



# EPA Brownfields Grants, CERCLA Liability, and All Appropriate Inquiries

The U. S. Environmental Protection Agency's (EPA) Brownfields Program provides grant funds for brownfields assessments, cleanup and capitalization of revolving loan funds. Eligible entities for Brownfield Grants include states, tribes, local governments, regional governments, quasi-governmental entities, and nonprofit organizations.<sup>1</sup>

To be eligible for an EPA Brownfields Grant to address contamination at brownfield properties, eligible entities must demonstrate that they are not liable under CERCLA for contamination at the site or that they do not have to meet the requirements for asserting an affirmative defense to CERCLA liability.

## Who can be found liable for contamination at a brownfield site?

Under CERCLA, state and local governments, nonprofit organizations, and other entities can be found to be liable by virtue of property ownership or by virtue of their actions with respect to a site. For sites with a release or threatened release of hazardous substances, potentially responsible parties include any person or party that:

- Owns or operates the property.
- Formerly owned or operated the property at the time of the disposal of hazardous substances.
- Arranged for hazardous substances to be disposed of at the site or transported to the site for disposal.
- Transported hazardous substances to the site.

## What is CERCLA?

Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as Superfund, persons can be held strictly liable for cleaning up hazardous substances at properties they either currently own or operate, or owned or operated in the past. Strict liability under CERCLA means that liability for environmental contamination can be assigned based solely on property ownership.

- The 2002 Small Business Liability Relief and Brownfields Revitalization Act (Brownfields Amendments) amended CERCLA to provide liability protections for certain landowners and potential property owners. These liability protections apply to certain property owners if they comply with specific provisions in the statute, including conducting [All Appropriate Inquiries \(AAI\)](#) for present and past use of the property. The 2018 Brownfields Utilization, Investment and Local Development (BUILD) Act further amended CERCLA by, in part, clarifying the liability protections for state or local governments, for parties with tenancy or leasehold interests, and for Alaska Native villages and Native Corporations.

<sup>1</sup> 501(c)(3) organizations may apply for Brownfields Assessment, Cleanup, and Revolving Loan Fund Grants. Other nonprofit organizations may only apply for Brownfields Cleanup Grants. More information is available in most recent [EPA Brownfields Cleanup Grant Guidelines](#).



Eastern Manufacturer Brewer, Maine, before cleanup



Eastern Manufacturer Brewer, Maine, after cleanup

## Do I need to be concerned about CERCLA liability if I am applying for a Brownfields Grant?

Yes. Brownfield Grant recipients are prohibited from using grant money to pay response costs at a brownfield site for which the recipient is potentially liable under CERCLA.

All Brownfield Grant applicants who may be potentially liable at the site for which they are seeking funds must demonstrate that they are not liable for the contamination that will be addressed by the grant, subgrant or loan.

Cleanup Grant applicants, in particular, must note this prohibition. Cleanup Grant applicants are required to own a site to receive brownfields funding to address contamination at the property. Cleanup Grant applicants must demonstrate they meet one of the liability protections because owners of contaminated property may be liable under CERCLA.

Some grant applicants who do not own the property for which they are seeking funding, or who are not seeking site-specific grant funds, may not have to demonstrate that they qualify for liability protection.

Please contact your EPA Regional Brownfields Program representative if you are not sure whether you need to demonstrate liability protection to be eligible for a grant.

## What are the different ways I can demonstrate that I am not liable under CERCLA?

CERCLA provides several ways for eligible entities to demonstrate that they are not liable for the contamination at the site.

Brownfield Grant applicants should note that CERCLA employs a “strict liability” scheme—that means it is without regard to fault. A person who owns a property that has had a release of hazardous substances can be held liable by virtue of ownership, regardless of intent.

## Exemptions to CERCLA liability:

The CERCLA statute exempts certain entities from liability when properties are acquired under specific circumstances and when the entity did not cause or contribute to the contamination. Exempt entities include the following:

- Units of state or local government that acquire ownership or control through seizure or otherwise in connection with law enforcement activity, or through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government acquired title by virtue of its function as sovereign, per CERCLA Section 101(20)(D).
- Alaska Native villages and Native Corporations that acquired property via a conveyance from the U.S. government under the Alaska Native Claims Settlement Act, per CERCLA Section 101(20)(E).
- CERCLA provides an exemption for eligible government entities that acquired property prior to January 11, 2002. Government entities that meet the definition of "eligible entity" in CERCLA Section 104(k)(1), and acquired a brownfields property prior to January 11, 2002, are eligible for brownfields grants, even if the eligible government entity does not qualify as a bona fide prospective purchaser. The exemption only applies if the eligible entity did not cause or contribute to a release or threatened release of hazardous substance at the property.

**CERCLA provides protection from liability for certain parties, provided they comply with specific criteria. Parties who may claim liability protection under CERCLA include the following:**

- Innocent landowners (ILOs), per CERCLA Section 101(35)(A) and 107(b)(3).
- Contiguous property owners (CPOs), per CERCLA Section 107(q).
- Bona fide prospective purchasers (BFPPs), per CERCLA Sections 101(40) and 107(r).
- Government entities that acquire property through an involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation, per CERCLA Section 101(35)(A)(ii). T

**To be eligible for liability protection under CERCLA as an ILO, CPO, or BFPP, prospective property owners must:**

- Conduct AAI in compliance with the Code of Federal Regulations (CFR), per 40 CFR Part 312, before acquiring the property.
- Not be affiliated with any person who is potentially liable through any familial relationship or any contractual, corporate or financial relationship (other than a relationship created by the instruments by which title to the property is conveyed or financed or by a contract for the sale of goods or services).<sup>2</sup>
- Comply with all continuing obligations after acquiring the property, per CERCLA Sections 101(40)(B) (BFPP), 107(q)(A) (CPO), and 101(35)(A) and (B) (ILO) (see next section, "What are continuing obligations?").

Note: Property acquisition includes properties acquired as gifts or through zero-price transactions.

## What are continuing obligations?

After acquiring a property, to maintain liability protections, landowners must comply with "continuing obligations" during their property ownership. To comply, landowners must:

- Demonstrate that no disposal of hazardous substances occurred at the facility after acquisition (for BFPPs and ILOs).
- Comply with land use restrictions and not impede the effectiveness or integrity of institutional controls.

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<sup>2</sup> The innocent landowner provision does not contain similar "no affiliation" language. In order to meet the statutory criteria of the innocent landowner liability protection, however, a person must establish by a preponderance of the evidence that the act or omission that caused the release or threat of release of hazardous substances and the resulting damages were caused by a third party with whom the person does not have an employment, agency, or contractual relationship. The term "contractual relationship" for the purpose of the innocent landowner liability protection is defined in CERCLA § 101(35)(A).

- Take “reasonable steps” to stop continuing releases, prevent threatened future releases, and prevent or limit human, environmental, or natural resources exposure to earlier releases.
- Provide full cooperation, assistance, and access to persons authorized to conduct response actions or natural resource restoration.
- Comply with any request for information and administrative subpoenas (for BFPPs and CPOs).
- Provide all legally required notices with respect to the discovery or release of any hazardous substance (for BFPPs and CPOs).

## What are “All Appropriate Inquiries”?

AAI is the process of evaluating a property’s environmental conditions, which may be relevant to assessing potential liability for any contamination, per CERCLA Section 101(35)(B).

EPA recognizes two ASTM International Standards as compliant with AAI requirements: ASTM E1527-21 “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process” and E2247-23 “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process for Forestland or Rural Property.”

## When must AAI be conducted?

Some aspects of AAI must be conducted or updated within one year before the date of acquisition of a property and other aspects within 180 days before the date of acquisition.

Certain aspects or provisions of AAI (i.e., interviews of current and past owners, review of government records, on-site visual inspection and searches for environmental cleanup liens) must be conducted or updated within 180 days before acquiring ownership of a property.

## Who can perform AAI?

The individual who supervises or conducts the AAI and signs the final required report must meet the definition of an “environmental professional” defined in the AAI final rule, 40 CFR Section 312.10.

A person who does not qualify as an environmental professional can assist in the conduct of the AAI if he or she is under the responsible charge of a person meeting the definition.

## Further information

For more information about brownfield grants and AAI, visit the EPA Brownfields website at <http://www.epa.gov/brownfields>.

For more information about CERCLA’s liability protections, please visit EPA’s Cleanup Enforcement website at <https://www.epa.gov/enforcement/addressing-liability-concerns-support-cleanup-and-reuse-contaminated-lands>.