

AN ACT

---

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

---

*Codification  
District of  
Columbia  
Official Code*

2001 Edition

2011 Winter  
Supp.

To amend the Brownfield Revitalization Amendment Act of 2000 to enhance the public health, welfare, and the environment of the District by strengthening the Mayor's oversight and enforcement authority to clean up polluted hazardous waste sites and to compel polluters to pay for past hazardous waste contamination.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Brownfield Revitalization Amendment Act of 2010".

Sec. 2. The Brownfield Revitalization Amendment Act of 2000, effective June 13, 2001 (D.C. Law 13-312; D.C. Official Code § 8-631.01 *et seq.*), is amended as follows:

(a) Strike the acronym "EHA" wherever it appears and insert the acronym "DDOE" in its place.

(b) Section 102 (D.C. Official Code § 8-631.02) is amended as follows:

(1) A new paragraph (1A) is added to read as follows:

"(1A) "Bona fide prospective purchaser" means a person, or tenant of a person, who acquires ownership of a facility after June 13, 2001 and establishes by a preponderance of the evidence that:

"(A) All disposal of hazardous substances at the facility occurred before the person acquired the facility;

"(B) The person undertook, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability, taking into account any specialized knowledge or experience on the part of the person, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection; provided, that in the case of property in residential or other similar use at the time of purchase by a nongovernmental or noncommercial entity, a facility inspection and title search that reveal no basis for further investigation shall be considered to satisfy the requirements of

Amend  
§ 8-631.02

this subparagraph;

"(C) The person provides all legally required notices with respect to the discovery or release of any hazardous substances at the facility;

"(D) The person exercises appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to:

"(i) Stop any continuing release;

"(ii) Prevent any threatened future release; and

"(iii) Prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance;

"(E) The person provides full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration at a vessel or facility (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response actions or natural resource restoration at the vessel or facility);

"(F) The person is in compliance with any institutional controls established or relied on in connection with the response action at the facility;

"(G) The person does not impede the effectiveness or integrity of any institutional control employed at the facility in connection with a response action;

"(H) The person complies with any request for information or administrative subpoena issued by the Mayor under this act;

"(I) The person is not potentially liable, or affiliated with any other person that is potentially liable, for response costs at the facility through a familial, 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 or by a contract for the sale of goods or services; and

"(J) The person is not the result of a reorganization of a business entity that was potentially liable; provided, that a bona fide prospective purchaser may know, or have reason to know, of the contamination at the facility at or before the time of acquisition and still be eligible for a defense to liability under this act."

(2) Paragraph (4) is amended to read as follows:

"(4) "DDOE" means the District Department of the Environment."

(3) A new paragraph (6A) is added to read as follows:

"(6A)(A) "Facility" means:

"(i) A building, structure, installation, equipment, pipe, pipeline (including any pipe into a sewer or publicly-owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft; or

"(ii) A site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located.

"(B) The term "facility" shall not include a consumer product in

consumer use or any vessel.”.

(4) A new paragraph (8A) is added to read as follows:

"(8A) "Hazardous Substances Response Plan" means the Mayor's plan, including policies and procedures, for responding to, and evaluating, hazardous substance releases that may threaten public health, welfare, and the environment, and that is consistent with the provisions of this act."

(5) Paragraph (12) is amended by striking the phrase "or government agency" and inserting the phrase "independent authority of the District government, or District, state, or federal government agency" in its place.

(6) A new paragraph (14A) is added to read as follows:

"(14A) "Response" means an action necessary to cleanup or otherwise prevent, minimize, or mitigate damage to the public health or welfare or to the environment from the release or threatened release of a hazardous substance, including a temporary or permanent measure and related enforcement activity."

(c) Section 201 (D.C. Official Code § 8-632.01) is amended as follows:

Amend  
§ 8-632.01

(1) Subsection (b) is amended to read as follows:

"(b) A responsible person shall be strictly liable, jointly and severally, for:

"(1) The costs, including the interest on the costs, of an abatement action;

"(2) The costs of a remedial cleanup and a health or any other risk assessment;

"(3) The costs of any other response action; and

"(4) Damages for injury to, destruction of, or loss of natural resources, including the reasonable cost of assessing the injury, destruction, or loss resulting from the release of the hazardous substance."

(2) Subsection (c) is amended as follows:

(A) The lead-in text is amended by striking the word "who" and inserting the phrase "who, with regard to a property from which there is a release or threatened release of a hazardous substance that causes or contributes to the incurrence of a response cost" in its place.

(B) Paragraphs (1) and (2) are amended by striking the phrase "of a contaminated property".

(d) Section 202 (D.C. Official Code § 8-632.02) is amended to read as follows:

Amend  
§ 8-632.02

“Sec. 202. Defenses.

“(a) A person shall not be liable pursuant to section 201(b) if the person establishes, by a preponderance of the evidence, that the release or contamination was caused by any of the following:

“(1) An act of God;

“(2) An act of war;

“(3) The migration, flow, or movement of hazardous substances from property owned by a person unrelated to the person asserting the defense;

“(4) An act or omission of an unrelated third party, if reasonable precautions were taken to prevent foreseeable releases;

“(5) An act or omission of a third party if the act or omission was reasonably outside the scope of a prior or an existing contractual relationship and the person asserting the defense could not have reasonably foreseen or prevented the act or omission; or

“(6) An act or omission that occurred prior to the acquisition of the property if due diligence had been exercised in investigating the possible existence of a release or contamination, except that due diligence shall not be required if the property was acquired by inheritance or bequest, through a foreclosure for tax delinquency, or by condemnation for blight or other threats to public health, safety, and welfare.

“(b)(1) Notwithstanding section 201, a bona fide prospective purchaser whose potential liability for a release or threatened release is based solely on the purchaser being considered to be an owner or operator of a facility shall not be liable as long as the bona fide prospective purchaser does not impede the performance of a response action or natural resource restoration.

“(2) If there are unrecovered response costs incurred by the District at a facility for which an owner of the facility is not liable by reason of paragraph (1) of this subsection, and if each of the conditions described in paragraph (3) of this subsection is met, the District shall have a lien on the facility, or may by agreement with the owner, obtain from the owner a lien on any other property or other assurance of payment satisfactory to the Mayor, for the unrecovered response costs.

“(3) The conditions referred to in paragraph (2) of this subsection are the following:

“(A) A response action for which there are unrecovered costs of the District is carried out at the facility; and

“(B) The response action increases the fair market value of the facility above the fair market value of the facility that existed before the response action was initiated.

“(4) A lien under paragraph (2) of this subsection shall:

“(A) Be in an amount not to exceed the increase in fair market value of the property attributable to the response action at the time of a sale or other disposition of the property;

“(B) Arise at the time at which costs are first incurred by the District with respect to a response action at the facility;

“(C) Be subject to the requirements of subsection (1)(3) of this section; and

“(D) Continue until satisfaction of the lien by sale or other means.”.

(e) Section 302(a)(1) (D.C. Official Code § 8-633.02(a)(1)) is repealed.

(f) Section 304 (D.C. Official Code § 8-633.04) is amended as follows:

(1) The section designation is amended by striking the word "security" and

Amend  
§ 8-633.02  
Amend  
§ 8-633.04

inserting the phrase "security of the cleanup action plan" in its place.

(2) Subsection (a) is amended to read as follows:

"(a) The Mayor may require an applicant to pay a fee not to exceed \$10,000 upon submission of an application to participate in the Program."

(g) Section 308 (D.C. Official Code § 8-633.08) is amended as follows:

Amend  
§ 8-633.08

(1) Subsection (a) is amended by striking the phrase "and revenues from any source pursuant to the Program" and inserting the phrase "revenues from a source pursuant to the Program, and revenues from other sources generated from enforcement at a contaminated property or from an action taken to prevent contamination, which sources of revenue may include enforcement actions under sections 201 and 406 and cost recoveries under section 402" in its place.

(2) Subsection (b) is amended by striking the phrase "and any other brownfield revitalization incentive established by this act" and inserting the phrase "other brownfield revitalization incentives established by this act, and other activities associated with the Mayor's cleanup of contaminated property, including the Mayor's oversight and enforcement activity" in its place.

(h) The designation of Title IV is amended to read as follows:

"TITLE IV. HAZARDOUS SUBSTANCE RESPONSE".

(i) Section 401 (D.C. Official Code § 8-634.01) is amended to read as follows:

"Sec. 401. Response and order authority.

Amend  
§ 8-634.01

"(a) Upon receipt of information of a threatened or actual release of a hazardous substance, the Mayor may:

"(1) Take response action not inconsistent with the Hazardous Substances Response Plan that the Mayor considers necessary to protect the public health or welfare or the environment;

"(2) Issue an administrative order to perform a response action that is not inconsistent with the Hazardous Substances Response Plan;

"(3) Take action necessary to protect the public health or welfare or the environment from an imminent and substantial threat;

"(4) Secure such relief as may be necessary to abate such danger or threat, and the Superior Court of the District of Columbia may grant such relief as the public interest and the equities of the case may require;

"(5) Issue an emergency executive order pursuant to the District of Columbia Emergency Act of 1980, effective March 5, 1981 (D.C. Law 3-149; D.C. Official Code § 7-2301 *et seq.*), as may be necessary to protect the public health or welfare or the environment; and

"(6) Issue an administrative order to enforce other provisions of this act.

"(b) This act shall not prevent or impede an immediate response by the Mayor to a contamination or threat of contamination that presents imminent and substantial danger to the

public.

"(c) A federal, state, local, or District permit shall not be required for the portion of a response action conducted entirely onsite, if the response action is selected and carried out in compliance with this section.

"(d) Any response action taken, ordered, or otherwise agreed to by the Mayor shall:

“(1) Be protective of public health and welfare and the environment; and

“(2) Attain a level of cleanup or control that attains legally applicable or relevant and appropriate standards, requirements, criteria, or limitations.

"(e) Response actions in which treatment permanently and significantly reduces the volume, toxicity, or mobility of hazardous substances shall be preferred over response actions not involving such treatment.

"(f) The Mayor may select a remedial action meeting the requirements of subsection (d) of this section that does not attain a level or standard of control at least the level or equivalent to a legally applicable or relevant and appropriate standard requirement if:

"(1) The response action selected is only part of a total response action that will attain the level or standard when complete;

"(2) Compliance with the requirement will result in greater risk to human health and the environment than alternative options;

"(3) Compliance with the requirement is technically impracticable from an engineering perspective; or

"(4) The response action selected will attain a standard of performance that is equivalent to that required under the otherwise applicable standard, requirement, or limitation, through use of another method or approach."

(j) Section 402 (D.C. Official Code § 8-634.02) is amended to read as follows:

"Sec. 402. Reimbursement for reasonable costs.

"(a) A person who receives and complies with the terms of an order issued under this act may petition the Mayor for the reimbursement of the reasonable costs of the action, plus interest, from the Clean Land Fund; provided, that:

"(1) The required action has been completed to the satisfaction of the Mayor;  
and

"(2) The petition is filed within 60 days of the issuance of a Certificate of Completion by the Mayor.

"(b) To obtain reimbursement, the petitioner shall establish by a preponderance of the evidence that:

"(1) The petitioner is not liable for response costs under section 201 of this act, and that the costs are reasonable in light of the action required by the relevant order; or

"(2)(A) The Mayor's decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with the law.

“(B) Reimbursement under this paragraph shall be limited to reasonable

Amend  
§ 8-634.02

costs incurred under the portions of the order found to be arbitrary and capricious or otherwise not in accordance with the law.

"(c) If the Mayor denies all or part of a petition made under this section, the petitioner may file an appeal in the Superior Court of the District of Columbia within 30 days of issuance of the Mayor's decision."

(k) New sections 403 through 411 are added to read as follows:

"Sec. 403. Access to information.

"(a) The Mayor, upon reasonable notice, may require any person who has or may have responsive information to:

"(1) Furnish information or documents relating to:

"(A) The identification, nature, and quantity of material that has been or is generated, stored, treated, or disposed of at a facility or transported to a facility;

"(B) The nature or extent of the release or threatened release of a hazardous substance from a facility; or

"(C) The ability of a person to pay for or perform a cleanup;

"(2) Grant the Mayor access at reasonable times to any facility, establishment, place, property, or location to inspect and copy all documents or records relating to matters set forth in paragraph (1) of this subsection; or

"(3) Copy or furnish to the Mayor all such documents or records relating to matters set forth in paragraph (1) of this subsection at the expense of the person.

"(b)(1) A record, report, or other information obtained from a person under this section shall be available to the public, except upon a showing satisfactory to the Mayor that the record, report, or other information, or a part thereof, other than health or safety effects data, if made public would divulge methods or processes entitled to protection as a trade secret.

"(2) The information, or a portion thereof, shall be considered confidential, except that a record, report, document, or other information may be disclosed by the Mayor when relevant in a proceeding under this act.

"(3)(A) A person required to provide information under this section shall not claim that the information is entitled to protection unless the request for confidentiality is made in writing at the time the record, report, or other information is submitted to the Mayor.

"(4) The following information shall not be exempt from disclosure under section 204(a)(14) of the District of Columbia Administrative Procedure Act, effective March 25, 1977 (D.C. Law 1-96; D.C. Official Code § 2-534(a)(14)):

"(A) The trade name, common name, or generic class or category of the hazardous substance;

"(B) The physical properties of the hazardous substance, including its boiling point, melting point, flash point, specific gravity, vapor density, solubility in water, and vapor pressure at 20 degrees Celsius;

"(C) The hazards to health and the environment posed by the substance,

including physical hazards such as explosion, and potential acute and chronic health hazards;

"(D) The potential routes of human or ecological exposure to the substance at the facility, establishment, place, or property being investigated, entered, or inspected under this act;

"(E) The location of disposal of a waste stream;

"(F) Monitoring data or analysis of monitoring data pertaining to disposal activities;

"(G) Hydrogeologic or geologic data; or

"(H) Groundwater monitoring data.

"(c) This act shall not prevent or preclude the Mayor from securing access or obtaining information in any other lawful and reasonable manner, including by issuing a subpoena to compel the production of information.

"Sec. 404. Entry, inspection, and sampling.

"(a) Upon a determination of a threat or an actual release of a hazardous substance that is a threat to the public health, welfare, or the environment, for the purpose of inspection and obtaining samples, the Mayor may enter at reasonable times, and issue orders as necessary to gain entry to, a facility, establishment, or other property if:

"(1) A hazardous substance may be, has been, or may have been generated, stored, treated, released, disposed of, or transported from the facility, establishment, or property; or

"(2) Entry is needed to determine the need for response, the appropriate response, or to effectuate a response action under this act.

"(b) The inspection and entry shall be completed with reasonable promptness.

"Sec. 405. Review.

"If the Mayor selects a response action pursuant to section 401 that results in any hazardous substances remaining at the site, the Mayor shall review the response action no less often than each 5 years after the initiation of the response action to assure that human health and the environment are being protected by the response action being implemented. If, after the review, it is the judgment of the Mayor that action is appropriate at the site in accordance with section 401, the Mayor shall take or require the action.

"Sec. 406. Civil penalties.

"Pursuant to section 401, a person who:

"(1) Violates or fails to comply with an order of the Mayor, permit, or other applicable standard, requirement, regulation, or provisions of law pursuant to this act, shall be liable for:

"(A) Civil penalties not to exceed \$10,000 for each day of noncompliance; and

"(B) An amount equal to 3 times the costs expended resulting from a failure to take proper action; and



"(2) Without sufficient cause, willfully violates, fails, or refuses to comply with an order of the Mayor, permit, or other applicable standard, requirement, regulation, or provisions of law pursuant to this act, shall be liable for:

"(A) Civil penalties not to exceed \$25,000 for each day of noncompliance; and

"(B) An amount equal to 3 times the costs expended resulting from a failure to take proper action.

"Sec. 407. Judicial actions.

"The Mayor may request the Attorney General, and the Attorney General shall have authority, to commence a civil action in the Superior Court of the District of Columbia:

"(1) To compel compliance with an order of the Mayor, permit, or other applicable standard, requirement, regulation, or provisions of law pursuant to this act;

"(2) To recover a response cost or natural resource damage, or for contribution;

"(3) To declare future liability for a response cost or damage;

"(4) For civil penalties not to exceed \$25,000 for each day of noncompliance against any person who unreasonably fails to comply with an order of the Mayor, permit, or other applicable standards, requirement, regulation, or provision of law pursuant to this act; and

"(5) For an amount equal to 3 times the costs expended resulting from a failure to take proper action.

"Sec. 408. Settlement authority.

"(a) The Mayor, in his or her discretion, may enter into an agreement with a person to perform a response action if the Mayor determines that the response action will be properly completed by the person.

"(b) The agreement shall be subject to public notice and comment. The Mayor may withdraw or withhold consent to the proposed settlement if comments disclose facts or considerations that indicate that the proposed settlement is inappropriate, improper, or inadequate. The parties to the agreement, including the Mayor, may enforce the agreement in the Superior Court of the District of Columbia.

"(c) The agreement may include limited covenants not to sue for contamination addressed in compliance with the terms of the agreement and may provide that the person shall not be liable to another person for response costs relating to a contamination addressed in compliance with the terms of the agreement.

"(d) The Mayor may find a person eligible to participate in the voluntary cleanup program established under section 301 as part of an agreement.

"Sec. 409. Contribution actions.

"(a) A person may seek contribution from another person who is liable under section 201. The claim shall be brought in the Superior Court of the District of Columbia. In resolving a contribution claim, the court may allocate a response cost among liable parties using the equitable factors as the court determines appropriate.

"(b) This section shall not diminish the right of a person to bring an action for contribution in the absence of a civil action under section 407.

"(c) A person who has resolved his, her, or its liability to the District in an administrative or judicially approved settlement, or has been issued a Certificate of Completion under section 306, shall not be liable for a claim for contribution regarding a matter addressed in the settlement or Certificate of Completion. The settlement or Certificate of Completion shall not discharge another responsible person unless its terms so provide, but it shall reduce liability of the others by the amount of the settlement.

"Sec. 410. Statute of limitations.

"(a) The provisions of D.C. Official Code § 12-301(10) notwithstanding, an action by or on behalf of the Mayor to recover the cost of a response action under this section must be commenced within 6 years after the initiation of physical onsite response work.

"(b) An action to compel the Mayor or another person to perform a duty brought under this section shall be commenced within 2 years after the date that the duty became nondiscretionary.

"Sec. 411. Judicial review.

"(a) In considering a challenge made to a response action taken or ordered under this act, or the denial of all or part of a petition for reimbursement under this act, the court shall uphold the Mayor's decision in selecting the response action unless the objecting party can demonstrate on the administrative record that the decision was arbitrary and capricious or otherwise not in accordance with District law.

"(b) If the court finds that the selection of the response action was arbitrary and capricious or otherwise not in accordance with District law, the court shall award only the response costs or damages that are consistent with the Hazardous Substances Response Plan and other relief as is consistent with the Hazardous Substances Response Plan.

"(c) In reviewing an alleged procedural error, the court may disallow the costs or damages only if the error was so serious and related to a matter of such central relevance to the action that the action would have been significantly changed had the error not been made.

"(d) The Mayor shall establish an administrative record upon which the Mayor shall base the selection of a non-emergency response action. The administrative record shall be available to the public, at a minimum, by scheduling an appointment to inspect the record during regular business hours at DDOE."

(1) Section 602(b) (D.C. Official Code § 8-636.02(b)) is amended to read as follows:

Amend  
§ 8-636.02

"(b)(1) This act shall not prevent a person from commencing an action to compel the Mayor to perform a non-discretionary duty under this act or to commence a civil action on his or her own behalf against a person who is in violation of an order of the Mayor, permit, or other applicable standard, requirement, regulation, or provision of law pursuant to this act.

"(2) An action shall not be commenced if the Mayor has commenced an action under this act or another law to require compliance with the standard, regulation, requirement,

or order concerned.

"(3) An action commenced pursuant to this subsection shall require a 60-day notice to the Mayor and an alleged violator.

"(4) The court may award attorneys' fees and other costs to the prevailing party on actions commenced pursuant to this subsection."

(m) A new section 603 is added to read as follows:

"Sec. 603. Timing of review.

"A court shall not review a challenge to a response action chosen by the Mayor or to review any order issued by the Mayor, pursuant to section 401, except in the following circumstances:

"(1) An action pursuant to section 401(a)(4);

"(2) An action for reimbursement pursuant to section 402;

"(3) An action pursuant to section 407(1), (2), (4), and (5);

"(4) An action for contribution pursuant to section 409; and

"(5) An action pursuant to section 602(b)."

(n) Section 801(a) (D.C. Official Code § 8-638.01(a)) is amended to read as follows:

Amend  
§ 8-638.01

"(a) The Mayor may promulgate rules to implement the provisions of this act, including provisions concerning site assessment, financial assurance, feasibility studies, response actions, enforcement, cleanup standards, natural resources, public participation, and other provisions relevant to this act."

### Sec. 3. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report as the fiscal impact statement required by section 602(c)(3) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(3)).

### Sec. 4. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of Congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December

**ENROLLED ORIGINAL**

24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.

---

Chairman  
Council of the District of Columbia

---

Mayor  
District of Columbia