

NJIT TAB & USEPA RLF Workshop October 13 & 14, 2010



Site & Borrower/Subgrantee
Eligibility Round Table



Topics

- Site eligibility
- Applicant eligibility
 - ✓ Hazardous substances sites
 - CERCLA liability
 - CERCLA liability protections
 - All appropriate inquiries
 - ✓ Petroleum Sites



Eligible Sites

- The site must be a Brownfield:
“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”





Eligible Sites

Brownfield sites include:

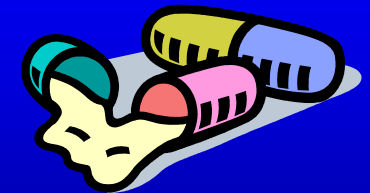
- Hazardous Substances Sites

- ✓ Metals, PAHs, PCBs, etc.
- ✓ Asbestos
- ✓ Lead paint
- ✓ See CERCLA § 101(14) & § 101(33) for definitions



- Controlled Substances Sites

- ✓ Methamphetamine labs
- ✓ See Section 102 of the Controlled Substances Act, 21 USC § 802





Eligible Sites

- Mine-Scarred Land Sites
 - ✓ Abandoned coal mines
 - ✓ Abandoned lands scarred by strip mining
 - ✓ Associated support and processing areas
- Petroleum Sites





Ineligible Sites

- Sites **Not** Eligible

- ✓ Listed or proposed for listing on NPL
- ✓ Subject to unilateral administrative orders, court orders, administrative orders on consent, or judicial consent decrees issued or entered into under CERCLA
- ✓ Subject to the jurisdiction, custody, or control of the US Government (does not include tribal land)





Property Specific Determinations

- Sites Requiring Property-Specific Determinations to be eligible
 - ✓ Planned or ongoing CERCLA removal action
 - ✓ Permit issued under Solid Waste Disposal Act, FWPCA, TSCA, or SDWA
 - ✓ Subject to corrective action under RCRA 3004(u) or 3008(h) or to a corrective action permit or order
 - ✓ Land disposal unit submitting a closure notification under RCRA subtitle C and for which closure requirements have been specified in a plan or permit
 - ✓ Portion of a facility at which there has been a release of PCBs subject to remediation under TSCA
 - ✓ Portion of a facility receiving funding from LUST Trust Funds



Property Specific Determinations

- Property-Specific Determination Criteria



✓ Protect human health & the environment AND either:

- Promote economic development or
- Enable the creation, preservation, or addition to parks, greenways, undeveloped property, other recreational property, or non-profit purposes





Prohibitions on Use of Grant Funds

- CERCLA § 104(k)

- ✓ “no part of a grant or loan ... may be used for the payment of ... a response cost at a brownfields site for which the recipient of the grant or loan is potentially liable under CERCLA section 107.”
- ✓ An RLF grant recipient cannot make a loan or subgrant to a party potentially liable for the costs of cleaning up a brownfields site



CERCLA Liability

Hazardous Substance Sites

- The borrower or subgrantee cannot be potentially liable under CERCLA § 107
 - ✓ Liable parties under CERCLA include:
 - Current owners and operators of facility
 - Past owners or operators at time of disposal of hazardous substances
 - Persons who arranged for hazardous substances to be disposed of or transported for disposal [generators]
 - Transporters of hazardous substances to disposal or treatment facilities from which there is a release



Eligible Borrowers & Subgrantees

CERCLA Liability -- Hazardous Substances

- CERCLA Liability Protections or Defenses
 - ✓ Bona fide prospective purchaser
 - ✓ Involuntary acquisition by units of state or local government
 - Tax delinquency or foreclosure
 - Abandonment
 - Bankruptcy
 - Eminent domain
 - ✓ Contiguous property owner
 - ✓ Innocent landowner





Eligible Borrowers & Subgrantees

Common Threshold Requirements

- General requirements for most CERCLA liability protections

Property owner must:

- ✓ Conduct All Appropriate Inquiries PRIOR to acquiring property
- ✓ Not be potentially liable or affiliated with any person who is potentially liable through:
 - Familial relationship
 - Contractual, corporate, or financial relationship OTHER THAN
 - One through which title to the facility is transferred or financed
 - Contract for sale of goods and services
- ✓ Comply with all continuing obligations AFTER acquiring property



Eligible Borrowers & Subgrantees

Continuing Obligations

- Continuing Obligations

- ✓ In order to maintain liability protection after acquiring the property, the owner must:
 - Provide all legally required notices due to any discovery or release of a hazardous substance
 - Exercise appropriate care by taking reasonable steps to stop or prevent continuing or future releases and exposures to human health and the environment
 - Provide full cooperation, assistance and access to allow for response actions or natural resource restoration
 - Comply with land use restrictions and institutional controls
 - Comply with information requests and subpoenas.



Eligible Borrowers & Subgrantees

BFPP Threshold Requirements

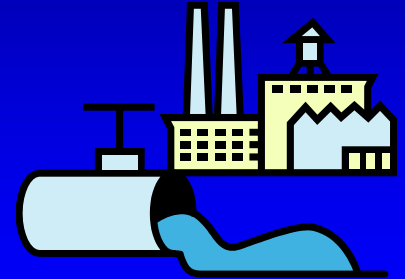
- Bona fide prospective purchaser (BFPP)
 - ✓ All disposal of hazardous substances occurred PRIOR to acquisition of property
 - ✓ Conducted all appropriate inquiries (AAI) PRIOR to acquisition of property
 - General statement found in definition of BFPP
 - All appropriate inquiries into previous ownership and uses in accordance with generally accepted good commercial and customary standards and practices
 - ✓ Not liable for contamination at site or affiliated with any other person potentially liable for response costs at site



Eligible Borrowers & Subgrantees

BFPP Continuing Obligations

- Bona fide prospective purchaser (BFPP)
 - ✓ Provides all legally required notices
 - ✓ Exercises appropriate care regarding contamination including
 - Stopping any continuing releases
 - Preventing future releases or exposures to past releases
 - ✓ Provides ACCESS to persons authorized to conduct response actions
 - ✓ Cooperates with persons authorized to conduct response actions if release of hazardous substances occurs on the property
 - ✓ Complies with any land-use restrictions on the property
 - ✓ Does not impede effectiveness or integrity of institutional controls
 - ✓ Complies with all information requests and administrative subpoenas





Eligible Borrowers & Subgrantees

Involuntary Acquisitions

- State or local governments acquiring ownership or control **involuntarily** through **bankruptcy**, **tax delinquency**, **abandonment**, or other circumstances by virtue of its function as sovereign are not considered owners for the purposes of CERCLA liability.
- The exclusion from ownership liability does not apply if the state or local government **caused** or **contributed** to the release of hazardous substances.



Eligible Borrowers & Subgrantees

Eminent Domain

- Government entity acquires property through exercise of eminent domain authority
 - ✓ Acquire property after disposal of hazardous substances
 - ✓ Exercise due care with respect to hazardous substances on the property
 - ✓ Take precautions against foreseeable acts of third parties
 - ✓ Comply with land use restrictions
 - ✓ Cannot impede effectiveness or integrity of institutional controls



Eligible Borrowers & Subgrantees

Contiguous Property Owners

- Contiguous property owner
 - ✓ At time of acquisition
 - conducted AAI
 - DID NOT KNOW or have reason to know that property was or could be contaminated by hazardous substances from contiguous property
 - ✓ Did not cause, contribute, or consent to release of hazardous substances
 - ✓ Not potentially liable for response costs at site
 - ✓ Not affiliated with person potentially liable for response costs



Eligible Borrowers & Subgrantees

Contiguous Property Owners

- ✓ Takes reasonable steps to:
 - Stop any continuing releases
 - Prevent any threatened future releases AND
 - Prevent or limit exposures to hazardous substances on the property
- ✓ Provides cooperation, assistance, and ACCESS to those authorized to conduct response actions
- ✓ Complies with land use restrictions and does not impede effectiveness of institutional controls
- ✓ Complies with any information requests or administrative subpoenas
- ✓ Provides all legally required notices



Eligible Borrowers & Subgrantees

Innocent Landowner

- Innocent landowner

- ✓ Perform AAI PRIOR to acquisition
- ✓ Acquire property AFTER disposal of hazardous substances
- ✓ DID NOT KNOW or have reason to know that hazardous substances were disposed of on the property
- ✓ Exercise due care with respect to hazardous substances on property
- ✓ Take precautions against foreseeable acts of third persons
- ✓ Act causing release of hazardous substances was by a third party with whom property owner has no relationship



Eligible Borrowers & Subgrantees

Innocent Landowner

- Innocent Landowner (con't.)
 - ✓ Provide cooperation, assistance, and ACCESS to those authorized to conduct response actions at site
 - ✓ Comply with land use restrictions
 - ✓ Does not impede effectiveness or integrity of institutional controls



Eligible Borrowers & Subgrantees

All Appropriate Inquiry

- All Appropriate Inquiries Rule -- 40 CFR Part 312
 - ✓ 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; and
 - The declaration by the environmental professional.



Eligible Borrowers & Subgrantees

All Appropriate Inquiry

- Specific AAI process based on date of acquisition

- ✓ Property acquired after November, 2006

- Completed AAI as delineated at 40 CFR 312;

EPA recognizes two international standards to be compliant with AAI

- ASTM E1527-05 “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process”
 - ASTM E2247-08 “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process for Forestland or Rural Property”



Eligible Borrowers & Subgrantees

All Appropriate Inquiry

- ✓ Property acquired on or after May 31, 1997 until November 1, 2006

EPA recognizes the following international standard to be compliant with AAI:

- ASTM E1527-97, ASTM E1527-00 “Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment Process”



Eligible Borrowers & Subgrantees

All Appropriate Inquiry

✓ Property acquired before May 31, 1997

➤ Following factors 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

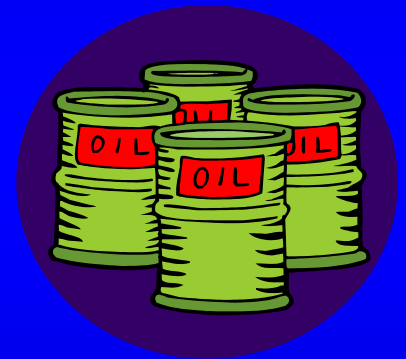


Eligible Borrowers & Subgrantees

Petroleum Sites

States or EPA must make statutory determinations:

- ✓ Site is relatively low risk compared to other petroleum-only sites
- ✓ No viable responsible party
- ✓ Applicant is not liable for contamination
- ✓ Site not subject to corrective action under RCRA §9003(h)





Eligible Borrowers & Subgrantees

Petroleum Sites

- Relatively Low Risk
 - ✓ Compared to other petroleum-only sites in state
 - ✓ Not cleaned up using LUST trust fund
 - ✓ Not subject to a response under the Oil Pollution Act





Eligible Borrowers & Subgrantees

Petroleum Sites

- No Viable Responsible Party
 - ✓ State or EPA must determine that:
 - There is no responsible party OR,
 - If there is a responsible party, the party is not financially viable to pay for the cleanup



Eligible Borrowers & Subgrantees

Petroleum Sites

- No responsible party for involuntary acquisitions
 - ✓ If site was last acquired through tax foreclosure, abandonment, or similar government proceedings
AND
 - ✓ No court judgment or administrative order requiring any party to conduct the activities funded by the grant
 - ✓ No enforcement action requiring any party to conduct the activities funded by the grant
 - ✓ No third party claim [citizen suit; contribution action] against current or immediate past owner requiring activities funded by grant



Eligible Borrowers & Subgrantees

Petroleum Sites

- No responsible party for other methods of acquisition
 - ✓ Current and immediate past owner:
 - Did not dispense or dispose of contamination at the site
 - Did not own the property during the dispensing or disposing of contamination at the site
 - Did not exacerbate contamination and took reasonable steps:
 - To stop continuing releases
 - To prevent future threatened releases and exposures to earlier petroleum releases



Eligible Borrowers & Subgrantees

Petroleum Sites

- No responsible party for other methods of acquisition
(con't)
 - ✓ No court judgment or administrative order requiring any party to conduct the activities funded by the grant
 - ✓ No enforcement action requiring any party to conduct the activities funded by the grant
 - ✓ No third party claim [citizen suit; contribution action] against current or immediate past owner requiring activities funded by grant



Eligible Borrowers & Subgrantees

Petroleum Sites

- No viable party
 - ✓ Party is viable if it is financially capable of performing the activity to be funded by the grant
 - ✓ General assumptions EPA will make:
 - Ongoing businesses or companies and government entities are viable
 - Defunct or insolvent companies are not viable
 - Individual responsible party not viable



Eligible Borrowers & Subgrantees

Petroleum Sites

- No Viable Party (con't)
 - ✓ 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



Eligible Borrowers & Subgrantees

Petroleum Sites

- Applicant Not Potentially Liable for Cleanup
 - ✓ Applicant for a loan or subgrant did not:
 - Dispense or dispose of petroleum contamination
 - Own the site when petroleum was dispensed or disposed
 - Exacerbate contamination
 - ✓ Applicant for loan or subgrant took reasonable steps with regard to the contamination:
 - Stopping continuing releases
 - Preventing threatened future releases
 - Preventing or limiting exposure to earlier petroleum releases



Eligible Borrowers & Subgrantees

Petroleum Sites

- Not Subject to Corrective Action under RCRA § 9003(h)
 - ✓ Applicant for loan or subgrant cannot be subject to a UST corrective action order under RCRA § 9003(h)



Questions?

