

REGION 1 RLF WORKSHOP

JUNE 5, 2012



Site & Borrower/Subgrantee
Eligibility Review



Getting Started

- ◉ When you first encounter a potential site for your RLF, what do you do?
- ◉ You want to know if the potential site and borrower or subgrantee (applicant) are eligible.
- ◉ So, you ask some questions.





Question # 1

Is it a Brownfields Site?

- 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”





Question # 1

Is it a Brownfields Site?

◎ 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)





Question # 1

Is it a Brownfields Site?

◉ Sites Eligible with a Property-Specific Determination (Add-Backs)

- > Planned or ongoing CERCLA removal action
- > Permit issued under Solid Waste Disposal Act (SWDA), Federal Water Pollution Control Act (FWPCA), Toxic Substances Control Act (TSCA), or Safe Drinking Water Act (SDWA)
- > Subject to corrective action under Resource Conservation & Recovery Act (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



Question # 1

Is it a Brownfields Site?

◉ 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





Question # 2

What Type of Contamination is Present?

○ Hazardous Substances Sites or Co-Mingled

- ✓ Metals, PAHs, PCBs, etc.
- ✓ Asbestos
- ✓ Lead Paint
- ✓ Controlled Substances
- ✓ Mine Scarred Lands
- ✓ Co-Mingled Hazardous Substances & Petroleum

○ Petroleum Sites

- ✓ Underground Storage Tanks (USTs)
- ✓ Tank Farms
- ✓ Gas & Service Stations



Question # 3

Is the Applicant Eligible?

◎ For Hazardous Substances & Co-Mingled

1. Is the applicant potentially liable under CERCLA § 107?
2. Does the applicant have a CERCLA liability protection or defense?

◎ For Petroleum

The State will determine if:

1. The site is Relatively Low Risk
2. The site has No Viable Responsible Party
3. The Applicant is Not Liable
4. The site is Not Subject to RCRA § 9003



Hazardous Substances & Co-Mingled CERCLA § 107

1. Is the applicant potentially liable under CERCLA § 107?

The applicant is a potentially liable party if they:

- ✓ Are the current owner or operator
- ✓ Owned or operated the property at the time of disposal of hazardous substances
- ✓ Arranged for hazardous substances to be disposed of or transported for disposal [generator]
- ✓ Transported hazardous substances to the property



Borrowers do not have to own the property during cleanup. However, the borrower **and** the current owner cannot be liable for contamination at the site.



Hazardous Substances & Co-Mingled CERCLA Liability Protection or Defense

2. Does the applicant have a CERCLA liability protection or defense?

CERCLA Liability Protections or Defenses

- a. Bona Fide Prospective Purchaser
- b. Involuntary Acquisition by units of state or local government
- d. Contiguous Property Owner (rare)
- e. Innocent Landowner (rare)





Hazardous Substances & Co-Mingled Bona Fide Prospective Purchaser

a. Bona Fide Prospective Purchaser (BFPP)

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



Hazardous Substances & Co-Mingled All Appropriate Inquiry

- ◉ Did the applicant perform All Appropriate Inquiry (AAI) before acquiring the property?
 - > The applicant conducted an ASTM E1527-05 Phase I Environmental Site Assessment or AAI compliant due diligence to:
 - ✓ Determine prior uses and ownership of the property.
 - ✓ Assess site conditions for evidence of releases or threatened releases of hazardous substances at the property.





Hazardous Substances & Co-Mingled All Appropriate Inquiry

◎ AAI Timing

- ✓ AAI was performed within **one year prior** to acquisition of property, and
- ✓ Within **180 days prior** to acquisition of property, the following aspects were performed or updated:
 - 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.



Hazardous Substances & Co-Mingled All Appropriate Inquiry

- If the applicant acquired the property after November 2006
 - ✓ The applicant **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
 - ASTM E2247-08 “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process for Forestland or Rural Property”



Hazardous Substances & Co-Mingled All Appropriate Inquiry

- ⦿ If the applicant 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”



Hazardous Substances & Co-Mingled All Appropriate Inquiry

- If the applicant 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



Hazardous Substances & Co-Mingled Involuntary Acquisition by State & Local Govs

b. Did the applicant acquire ownership or control involuntarily through:

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

If so, the applicant is not considered an owner for the purposes of CERCLA liability.



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



Hazardous Substances & Co-Mingled Continuing Obligations

- ◉ Did the applicant comply with Continuing Obligations?
 - > In order to maintain liability protection after acquiring the property, all applicants 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.



Petroleum Sites State Determination

- The State will make all petroleum determinations at the properties being considered for your RLF.
- Get them involved right away to determine site eligibility.



Petroleum Sites State Determination



- The State will look at the following criteria:
 1. The site is relatively low risk compared to other petroleum-only sites in state
 2. The site has No Viable Responsible Party
 3. The Applicant is Not Liable
 4. The site is Not Subject to RCRA § 9003





Petroleum Sites

No Liable Viable Party

- There is no liable party, or
- There is a liable party, but the party is not financially viable to pay for the cleanup





Petroleum Sites

No Viable 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
 - Individual responsible parties are not viable



Petroleum Sites

Applicant is Not Liable

◉ Applicant Not Liable for Contamination

- ✓ 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



Next Steps

- ◉ Now that you have pondered these questions, what is the next step?
 - > **Every situation is different. We cannot tell you the answers without knowing the facts.**
 - > **Provide the information outlined in the RLF Property & Borrower/Subgrantee Eligibility “form” to your Project Officer.**
 - > **For Petroleum Sites: Talk to your State and provide information to help them make the petroleum determination.**