

Brownfield Redevelopment Resources – Legal Assistance *Getting Comfortable with Comfort Letters*



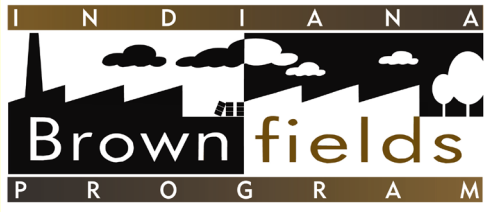
Environmental Stewardship. Economic Development.

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IDEM E101
ERCs
Virtual Workshop
September 1, 2021



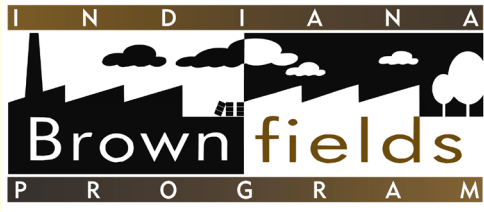
A State that Works



What is a Brownfield? On paper

- Indiana defines a brownfield site as:
 - a parcel of real estate
 - abandoned, inactive, or underutilized
 - on which expansion, redevelopment, or reuse is complicated because of the presence or potential presence of a hazardous substance, a contaminant, petroleum, or a petroleum product *that poses a risk to human health and the environment.*
- Similar to U.S. EPA definition (real property)





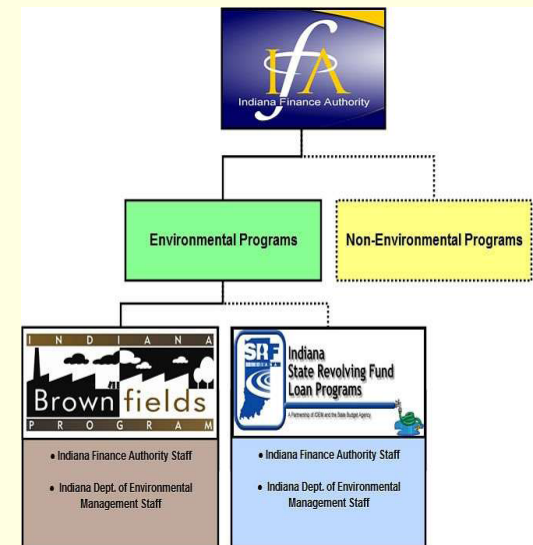
What is a Brownfield? In reality





Who we are

- Indiana Finance Authority (IFA) – Environmental Programs
- Created by 2005 legislation (SEA 578); IC 13-11-2-19.3
- Works in partnership with U.S. EPA
- Funded by state appropriations & federal funds





What we do to help

- **Voluntary - not regulatory**
 - **No fees**
 - **Non-responsible parties**
 - **Property transfers and/or financing**
 - **Use existing laws, regulations, and/or policies**
-
- **Assistance**
 - **Financial - state/fed**
 - Grants/Professional Services
 - Loans
 - **Legal**
 - Comfort Letters
 - **Technical**
 - Closure Letters (SSL, NFA)
 - Comment Letters
 - **Educational**
- **Coordination**
 - **U.S. EPA**
 - **IDEM Programs**
 - Voluntary Remediation Program
 - State Cleanup
 - Other OLQ programs as necessary





Legal Comfort Letters

- **No cost**
- **Not a responsible party**
- **Comfort Letter:**
 - Qualify for an applicable exemption to liability found in Indiana law or IDEM policy; not a legal release from liability
 - government entity
 - creditor, lender, fiduciary
 - not the statutory owner of a UST
 - nonprofit corporation
 - tenant
 - Bona Fide Prospective Purchaser (BFPP) and All Appropriate Inquiry (AAI)
 - Contaminated Aquifer or Property containing contaminated aquifer
 - Explains the applicable liability exemption, or defense, or IDEM's exercise of enforcement discretion per IDEM policy.





Legal Comfort Letters- ERCs

- In order for your Comfort Letter (or Site Status Letter or No Further Action Letter) to be effective, if there is an accompanying **Environmental Restrictive Covenant (ERC)**, it must be recorded in the respective County Recorder's Office.
- To avoid errors, please closely read the steps described on the *Environmental Restrictive Covenant (ERC) Recording Instructions* form enclosed with your letter and ERC before recording your IDEM-approved ERC





Comfort Letter BFPP

- **Bona Fide Prospective Purchaser (BFPP) Defense**
 - Meet AAI requirements – Phase I ESA (ASTM1527-13, ASTM1527-21 anticipated)
 - Self Implementing
 - Can be issued after purchase
 - No RECs or Historical RECs and/or **no** contamination
 - Site does not qualify for a Comfort Letter
 - Comment Letter
 - Due Care and Reasonable Steps
 - Phase II Investigation
 - Identified RECs should be investigated
 - IBP to comment on due care/continuing obligations
 - No contamination – Comment Letter





Comfort Letter - BFPP Phase I ESA

■ Phase I Environmental Site Assessment (ESA)

- ASTM1527-13, ASTM1527-21 anticipated – AAI compliant
- One year shelf life
- Viability date: **180 days** from the earliest of the date of the following conducted activities **prior to closing**:
 - interviews
 - liens
 - government record reviews
 - visual inspections
 - re-declaration by the Environmental Professional
 - User Questionnaire





Comfort Letter - BFPP Phase I ESA

■ RECs vs CRECs vs HRECs vs VECs

■ Recognized Environmental Condition (REC)

“...the presence or likely presence of any hazardous substances or petroleum products in, on, or at a property: (1) due to any release to the environment; (2) under conditions indicative of a release to the environment; or (3) under conditions that pose a material threat of a future release to the environment.”

■ Controlled REC

“...a recognized environmental condition resulting from a past release of hazardous substances or petroleum products that has been addressed to the satisfaction of the applicable regulatory authority (for example, as evidenced by the issuance of a no further action letter or equivalent, or meeting risk-based criteria established by regulatory authority), with hazardous substances or petroleum products allowed to remain in place subject to the implementation of required controls (for example, property use restrictions, activity and use limitations, institutional controls, or engineering controls).”

■ Historical REC

“...a past release of any hazardous substances or petroleum products that has occurred in connection with the property and has been addressed to the satisfaction of the applicable regulatory authority or meeting unrestricted use criteria established by a regulatory authority, without subjecting the property to any required controls (for example, property use restrictions, activity and use limitations, institutional controls, or engineering controls).”

■ Vapor Encroachment Condition (VEC)





Comfort Letter - BFPP Phase I ESA

■ Other ASTM Terms

■ De Minimis Condition

“...a condition that generally does not present a threat to human health or the environment and that generally would not be the subject of an enforcement action if brought to the attention of appropriate governmental agencies. Conditions determined to be de minimis conditions are not recognized environmental conditions nor controlled recognized environmental conditions.”

■ Common Non-Scope Issues

- Asbestos Containing Materials (ACM)
- Lead-Based Paint (LBP)
- Business Environmental Risks (BERs) – often misused or not used
- Other contaminants pending anticipated ASTM1527-21 changes





Comfort Letter - BFPP Phase II ESA

■ Phase II Environmental Site Assessment (ESA)

- Investigate RECs identified in the Phase I ESA
 - Soil borings
 - Groundwater
 - Soil Gas
 - Indoor Air
 - Exposure Risks
 - Soil - direct contact residential, commercial/industrial, excavation worker scenarios
 - Groundwater – drinking and vapor
 - Soil gas – vapor outside building or beneath slab
 - Indoor air – vapor in the building
 - More information, better letter





Environmental Restrictive Covenant (ERC)

■ ERC Land Use Restrictions

- Drafted by the Program
- Recorded to property deeds – Co. Recorder's Office
- Detail property conditions
 - Contaminants – levels and locations
 - Affected media – soil, groundwater, surface water, soil gas, and/or indoor air
- Describe land use restrictions deemed necessary for proposed use – residential, commercial, industrial, recreational
- Modifications can be made as property conditions change or more information is gathered





Comfort Letter Timeline & Process

- Letters are typically issued within a **minimum of 120 days** from the time the Program receives all pertinent documentation and information.
- Length of the time varies based on:
 - the number of other requests already in the queue
 - the volume of data/reports associated with the subject site that require review
- Reminder, BFPP liability defense is self-implementing; a stakeholder need not have an IDEM Comfort Letter in hand at the time of site transfer/closing to be eligible for the liability defense.





Other Letters

■ Reasonable Steps

- Updates Comfort Letters to address obligations of a new purchaser
- Purchaser provides additional investigation
- Can provide revision of **ERC**

■ Site Status Letter (SSL) - Closure

- Non-responsible party
- Demonstrate **current** contaminant levels substantially meet IDEM screening levels
- Concludes that current site conditions do not present a threat to human health or the environment and that IDEM does not plan to take or require a response action at the brownfield site
- Does not address the potential liability

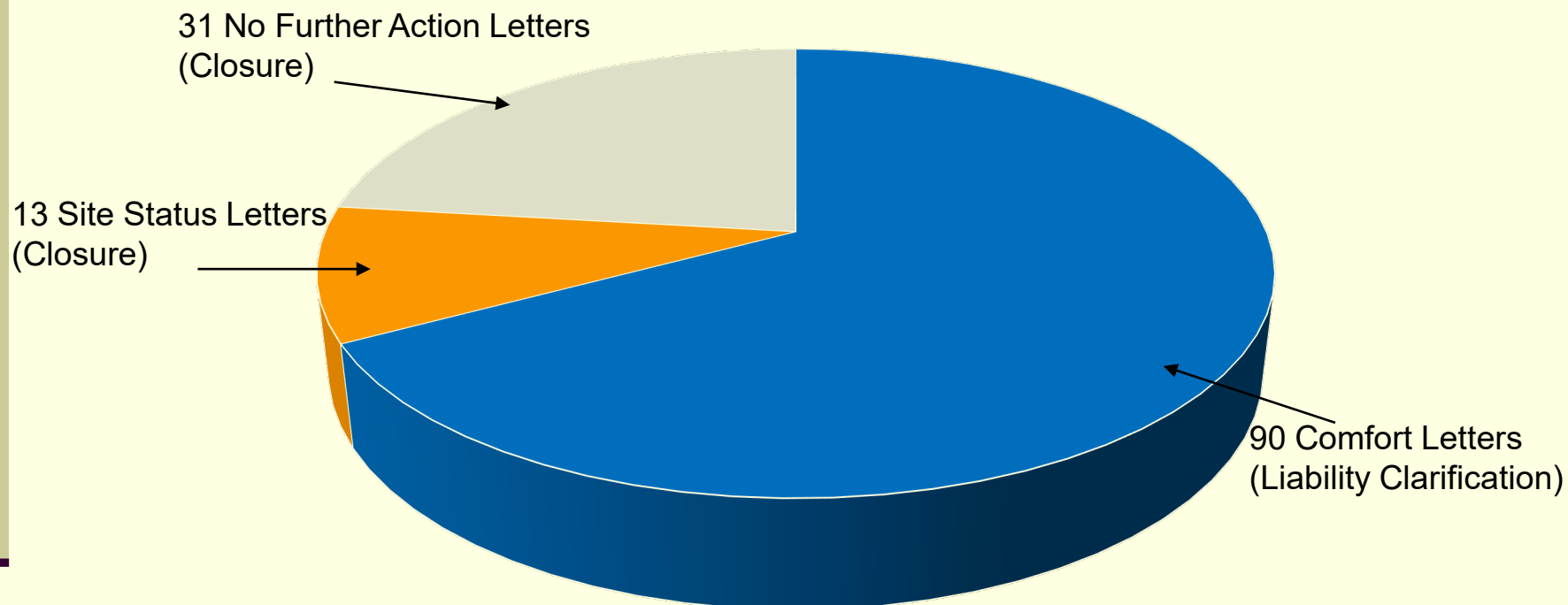
■ No Further Action (NFA) - Closure

- Non-responsible and responsible parties
- Only for incidents such as spills
- Petroleum sites and an occasional hazardous site
- Similar to SSL



SFY20

134 Comfort/Closure Letters Issued



CL – applicant qualifies for applicable liability exemption or enforcement discretion policy

SSL/NFA – site conditions satisfy Remediation Closure Guide (RCG) closure criteria/screening levels with or without an environmental restrictive covenant (ERC)





Success Story





Former Aztec/ Crown Laundry Indianapolis

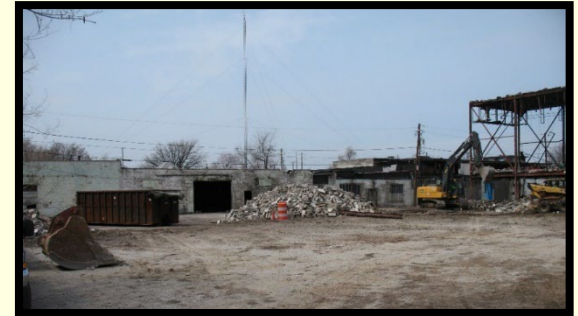
Site Information

- 2.6-acre five parcel site in Indianapolis
- Laundry from early 1900s - 1970s (later auto repair shop)
- 2007 - 2011 investigations confirmed chlorinated and petroleum contamination in ground water and soil
- 2011 EPA emergency removal of drums, containers, 13 underground storage tanks, and ~ 13,580 tons of contaminated soil

IBP Support (multiple letter recipients)

- 2010 Comfort Letter to city and land bank to facilitate remediation
- 2012 Supplemental Environmental Project (SEP) funding - \$23,760
- 2013 Comfort Letter to city
- 2013 & 2014 128(a) site assessment funding - \$47,010
- 2015 Comfort & Closure Letter to Phase I developer
- 2016 Brownfields Determination Letter to developer in support of tax credit application for Phase II
- 2017 Comfort Letter to Phase II developer

Summary (to date): 5 letters issued and \$70,770 invested





Former Aztec/ Crown Laundry Indianapolis

Three Phases of Redevelopment

1. 2016 Grand opening held for 30-unit Oxford Place Senior Apartments – Phase I
 - ~ \$7.5M total project costs
 - \$570,032 Rental Housing Tax Credits (RHTCs), \$356,181 Development Fund Loan
2. 2019 Grand opening 39-unit Parker Place Senior Apartments – Phase II
 - ~ \$7.4M anticipated total project costs
 - \$557,814 RHTCs, \$490,000 Housing Trust Fund funding, \$500,000 Development Fund Loan
3. 2019 planned opening apartments and retail space – Phase III

Return on IFA Investment (to date)

\$106:\$1

Phase I Oxford Place Senior
Apartments



Phase II Parker Place Senior
Apartments





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Check out the Indiana Brownfields Program web site at: www.brownfields.in.gov

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