



EPA REGION 1 RLF WORKSHOP

APRIL 6-7, 2017



RLF 101
Site & Borrower/Subrecipient
Eligibility



Topics

- Eligible Sites
- Ineligible Sites
- Property Specific Determinations
- Eligible Borrowers & Subrecipients
- Hazardous Substances Sites
- Petroleum Sites



Eligible Sites

- The site must be a Brownfield as defined by Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) 101 (39)

“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



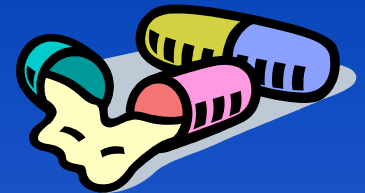
○ Hazardous Substances

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



○ 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 mining
- > Associated coal processing areas



◉ Petroleum Sites

- > Gas stations
- > Tank farms
- > Heating USTs





Ineligible Sites



- ◉ Listed or proposed for listing on the National Priorities List (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 except:
 - > Privately owned Formerly Used Defense Sites (FUDS)
 - > Privately owned Formerly Utilized Sites Remedial Action Program (FUSRAP)
 - > Other former federal property disposed of by the US government
 - > Tribal land held in trust by the US Government



Property Specific Determinations

- Sites Requiring Property Specific Determinations
 - > Planned or ongoing CERCLA removal action
 - > Permit issued under Resource Conservation and Recovery Act (RCRA), Federal Water Pollution Control Act (FWPCA), Toxic Substances Control Act (TSCA), or Safe Drinking Water Act (SDWA)
 - > Subject to corrective action under RCRA 3004(u) or 3008(h)
 - > Land disposal unit submitting a closure notification under RCRA subtitle C
 - > Release of PCBs subject to remediation under TSCA
 - > Received funding from Leaking Underground Storage Tank (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





Eligible Borrowers & Subrecipients

◉ Eligible Borrowers

- > States
- > Municipalities
- > Political Subdivisions
- > US Territories
- > Indian Tribes
- > Non-Profits
- > Private Developers

◉ Eligible Subrecipients

- > States
- > Municipalities
- > Political Subdivisions
- > US Territories
- > Indian Tribes
- > Non-Profits





Hazardous Substances Sites

- CERCLA Liability
- CERCLA Liability Protections or Defenses
 - > General Requirements for Most CERCLA Liability Protections
 - > Bona Fide Prospective Purchaser (BFPP)
 - > Involuntary Acquisitions
 - > Contiguous Property Owner
 - > Innocent Landowner
 - > Continuing Obligations
- All Appropriate Inquiries (AAI)



Hazardous Substances Sites

CERCLA Liability

- 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
 - > Generators or transporters of hazardous substances



Hazardous Substances Sites

CERCLA Liability Protections or Defenses

- Bona Fide Prospective Purchaser (BFPP)
- Involuntary Acquisition by units of state or local government
 - > Tax delinquency or foreclosure
 - > Eminent domain
 - > Abandonment
 - > Bankruptcy
- Contiguous Property Owner (CPO)
- Innocent Landowner (IL)



Hazardous Substances Sites

General Requirements for Most CERCLA Liability Protections



- The property owner must:
 - > Conduct All Appropriate Inquiries (AAI) 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.



Hazardous Substances Sites

Bona Fide Prospective Purchaser (BFPP)

- For a BFPP defense, the property owner must meet these **Threshold Criteria**:
 - > Affirm that all disposal of hazardous substances occurred **PRIOR** to acquisition of property.
 - > Have conducted all appropriate inquiries (AAI) **PRIOR** to acquisition of property.
 - > Not be liable for contamination at site or affiliated with any other person potentially liable for response costs at site.





Hazardous Substances Sites

Bona Fide Prospective Purchaser (BFPP)

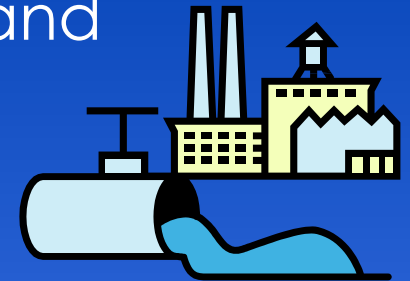
- For a BFPP defense, the property owner must meet these **Continuing Obligations**:
 - > Comply with any land-use restrictions on the property.
 - > Not impede effectiveness or integrity of institutional controls.
 - > Take reasonable steps with respect to hazardous substance releases.
 - Stop continuing releases,
 - Prevent threatened future releases, and
 - Prevent or limit human, environmental, or natural resource exposure to earlier hazardous substance releases.



Hazardous Substances Sites

Bona Fide Prospective Purchaser (BFPP)

- For a BFPP defense, the property owner must meet these **Continuing Obligations**:
 - > Cooperate with persons authorized to conduct response actions if release of hazardous substances occurs on the property.
 - > Provide access to persons authorized to conduct response actions or restoration.
 - > Comply with all information requests and administrative subpoenas.
 - > Provide all legally required notices.





Hazardous Substances Sites

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.



Hazardous Substances Sites

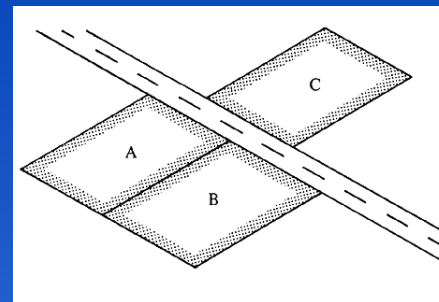
Involuntary Acquisitions

- ◎ A Government entity acquiring property involuntarily must:
 - > 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.
 - > Cooperate, assist, and provide access.
 - > Comply with land use restrictions.
 - > Not impede effectiveness or integrity of institutional controls.



Hazardous Substances Sites Contiguous Property Owner (CPO)

- This defense applies to property that is “contiguous” or otherwise similarly situated to, a facility that is the only source of contamination found on the property.
- The owner did not know or have reason to know that property was or could be contaminated by hazardous substances from contiguous property.





Hazardous Substances Sites

Contiguous Property Owner (CPO)

- For a CPO defense, the property owner must meet these **Threshold Criteria**:
 - > Affirm that all disposal of hazardous substances occurred **PRIOR** to acquisition of property.
 - > Have conducted all appropriate inquiries (AAI) **PRIOR** to acquisition of property.
 - > Not be liable for contamination at site or affiliated with any other person potentially liable for response costs at site.





Hazardous Substances Sites

Contiguous Property Owner (CPO)

- For a CPO defense, the property owner must meet these **Continuing Obligations**:
 - > Comply with any land-use restrictions on the property.
 - > Not impede effectiveness or integrity of institutional controls.
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 - Stop continuing releases,
 - Prevent threatened future releases, and
 - Prevent or limit human, environmental, or natural resource exposure to earlier hazardous substance releases.



Hazardous Substances Sites

Contiguous Property Owner (CPO)

- For a CPO defense, the property owner must meet these **Continuing Obligations**:
 - > Cooperate with persons authorized to conduct response actions if release of hazardous substances occurs on the property.
 - > Provide access to persons authorized to conduct response actions or restoration.
 - > Comply with all information requests and administrative subpoenas.
 - > Provide all legally required notices.



Hazardous Substances Sites

Innocent Landowner (ILO)



- This defense only applies when the purchaser acquired the facility without knowing or having reason to know a haz substance was disposed of on, in, or at the facility.
- The owner must not know or have reason to know that hazardous substances were disposed of on property.





Hazardous Substances Sites

Innocent Landowner (ILO)

- For an ILO defense, the property owner must meet these **Threshold Criteria**:
 - > Affirm that all disposal of hazardous substances occurred **PRIOR** to acquisition of property.
 - > Have conducted all appropriate inquiries (AAI) **PRIOR** to acquisition of property.
 - > Not be liable for contamination at site or affiliated with any other person potentially liable for response costs at site.



Hazardous Substances Sites Innocent Landowner (ILO)

- For an ILO defense, the property owner must meet these **Continuing Obligations**:
 - > Comply with any land-use restrictions on the property.
 - > Not impede effectiveness or integrity of institutional controls.
 - > Take reasonable steps with respect to hazardous substance releases.
 - Stop continuing releases,
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 - Prevent or limit human, environmental, or natural resource exposure to earlier hazardous substance releases.



Hazardous Substances Sites Innocent Landowner (ILO)

- For an ILO defense, the property owner must meet these **Continuing Obligations**:
 - > Cooperate with persons authorized to conduct response actions if release of hazardous substances occurs on the property.
 - > Provide access to persons authorized to conduct response actions or restoration.
 - > Comply with all information requests and administrative subpoenas.
 - > Provide all legally required notices.



Hazardous Substances Sites

All Appropriate Inquiries (AAI)

- ◎ All Appropriate Inquiries Rule
 - > “All Appropriate Inquiries,” or AAI is the process of conducting due diligence or a Phase I Environmental Site Assessment to determine prior uses and ownership of a property and assess conditions at the property that may be indicative of releases or threatened releases of hazardous substances at, on, in, or to the property.



Hazardous Substances Sites

All Appropriate Inquiries (AAI)

- ◎ AAI - 40 CFR Part 312.20(a)
 - > Performed within **one year prior** to acquisition of property and must include:
 - 1) An inquiry by an environmental professional (as defined in 40 CFR 312.10, as provided in 40 CFR 312.21;
 - 2) The collection of information pursuant to 40 CFR 312.22 by persons identified under 40 CFR 312.1(b) ;
and
 - 3) Searches for recorded environmental cleanup liens, as required in 40 CFR 312.25



Hazardous Substances Sites

All Appropriate Inquiries (AAI)

- ◎ AAI Update – [40 CFR Part 312.20\(b\)](#)
 - > Certain aspects must be performed or updated within **180 days prior** to acquisition of property:
 - 1) Interviews with past and present owners, operators, and occupants;
 - 2) Searches for recorded environmental cleanup liens;
 - 3) Reviews of federal, tribal, state, and local government records;
 - 4) Visual inspections of the facility and of adjoining properties; and
 - 5) The declaration by the environmental professional.



Hazardous Substances Sites

All Appropriate Inquiries (AAI)

- 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 & ASTM E1527-13 “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”



Hazardous Substances Sites

All Appropriate Inquiries (AAI)

- Property acquired on or after May 31, 1997 to 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”

Hazardous Substances Sites

All Appropriate Inquiries (AAI)



- ◉ 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



Petroleum Sites

- States (or EPA) make statutory determinations:
 - > Site is relatively low risk
 - > No viable responsible party
 - > Applicant is not potentially liable for contamination
 - > Site not subject to corrective action under RCRA §9003(h)





Petroleum Determination

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



Petroleum Determination

No Viable Responsible Party



- State or EPA must determine that:
 - > There is no responsible party OR,
 - > There is a responsible party, but the party is not financially viable to pay for the activity.





Petroleum Determination

No Viable Responsible Party

○ For Involuntary Acquisitions

- > If site was last acquired through tax foreclosure, abandonment, or equivalent 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 against current or immediate past owner requiring activities funded by grant

Petroleum Determination

No Viable 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



Petroleum Determination

No Viable 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 against current or immediate past owner requiring activities funded by grant



Petroleum Determination

No Viable Responsible 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



Petroleum Determination

No Viable Responsible Party

- 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

Petroleum Determination

Applicant is Not Liable



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



Petroleum Determination

Not Subject to RCRA § 9003(h)

- Applicant for loan or subaward cannot be subject to a UST corrective action order under RCRA § 9003(h).





Questions

