

Brownfields Q&A

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Three Questions:

- ▶ Why are hazardous and petroleum brownfields separated?
- ▶ What are eligible costs?
- ▶ How do you determine site eligibility?

What is a Brownfield?

Small Business Liability Relief and Brownfields Revitalization Act (the "Brownfields Law"), 2002

- ▶ “Brownfield site” means 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.

Cleaning up and reinvesting in these properties protects the environment, reduces blight, and takes development pressures off greenspaces and working lands.

Why Petroleum Brownfields?

Underground Storage Tanks (and therefore Petroleum Brownfields) are regulated via Energy Policy Act and Solid Waste Disposal Act

- ▶ [U.S. Code, Title 42, Chapter 82, Subchapter IX](#)
- ▶ [UST provisions of the Energy Policy Act of 2005](#)
- ▶ OUST is responsible for promoting the cleanup of federally-regulated leaking underground storage tank sites (e.g., high risk petroleum release sites).

Petroleum-contaminated sites were not eligible for traditional brownfields funding. A key provision of the 2002 law allocates 25 percent of brownfields funding each year to assess, clean up, and ready for reuse relatively low-risk petroleum brownfield sites.

Eligible Costs

- ▶ Grant funds may be used for direct costs associated with programmatic management of the grant, such as required performance reporting and environmental oversight.
 - ▶ All costs charged to assessment grants must be consistent with the applicable OMB Cost Circular 2 CFR 200 Subpart E.
- ▶ A local government may use up to 10 percent of its grant funds for any of the following activities:
 - ▶ a. health monitoring of populations exposed to hazardous substances, pollutants, or contaminants from a brownfield site;
 - ▶ b. monitoring and enforcement of any institutional control used to prevent human exposure to any hazardous substance, pollutant, or contaminant from a brownfield site; and
 - ▶ c. other related program development and implementation activities (e.g., writing local brownfields-related ordinances) to effectively oversee assessments and cleanups described in an EPA-approved work plan.
- ▶ A portion of the brownfields grant may be used to purchase environmental insurance.

Eligible Costs

Grant funds cannot be used for the following activities:

- ▶ Administrative costs, such as indirect costs, of grant administration with the exception of financial and performance reporting costs; and
- ▶ Proposal preparation costs.

See the Brownfields FAQs at

http://www.epa.gov/brownfields/proposal_guides/FY16_FAQs.pdf

for additional information on ineligible grant activities and ineligible costs.

Site Eligibility

- ▶ Who makes the eligibility call for assessments?
 - Hazardous Substances >> EPA makes determination
 - Petroleum >> State makes determination

Hazardous Substances:

- Metals, PAHs, PCBs, chlorinated solvents, etc.
- Asbestos
- Lead Paint
- Controlled substances
- Mine-scarred lands
- Co-mingled Hazardous Substances and Petroleum

Petroleum sites:

- Underground Storage Tanks (USTs)
- Tank Farms
- Gas and service stations
- *Distinctly separate from hazardous substances*
- *Generally unused petroleum products in tanks or in soil*

Site Eligibility

Ineligible sites

- ▶ Is the site listed (or proposed for listing) on the National Priorities List (NPL)?
- ▶ Is facility subject to unilateral administrative orders, court orders, administrative orders on consent, or judicial consent decrees issued to or entered into by parties under CERCLA?
- ▶ Is facility subject to the jurisdiction, custody, or control the US government? (Land held in trust by the US gov. for an Indian tribe is eligible.)

Site Eligibility:

Sites Requiring a Property-Specific Determination

- ▶ Facility is subject to CERCLA removal action?
- ▶ Facility issued permit by U.S. or authorized state under the Solid Waste Disposal Act (as amended by RCRA, FWPCA, TSCA, or SWDA)?
- ▶ Facility subject to corrective action orders under RCRA?
- ▶ Facility is a land disposal unit w/ closure notification under RCRA subtitle C, or closure requirements in plan or permit?
- ▶ Facility had PCB release subject to remediation under TSCA?
- ▶ Facility got funding for remediation from LUST Trust Fund?

BASICALLY - has EPA been involved here before?

Site Eligibility

Hazardous Substances

1. Are there any other Enforcement Actions?
2. Are they potentially liable under CERCLA § 107?
3. Do they have a CERCLA liability protection or defense?

Site Eligibility

Hazardous Substances

Other Environmental Enforcement Actions

Are there any other known ongoing or anticipated environmental enforcement actions (at the federal, state or local level) regarding the responsibility of any party for contamination or hazardous substances at the site?

- ▶ Brownfields sites are generally state lead sites
 - ▶ Having analytical data likely means they're in the system
- ▶ Research similar to property specific determination
- ▶ Local issues are likely related to unsafe properties, trespassing, vandalism
 - ▶ Exposure to chemicals, asbestos, lead paint etc.

Site Eligibility

Hazardous Substances

CERCLA §107 liability

Grantee does not and will not own property

- ▶ Did the grant recipient ever arrange for the disposal of hazardous substances at the site, or transport hazardous substances to the site?
- ▶ Did the grantee recipient ever cause or contribute to any releases of hazardous substances at the site?
- ▶ Describe the grant recipient's relationship with the current owner and the owner's role in the work to be completed:
- ▶ Does the grant recipient have access?

Site Eligibility

Hazardous Substances

Grantee or Applicant owns or will own property

When & from whom did/will you acquire the property

- ▶ Date it was/will be acquired
- ▶ Name and identity of party from whom you acquired or will acquire the property
- ▶ Describe all familial, contractual, corporate or financial relationships or affiliations with past or current owner or operators

How did/will you acquire the property

- ▶ Negotiated purchase from a private individual
- ▶ Purchase or transfer from another governmental unit
- ▶ Tax foreclosure
- ▶ Eminent domain
- ▶ Donation
- ▶ Other (explain)
- ▶ Considered an involuntary acquisition

Site Eligibility

Hazardous Substances

Grantee or Applicant owns or will own property

Do they have a CERCLA liability protection or defense?

CERCLA Liability Protections or Defenses

- ▶ Bona Fide Prospective Purchaser
- ▶ Involuntary Acquisition by units of state or local government
- ▶ Contiguous Property Owner (rare)
- ▶ Innocent Landowner (rare)

Site Eligibility

Hazardous Substances

Grantee or Applicant owns or will own property

Bona Fide Prospective Purchaser (BFPP)

- ▶ They conducted all Appropriate Inquiries (AAI) **PRIOR** to acquisition of property
- ▶ All disposal of hazardous substances occurred **PRIOR** to their acquisition of property
- ▶ They are not liable for contamination at the property or affiliated with any other person potentially liable for response costs at the property
- ▶ They are complying with all Continuing Obligations **AFTER** acquiring the property

Site Eligibility

Hazardous Substances

Grantee or Applicant owns or will own property

Information needed to establish liability protections

- ▶ Did the grantee or Applicant perform any environmental inquiry prior to the purchase of the property?
 - ▶ Describe the types and dates of the assessments, on whose behalf they were performed, and indicate whether a Phase I investigation was performed in accordance with EPA's All Appropriate Inquiry (AAI) rule (or ASTM E1527-05, or its equivalent at the time of purchase):
 - ▶ Determine prior uses and ownership of a property.
 - ▶ Assess conditions that may be indicative of releases or threatened releases of hazardous substances at the property.

Site Eligibility

Hazardous Substances

Grantee or Applicant owns or will own property

AAI timing is very important

- ✓ Performed within **one year prior** to acquisition of property
- ✓ Certain aspects must be performed or updated within **180 days prior** to acquisition of property:
 - ▶ Interviews with past and present owners, operators, and occupants;
 - ▶ Searches for recorded environmental cleanup liens;
 - ▶ Reviews of federal, tribal, state, and local government records;
 - ▶ Visual inspections of the facility and of adjoining properties;
 - ▶ The declaration by the environmental professional.

Site Eligibility

Hazardous Substances

Grantee or Applicant owns or will own property

All Appropriate Inquiry

If they acquired the property after November 2006

- ✓ They **must** have completed AAI.
- ✓ EPA recognizes the following to be AAI compliant:
 - ▶ ASTM E1527-05 “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process” (or most current version)
 - ▶ ASTM E2247-08 “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process for Forestland or Rural Property”

Site Eligibility Hazardous Substances

Grantee or Applicant owns or will own property

All Appropriate Inquiry

If they acquired the property on or after May 31, 1997 to November 1, 2006

- ▶ EPA recognizes the following to be AAI compliant:
 - ▶ ASTM E1527-97 & ASTM E1527-00 “Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment Process”

Site Eligibility

Hazardous Substances

Grantee or Applicant owns or will own property

All Appropriate Inquiry

If they acquired the property before May 31, 1997

- ▶ The following factors are taken into account in determining compliance:
 - ▶ Specialized knowledge or experience of purchaser
 - ▶ Relationship of purchase price to value of property if not contaminated
 - ▶ Commonly known or reasonably ascertainable information about the property
 - ▶ Obviousness of presence or likely presence of contamination at the property
 - ▶ Ability to detect contamination by appropriate inspection

Site Eligibility

Hazardous Substances

Grantee or Applicant owns or will own property

Involuntary Acquisition by State & Local Governments

Did they acquire ownership or control involuntarily through:

- ✓ **Bankruptcy,**
- ✓ **Tax delinquency, or**
- ✓ **Abandonment?**

If so, they are not considered owners for the purposes of CERCLA liability.

The exclusion from liability does not apply if they **caused or contributed** to the release of hazardous substances.

***Does not include Donated properties!**

Site Eligibility

Hazardous Substances

Grantee or Applicant owns or will own property

Involuntary Acquisition by State & Local Govs

Did they acquire the property through exercise of **eminent domain** authority?

If so, they have liability protection if:

- ✓ They acquired property after disposal of hazardous substances
- ✓ They exercise due care with respect to hazardous substances on the property
- ✓ They take precautions against foreseeable acts of third parties
- ✓ They comply with land use restrictions
- ✓ They do not impede effectiveness or integrity of institutional controls

Site Eligibility

Hazardous Substances

Grantee or Applicant owns or will own property

Continuing Obligations After Purchase

- ▶ Stop continuing releases
- ▶ Prevent future releases
- ▶ Prevent/limit exposure to past releases
- ▶ Comply with AULs
- ▶ Cooperate with access, and information requests
- ▶ Provide all legal notices

Post Acquisition Property Uses

- ▶ Describe property uses since purchase
- ▶ Include persons and entities other than owner using the property
- ▶ Provide timeline, details , and relationships to current and prior uses

Petroleum Site Eligibility

- ▶ Most often states make petroleum determinations at the properties being considered for assessment or RLF
- ▶ Get them involved right away to help evaluate the following:
 1. The site is relatively low risk compared to other petroleum-only sites
 2. There is no viable responsible party
 3. Grantee/Applicant is not liable for contamination
 4. The site not subject to corrective action under RCRA §9003(h)

Petroleum Site Eligibility

Relatively Low Risk

The site must be relatively low risk compared to other petroleum-only sites in state

- ▶ Is site currently being cleaned up using LUST trust fund ?
- ▶ Is the site currently subject to a response under the Oil Pollution Act

Petroleum Site Eligibility

Establishing No Responsible Party

- ▶ The site owner must not be Subject to Corrective Action under RCRA § 9003(h)
- ▶ Other judgments, orders or third party suites
 - ▶ Is there a court judgment or administrative order requiring any party to conduct the cleanup activities?
 - ▶ Is there an enforcement action requiring any party to conduct the cleanup activities?
 - ▶ Is there a third party claim against current or immediate past owner requiring cleanup activities?



Petroleum Site Eligibility

Establishing No Viable Responsible Party

- ▶ There is no responsible party, or
- ▶ There is a responsible party, but the party is not financially viable to pay for the cleanup
- ▶ Involuntary Acquisitions
 - ▶ Site was acquired through tax foreclosure, abandonment, or similar government proceedings are deemed to have no responsible party
 - ▶ Provided no responsible parties are identified that are legally being required to clean up the site (previous slide)

Petroleum Site Eligibility

Establishing No Viable Responsible Party

- ▶ Current owner (at time of eligibility submission)
- ▶ Immediate past owner
- ▶ Grantee or Applicant **(must NOT be liable)**
 - ▶ Did you dispense or dispose of petroleum at the site?
 - ▶ Did you own the property during the dispensing or disposing of petroleum at the site?
 - ▶ Did you take reasonable steps after acquiring and not exacerbate contamination?

Petroleum Site Eligibility

Establishing No Viable Responsible Party

No Viable Party

- ▶ Party is viable if it is financially capable of performing the activity to be funded by the grant
- ▶ General assumptions:
 - ▶ Ongoing businesses or companies and government entities are viable
 - ▶ Defunct or insolvent companies are not viable
 - ▶ An Individual responsible party is not viable

Petroleum Site Eligibility

Establishing No Viable Responsible Party

No Viable Party

- ▶ Resources to be consulted in making determination of viability
- ▶ Responsible party must submit financial information such as tax returns, bank statements, financial statements, environmental insurance policies
- ▶ Federal, state, and local records such as Secretary of State databases, property/land records, state hazardous waste files
- ▶ Public and commercial financial databases

Online Resources

- ▶ Review your Guidelines:

<https://www.epa.gov/sites/production/files/2015-10/documents/epa-oswer-oblr-15-04.pdf>

- ▶ FAQs

<https://www.epa.gov/brownfields/fy-2018-brownfields-assessment-revolving-loan-fund-and-cleanup-grant-guideline-documents>