

BROWNFIELDS in the PACIFIC ISLANDS – How Does it All Work?

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Historical Perspective -- Cleanup of Contaminated Property

- CERCLA passed in 1980
- Clean up most seriously contaminated sites
- Established liability scheme to require polluter to pay – called potentially responsible parties (PRPs)



Before the Brownfields Law?

- 4 Groups of PRPs
 - **All current owners and operators**
 - **All previous owners and operators at the time of disposal**
 - Generators – parties that arranged for disposal of waste
 - Transporters who selected the disposal site
- Very Few Exceptions to Liability



Exception: Party an Innocent Landowner

- Party could not have a contractual relationship with liable party -- including land transfer documents unless narrow exceptions met – innocent landowner, inheritor, or
- Unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other involuntary circumstances
- **And Took Due Care**
- Separate provision also protects governments that acquire involuntarily who did not cause or contribute to contamination



Then Came the Brownfields Law: What is a Brownfield?

- ❑ Brownfields are **properties**, the expansion, development or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant or contaminant (42 U.S.C. § 9601(39))
- ❑ “**Brownfields Law**” (an Amendment to CERCLA – passed in Jan. 2002) “Small Business Liability Relief and Brownfields Revitalization Act”



Brownfields Law Liability Exemptions

- Brownfields Amendments of 2002 Liability Exemptions
 - Bona fide Prospective Purchasers (BFPPs)
 - Contiguous Property Owners (CPOs)
- Intended to mitigate harsh effects of CERCLA, promote redevelopment



Two major funding sources

(1) Section 104 (k)

competitive grant funding program

- ✓ **Assessment, Revolving Loan Fund, and Cleanup Grants (ARC Grants)**
- ✓ **Hazardous Waste and Petroleum Sites**
- ✓ **Job Training Grants**

Note: Allows use of funds on sites contaminated by petroleum or illegal drug labs.

Two Major funding sources (continued)

(2) Section 128 (a) State and Tribal Response Program -- To create or to enhance existing environmental response program

- **Element 1 - Timely survey and inventory of Brownfields sites**
- **Element 2 - Oversight and enforcement authorities**
- **Element 3 - Public participation**
- **Element 4 – Cleanup verification and certification**



Section 104 (k) Grants

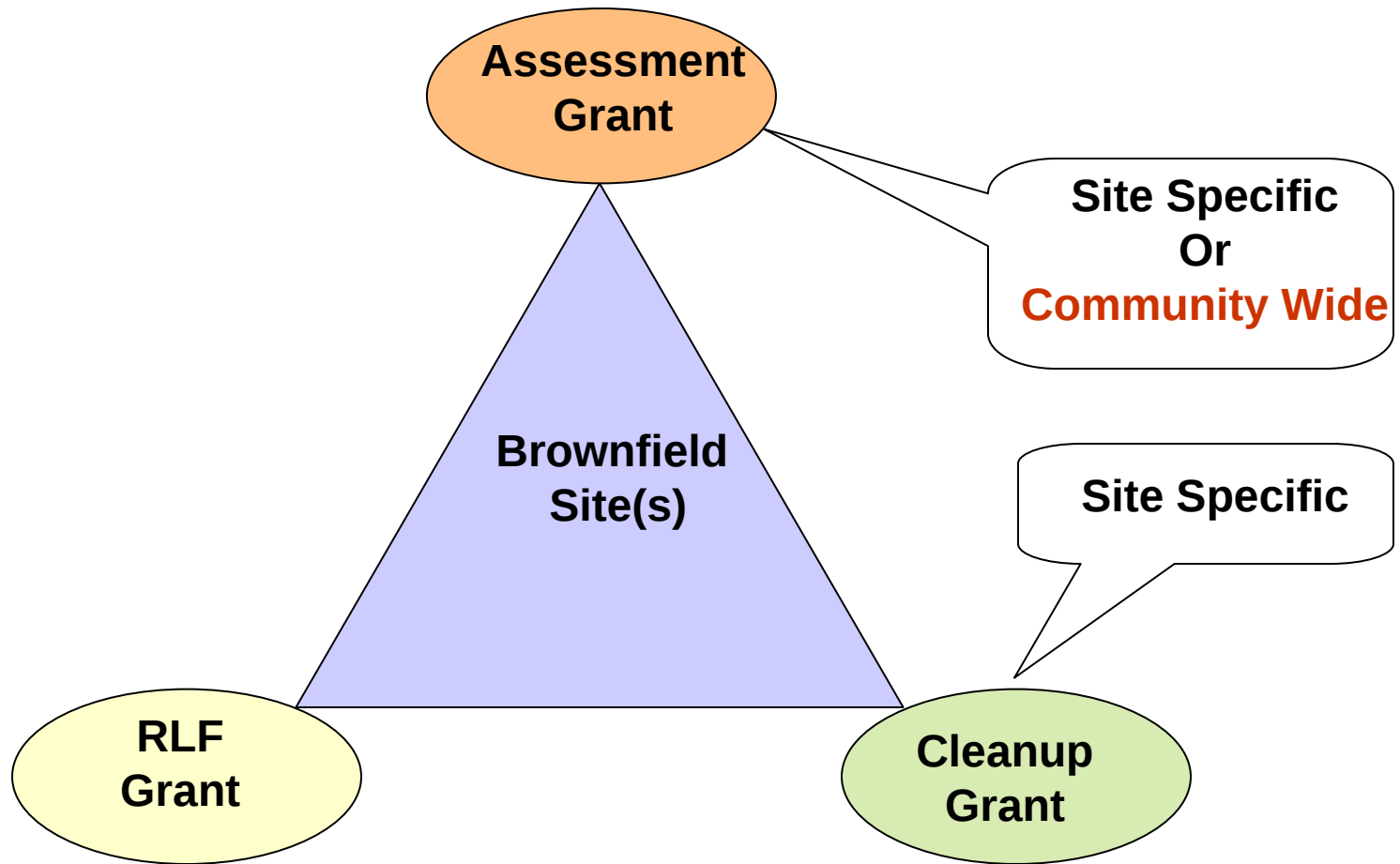
- ❖ Sites contaminated by petroleum and hazardous substances, pollutants, or contaminants (including co-mingled with petroleum)
- ❖ Cleanup and Assessment -- \$200,000, up to 3 site-specific proposals
- ❖ Revolving Loan Fund (RLF) -- \$1 million, or \$1 million per eligible entity for coalitions

Section 128 (a) Grants

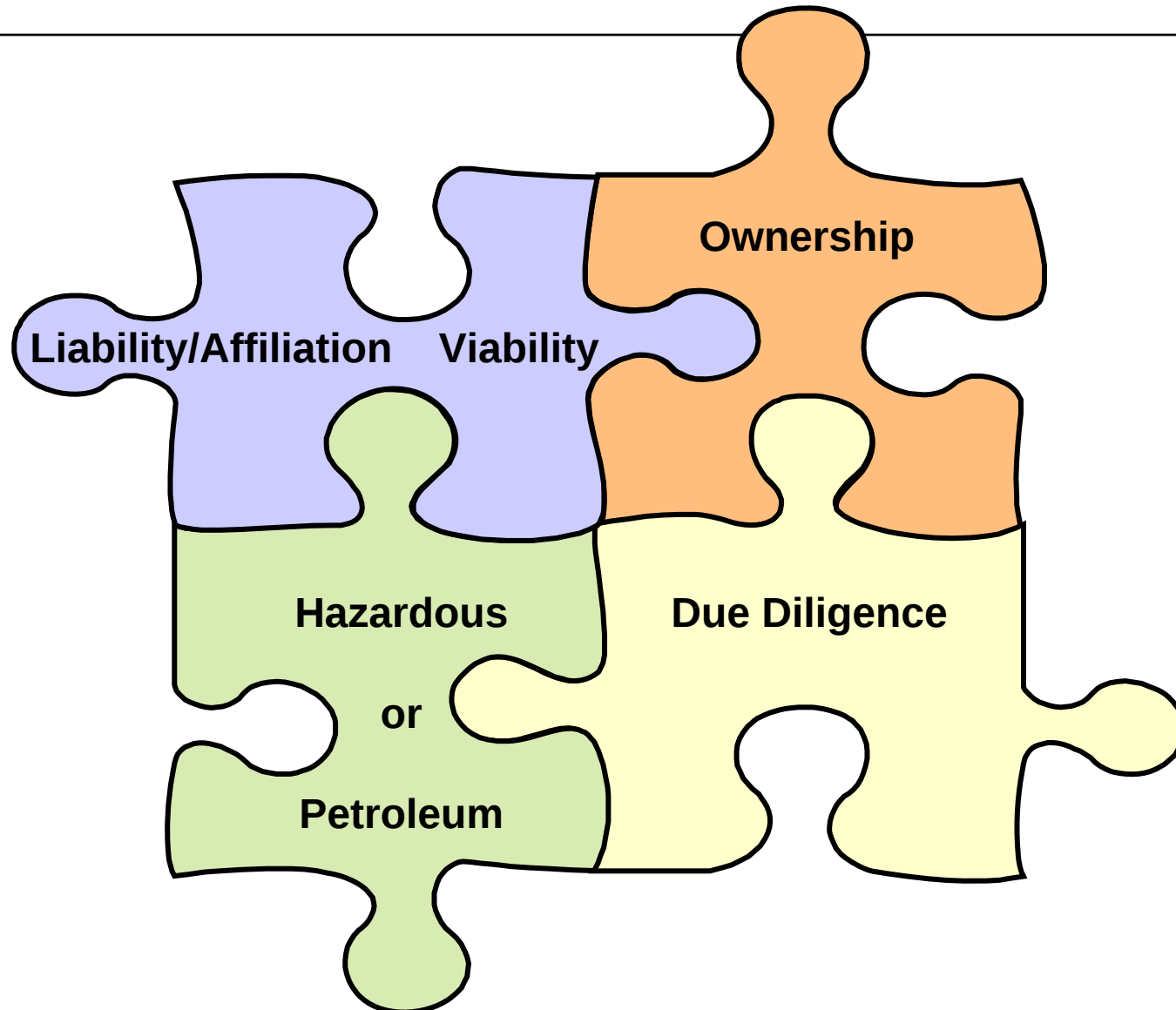
❑ 128 (a) Grants

- ❖ To develop or enhance the response program
- ❖ 4 + 1 elements
- ❖ Limited site assessment or cleanup at Brownfields sites
- ❖ Primarily for other activities that increase the number of response actions conducted or overseen
- ❖ Capacity building - Enhanced technical and programmatic capabilities

Brownfield Property and 104 (k) Grants



Interaction of Various Issues





Competitive Grants Program – The Process

- Applications
- Threshold Review
- Ranking
- Selection
- Announcement
- Award



Before the Competition -- What are the Threshold Issues?

- Is the applicant eligible?
 - Eligible entity?
 - Liable party?
 - Does the applicant own the site (cleanup grants)?
- Is the site eligible?
- Other Issues -- Has the applicant met criteria for cleanup authority/oversight, cost share and community notification



Who is Eligible for a Grant or Loan?

- Cleanup Grants: several categories of governmental and tribal entities, plus NPOs (applicant must own site)
- Assessment and RLF: all the same entities except NPOs; (applicant does not have to own site for assessment)
- Not PRPs



Eligible Entity Cannot be a PRP for the Site

- Hazardous Waste Site – CERCLA standard
- Petroleum Site – RCRA-based standard



CERCLA Standards for Hazardous Waste Site Eligible Parties

- Must Meet BFPP, innocent landowner, CPO definition OR
- Meet other statutory defense or exclusion

BFPP -- AAI (Before), and Reasonable Steps (After)

- All appropriate inquiry – Before Purchase
 - ASTM 1527-05 (post November 1, 2006)
 - ASTM 1527-1997 or 2000 or equivalent (1/2002 – 11/2006)
 - Grants Only: Pre 1/2002 – AAI prior to purchase, other RSP steps
- **AND No Affiliation** w/Liable Party (contractual, familial, corporate or financial) (exceptions for goods or services and conveyance documents)
- Reasonable steps after purchase



AAI Requirement Must be Current

- AAI must not be more than 1 year old
- Must be updated if more than 6 months old prior to purchase
- **Phase 2 Does Not Count as Update to Phase 1!**



Contiguous Property Owners

- Own property adjacent or contiguous to contaminated property
- Contaminated by adjacent or contiguous property
- AAI not required
- No Affiliation

Petroleum Site Applicant Eligibility Additional Requirements -- RCRA Based

- Site must be “relatively low risk”
- No Viable Responsible Party
 - Site last acquired through government proceedings AND no judgment, administrative order, enforcement action or lawsuit requires the assessment or cleanup of the site (important in islands where many acquisitions are involuntary acquisitions by gov't)



OR

- no judgment, administrative order, enforcement action or lawsuit requires the assessment or cleanup of the site;
- **AND** current and immediate past owner did not dispense or dispose, or own property during dispensing or disposal of contamination, did not make it worse, and took reasonable steps



Site Eligibility -- Some Sites are not Eligible

- Properties listed or proposed for NPL
- Facilities subject to UAOs, court orders, administrative orders on consent, or judicial consent decrees under CERCLA (not state)
- Facilities subject to jurisdiction, custody and control of U.S. (except Trust land)



Site Eligibility -- Some Sites are Eligible Only on Site-Specific Determination

- Subject to planned or ongoing removal under CERCLA
- Subject to UAOs, court orders, AOCs, CDs or Permits Under RCRA, FWPCA, TSCA or SDWA
- Land disposal units that have submitted RCRA closure notification or subject to closure plan
- Properties w/PCB release and subject to TSCA remediation
- Properties receiving LUST trust fund \$\$
- Properties subject to RCRA Corrective Action Order (3004(u) or (3008(h)))



Things to Consider – For Site-specific Grant OR Once You Have 104 (k) Community Wide Assessment Grant

- Ownership
- Liability/Viability
- Hazardous or Petroleum
- AAI, Reasonable Steps
- Current property use
- Other on-going legal/administrative actions
- Community Involvement



Case Study 1

- Island property owner Hal finds 10 drums on his property leaked hazardous substances. What do you (the state agency) do?



Case Study 1 -- continued

- Require him to clean it up? Do you have a voluntary program? Do you have a prescriptive program? How can you develop one?
- Grants – can you give him a grant or a loan?
- Can you use an assessment grant or 128 (a) money to assess the problem?
- Can you clean it up using a cleanup grant or 128(a) money?



Case Study 2

- Abandoned gas station – current owner defunct
- Prior owner is wealthy landowner who still lives on the island
- What can you do?



Case Study 2 – continued

- Require prior owner to clean it up?
- Grants – can you give the current owner a grant or loan
- Can you assess or clean it up using assessment money or a cleanup grant?



State Response Program – How to Get There from Here

- Use 128(a)
- Develop your program
 - Pass a Superfund law
 - Become authorized for RCRA Hazardous Waste, Solid Waste, Sub I?
 - Delegated for CWA?
- Statutory authority, regulations, policy and guidance



What Can 128(a) Funds be Used For?

- Legislation, procedures, etc. to establish legal or administrative structure
- RLF capitalization
- Environmental insurance
- Public record development
- Limited site-specific activities



128(a) Grants -- Goals

- Ensure that states and tribes build response programs that include 4 elements;
- Provide funding for other activities that increase the number of response actions conducted or overseen.



4 Elements

- Survey and inventory of BF sites
- Oversight and enforcement authorities or other mechanisms to ensure protective, complete cleanups
- Meaningful Opportunities for Public Participation
- Approval of Cleanup Plan and Certification of Completeness



Public Record Requirement

- Identify past and future response action sites
- Identify suitability for unrestricted use or ICs



What are the Limitations on Site-Specific Activities Using 128(a) funds?

- Brownfields site
- Limited percentage of funds
- \$200K per site
- EPA approval required to assess and cleanup recipient-owned sites for which recipient is not a PRP
- Cannot be used if Recipient is a PRP
- Subgrants cannot be awarded to PRPs



When to Use 104(k); When to Use 128(a)

- **Use 104(k) to assess and clean up government-owned sites for which gov't not liable**
- **And non-gov't-owned hazardous waste sites;**
- **And petroleum sites for which gov't not liable and no current or former viable, liable party**
- **Use 128(a) to develop program to require PRPs to clean up their own sites**



References

- Standards and Practices for All Appropriate Inquiries; Final Rule
 - 40 CFR Part 312
 - 70 Fed. Reg. 66070 (11/1/2005)



References Continued

“Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA (“Common Elements”)” (Bromm, 3/6/2003)

[http://www.epa.gov/compliance/resources/policies/cleanup/superfund/ common-elem-guide.pdf](http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf) and respectively.



References Continued

- “Bona Fide Prospective Purchasers and the New Amendments to CERCLA” (Breen, 5/31/02)
<http://www.epa.gov/compliance/resources/policies/cleanup/superfund/bonf-pp-cercla-mem.pdf>