSRA and participate in the Florida Brownfields Program, provided they are in good faith compliance with any Consent Order and participation will result in the creation of at least 10 new jobs. Would EPA consider allowing a Potentially Responsible Party (PRP) for a Superfund Site to participate in the Florida Brownfields Program? Or is that a deal-breaker for EPA as to who may participate? Is EPA's preference to only allow an innocent purchaser of a Superfund Site (e.g., a

¹ ICECAP was originally created as a random audit program to ensure compliance at sites closed conditionally using institutional controls and engineering controls, if applicable (also called IC/EC). The most common IC is restrictions in a Declaration of Restrictive Covenant (DRC) that is recorded against the property. The original goal of the ICECAP was to audit sites with IC/EC once every five years to ensure compliance, especially if ownership had changed hands and the new owner might not be aware of the DRC or EC maintenance requirements, for example.

- developer who never caused or contributed to the contamination) to participate in the Florida Brownfields Program?
13. Would a prospective PRFBSR for a Superfund Site be required to seek and obtain Bona Fide Prospective Purchaser (BFPP) status from EPA before being allowed to participate in the Florida Brownfields Program?
 14. EPA has expressed concern about the cleanup standards being different for the state versus the federal government as a reason that Superfund Sites may not participate in the Brownfields Program. Can EPA please elaborate on this concern? If the state standards are more stringent under Florida's Risk-Based Corrective Action (RBCA) criteria, and a PRFBSR is willing to conduct voluntary cleanup and achieve those state standards and cleanup target levels, what is EPA's concern?
 15. Is EPA's concern in #9 above limited to the Category B Brownfields Program participation (i.e., a site assessment and/or cleanup funded with EPA grant money through the State's SRP Grant)? If so, could language be drafted in the MOA to limit grant funding to only cover assessment and cleanup to federal standards, and anything beyond that as required by state standards and criteria would have to be funded by the PRFBSR? This leaves the ARARs debate for another day.
 16. What are EPA Headquarters concerns with this issue of allowing Superfund Sites to participate in the Brownfields Program?
 17. How are other Region 4 states handling this issue? Does EPA have MOAs with any other states? Or is Florida unique in this statutory requirement?