

BROWNFIELDS ELIGIBILITY & LIABILITY

WHAT YOU SHOULD KNOW ABOUT
CERCLA, BROWNFIELDS LAW AND THE BUILD ACT

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OVERVIEW

- Brownfields Site Eligibility
- CERCLA Liability Protections and Exemptions
- Brownfields Liability Threshold
- Questions

BROWNFIELDS GRANT ELIGIBILITY

- Site eligibility
- Liability Threshold

SITE ELIGIBILITY – IS IT A BROWNFIELD?

- Comprehensive Environmental Response, Compensation & Liability Act (“CERCLA”)(1980), 42 U.S.C. § 9601 et seq. (aka "Superfund Law")
- CERCLA Defines a "Brownfield" as "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." CERCLA 101(39)(A)
- Also includes sites contaminated by petroleum or petroleum product, controlled substances (e.g. meth lab) and mine-scarred lands.

BROWNFIELDS GRANT SITE ELIGIBILITY

The following sites are NOT eligible for Brownfields grants:

- Listed or proposed for listing on the National Priorities List (NPL);
- Subject to unilateral administrative order, court order, administrative order on consent, or judicial consent decree under CERCLA;
- Subject to the jurisdiction, custody, or control of the U.S. government (exception: land held in trust by U.S. government for an Indian tribe **is generally eligible** for brownfields funding).

BROWNFIELDS SITE ELIGIBILITY, CT'D

Certain types of sites require “Property-Specific” determinations:

- Subject to planned/ongoing CERCLA removal actions
- Subject to administrative/judicial order, or consent decree, or which permit has been issued by US/State under:
 - ✓ Resource Conservation and Recovery Act (RCRA);
Treatment/storage/disposal facilities
 - ✓ Federal Water Pollution Control Act (Clean Water Act)
 - ✓ Toxic Substances Control Act (TSCA)
 - ✓ Safe Water Drinking Act (SWDA)

BROWNFIELDS SITE ELIGIBILITY, CT'D

More sites requiring Property-Specific determinations:

- Subject to RCRA § 3004(u) or § 3008(h) corrective action permits or orders
- Land disposal units that have submitted RCRA closure notification or subject to closure requirements
- Subject to a TSCA remediation for PCB release
- Received cleanup funding from Leaking Underground Storage Tank (LUST) Trust Fund

BROWNFIELDS SITE ELIGIBILITY, CT'D

Approval of Property-Specific Determinations:

- Does grant/loan/sub-grant protect human health and the environment; AND either
- promote economic development OR
- enable the property to be used for parks, greenways, and similar recreational or nonprofit purposes.

CERCLA LIABILITY PROTECTIONS AND EXEMPTIONS

With a few exceptions (discussed later), Brownfields grant applicants must demonstrate that they are exempt from CERCLA liability to be eligible for Brownfields grant funding – CERCLA 104(k)

CLASSES OF
POTENTIALLY
RESPONSIBLE
PARTIES
(PRPs)
CERCLA § 107

- Current owner/operator of the site
- Owner/operator of a site at the time of disposal
- Person who arranged for the disposal of a hazardous substance at a site
- Person who transported a hazardous substance to a site (who selected that site for disposal)

CLASSES OF
POTENTIALLY
RESPONSIBLE
PARTIES
(PRPs)
CERCLA § 107

There are exceptions, including:

- De minimis / De micromis
- Service Station (recycled oil)
- Indian Tribes
- Municipal Solid Waste generators and transporters
- Secured Creditor Exemption
- Residential Homeowners

CLASSES OF
POTENTIALLY
RESPONSIBLE
PARTIES
(PRPs)
CERCLA § 107

Under CERCLA, persons may be held **strictly liable** (without fault/culpability, just by virtue of ownership), and **jointly and severally liable** (held individually or collectively accountable) for cleaning up hazardous substances at properties where they own/operate, or owned/operated in the past at the time of disposal.

CERCLA LIABILITY PROTECTIONS AND EXEMPTIONS

- Innocent Landowner / Third Party
- Contiguous Property Owner
- Bona Fide Prospective Purchaser (BFPP)
- State and Local Governmental Entity Acquisitions

CERCLA LIABILITY PROTECTIONS

Innocent Landowners Defense 101(35)(A)

Three types of Innocent Landowners:

(1) Owner that at the time of acquisition “did not know and had no reason to know” about the contamination at the property (shown by performing All Appropriate Inquiries or AAI, discussed later); and

No affiliation with any liable party, other than relationship created by instrument conveying title to property.

****Creation of BFPP Protections essentially made this type of Innocent Landowner Defense redundant for post-Brownfields-Amendment acquisitions****

CERCLA LIABILITY PROTECTIONS

Innocent
Landowners Defense
101(35)(A)

(2) Governments to acquired the property involuntarily

**** Expansion of State and Local Governmental Entity Acquisitions Exemptions due to BUILD Act****

(3) Owner who acquired property by inheritance or bequest

CERCLA LIABILITY PROTECTIONS

Third-Party Defense 107(b)

- Contamination was solely caused by:
 - ❖ Act of God;
 - ❖ Act of war;
 - ❖ Acts or omissions of a third party (outside of a contractual relationship)
- AND
- Owner must demonstrate that they exercised due care and took precautions against foreseeable acts or omissions

CERCLA LIABILITY PROTECTIONS

Contiguous Property Owners Exemption 107(q)(1)(A)

- Owner of property contiguous (or similarly situated) to a facility that is the only source of contamination found on the property;
- At the time of acquisition “did not know and had no reason to know” about the contamination at the property (AAI);
- No affiliation with any liable party; AND
- Meets continuing obligations (comply with land use restrictions, etc.)

CERCLA LIABILITY PROTECTIONS

Bona Fide Prospective Purchaser Protection 101(40)

Applies to purchasers with knowledge of contamination, provided the following:

- Property was acquired after January 11, 2002;
- All Appropriate Inquiries (AAI) conducted prior to purchase;
- Not potentially liable or affiliated with potentially liable party other than relationship created by instrument conveying title to property; and
- Continuing obligations.

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ALL APPROPRIATE INQUIRIES

The process of evaluating a property's environmental conditions and assessing the likelihood of the presence of any contamination.

****Maybe the most common stumbling block related to grant eligibility****

ALL APPROPRIATE INQUIRIES

Purpose, Timing and Procedure

- Due Diligence (Phase I Environmental Site Assessment or equivalent) that determines prior uses and ownership of a property, and assesses the conditions of the property that may indicate releases or threatened releases of hazardous substances, contaminants or pollutants at, on, in or to the property BEFORE a prospective purchaser acquires the real property.
- EPA has adopted ASTM E1527-21 as most recent standard

ALL APPROPRIATE INQUIRIES

Purpose, Timing and Procedure

- A Phase I ESA is an initial site assessment to identify potential presence of environmental contamination or Recognized Environmental Conditions (RECs) at the property
- It does NOT delineate contamination or quantify risk

FOR AAI, TIMING IS EVERYTHING

- Phase I or equivalent must be performed **before** date of acquisition (“performed” = date of environmental professional’s signature)
- Also must be performed or updated within one year prior to acquisition, some portions must be performed/updated within 180 days prior (interviews/records review/site inspection/environmental cleanup lien check)*generally just say “180 days”*
- This requirement is regardless of whether a Phase II has been performed.

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- **Continuing obligations.**

CERCLA LIABILITY PROTECTIONS

Bona Fide
Prospective
Purchaser Protection

Continuing Obligations

- Notice: Provide all legally required notices
- Care: Reasonable steps taken to stop continuing release/prevent any threatened future release/prevent or limit any human, environmental, or natural resource exposure;

CERCLA LIABILITY PROTECTIONS

Bona Fide
Prospective
Purchaser Protection

Continuing Obligations ct'd

- Access: Provide full cooperation and access to parties undertaking any response action or natural resource restoration;
- ICs: Comply with land use restrictions and not impede the effectiveness or integrity of any institutional control; and
- Requests: Comply with all governmental information requests and subpoenas.

CERCLA LIABILITY PROTECTIONS

Bona Fide Prospective Purchaser Protection

BFPP TENANTS

Person who acquired a "leasehold interest" in a property after January 11, 2002 may be treated as BFPP, if:

- the interest is not designed to avoid CERCLA liability; and either
- Property owner is a BFPP; OR
- Owner was BFPP at the time of lease, lost status through no action of lessee, and lessee qualifies for all BFPP criteria other than AAI; OR
- Lessee qualifies for all BFPP criteria.

CERCLA LIABILITY PROTECTIONS

State and Local
Governmental
Entity Acquisitions
Exemptions
101(20)(D)
and 101(35)(A)(ii)

Exempts state and local government entities from owner/operator liability if:

- Property acquired “by virtue of their function as a sovereign” (uniquely gov’tl authority);
- Government entity did not cause or contribute to the contamination;
- No affiliation with the liable party; and
- Due care is exercised after acquisition.

CERCLA LIABILITY PROTECTIONS

State and Local
Governmental
Entity Acquisitions
Exemptions
101(20)(D)
and 101(35)(A)(ii)

Acquisitions made by government entity
“functioning as a sovereign” include:

- ✓ Bankruptcy
- ✓ Tax delinquency
- ✓ Abandonment
- ✓ Escheat (owner died intestate)
- ✓ Seizure/Forfeiture Authority
- ✓ Eminent Domain (purchase or condemnation for future public use)

CERCLA LIABILITY PROTECTIONS State and Local Governmental Entity Acquisitions Exemptions 101(20)(D) and 101(35)(A)(ii)

BUILD ACT CHANGES:

- Removed requirement that the government acquisition must be "involuntary."
- There was previous confusion surrounding whether some acquisitions, such as planned "eminent domain," was an allowable method of acquisition.
- However, this does not mean all "voluntary" acquisitions fall within this exemption.
- For example, acquisition of a property for future private use (or primarily private benefit), and acceptance of donated property, do NOT qualify under this exemption.

BROWNFIELDS LIABILITY THRESHOLD

Applicants cannot be liable under CERCLA for contamination for any site.

Hazardous substances: Must demonstrate that they are either exempt from CERCLA liability OR that property was publicly owned and acquired prior to January 11, 2002 OR qualify for a CERCLA liability protection.

Petroleum: Additional requirements (discussed later)

BROWNFIELDS GRANTS: EXEMPTIONS TO CERCLA LIABILITY

- Applicant does/will not own the site at time of application (Assessment grant ONLY)
- Indian Tribes
- Alaska Native Village Corporations and Alaska Native Regional Corporations
- Exempted State and Local Government Acquisitions

BROWNFIELDS GRANTS: CERCLA LIABILITY PROTECTIONS (DISCUSSED EARLIER)

- Innocent Landowner
- Contiguous Property Owner
- BFPP – In addition, for grant purposes only, applicant may be eligible for non-publicly-owned property acquired pre-January 11, 2002, if they can demonstrate they performed environmental due diligence customary of the time and did not cause/contribute to the contamination.

BROWNFIELDS LIABILITY THRESHOLD

- Petroleum: In addition to other BF criteria, there can be no “viable responsible party” (current or immediate past owner), AND a Petroleum Site Eligibility Determination Letter must be provided by EPA (Tribal) or the State (non-Tribal).
- **BUILD Act change:** There is no longer a requirement that a petroleum site be “of relative low risk” to be eligible.
- EPA gives considerable deference to State’s petroleum determination.
- “Petroleum” includes petroleum contaminants (benzene, polyaromatic hydrocarbons, total petroleum hydrocarbons, etc.)

TARGETED BROWNFIELDS ASSESSMENTS (EPA SERVICE, NOT A GRANT)

- Eligible entities: local units of government; quasi-governmental entities (land clearance authorities, community development organizations); tribal governments; regional council or redevelopment agencies; non-profit entities. Cannot be PRP.
- Eligible properties: must meet statutory definition of brownfield, and requestor-owned or abandoned
- Privately-owned properties, if redevelopment will result in “significant benefits to the general public” (case-by-case basis)

ADDITIONAL RESOURCES

- This was by no means a complete overview!
- Helpful resources can be found at:
 - EPA Brownfields Information:
<https://www.epa.gov/brownfields>
 - EPA Region 6 Brownfields Information:
<https://www.epa.gov/brownfields/brownfields-and-land-revitalization-region-6>
 - Brownfields FAQs for FY2024:
<https://www.epa.gov/brownfields/frequently-asked-questions-about-multipurpose-assessment-rlf-and-cleanup-grants>

QUESTIONS?

