

# EPA's Brownfields Program

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# What are Brownfields?

- Once productive areas that are abandoned – some are contaminated
- Lenders, investors, and developers fear environmental liability and therefore are more attracted to “greenfields”
- The result is blighted properties – brownfields – some are contaminated
- GAO once estimated that there are more than 450,000 brownfields across the country – others estimate that there may be more than a million

# EPA Brownfields Program History

- In the early 1990's, the U.S. Conference of Mayors pointed to brownfields as one of the most critical problems facing cities
- Brownfields push down property values and tax revenues
- Properties were not getting cleaned up and were worsening community blight
- In mid to late 1990's EPA "pilots" provided seed money for helping communities and supporting new ideas

# Small Business Liability Relief and Brownfields Revitalization Act

- Success of Brownfields Initiative led to legislative proposals
- Brownfields legislation signed in January 2002
  - Authorized Brownfields Program and defined “brownfields”
  - Expanded funding for brownfields assessment and cleanup competitive grants
  - Clarified liability protections
  - Increased support for State and tribal programs

# Brownfields Grants – Eligibility

- General purpose units of government
- Quasi-government entities operating under supervision of local government
- Regional Councils
- Redevelopment Agencies
- Tribes

# Brownfields Grants – Eligibility

- Non-profit organizations are eligible for cleanup grants for properties owned by the non-profit.
- Loans from RLF grants may be made to:
  - Eligible entities
  - Developers
  - Private site owners

# Eligible Properties

- **Brownfields** are 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.
- Brownfields also include:
  - Petroleum-contaminated properties
  - Properties w/controlled substances
  - Mine-scarred lands

# Eligible Properties

- Three types of Properties are not eligible for brownfields grants:
  - Sites listed on the NPL
  - Facilities subject to CERCLA orders and consent decrees
  - Properties owned or under the control of the federal government



# Eligible Properties

- For some types of properties, EPA must make a “property-specific” determination for eligibility:
  - RCRA-permitted facilities
  - CERCLA removal sites
  - Sites that received UST trust fund monies

# Clarified Liability

The **Brownfields Amendments** also:

- Provided liability protections for innocent landowners, bona fide prospective purchasers and contiguous property owners
- Liability protections require that property owners demonstrate due diligence (all appropriate inquiries) prior to acquisition and take reasonable steps after acquisition
- Required EPA to issue regulations for “all appropriate inquiries”

# Increased Support for State and Tribal Programs

- Authorized funding to establish and enhance State and Tribal Response Programs
- Current funding provides about \$47 million per year for grants awarded annually on an allocation basis
- States and Tribes use program funds to establish response programs and enhance site-specific activities
- Created enforcement bar against federal Superfund action for sites enrolled in State response programs

# All Appropriate Inquiries

- The Small Business Liability Relief and Brownfields Revitalization Act required that EPA develop federal standards and practices for “all appropriate inquiries.”
- Applicable to:
  - Innocent Landowners
  - Contiguous Property Owners
  - Bona fide
- Required parties receiving Brownfields assessment grants to use AAI.

# What is “All Appropriate Inquiries?”

- “All Appropriate Inquiries,” (AAI) or due diligence, is the process of evaluating a property for potential environmental contamination and assessing potential liability for any contamination present at the property.

# Why Comply with AAI?

- Required if seeking protection from CERCLA liability
- To understand potential environmental risks associated with a property prior to purchase
- Gain information that will help property owner comply with “continuing obligations” after purchase

# Applicability

- The All Appropriate Inquiries standards will apply to:
  - Property owners asserting CERCLA liability protections
  - Entities applying for brownfields grants that are not otherwise exempt from CERCLA liability
  - Persons receiving brownfields grants for site characterization and assessment under CERCLA 104(k)(2)(B)

# Applicability (cont.)

- Brownfields cleaned up under state response programs may be eligible for federal enforcement bar per CERCLA 128(b) – AAI **not** required by CERCLA.
- AAI **not** required if government entity acquired property:
  - involuntarily (CERCLA 101(29)(D))
  - By eminent domain (CERCLA 101(35)(A)(II))



# CERCLA Liability Protections

- The Brownfields Amendments to CERCLA provide liability protections for landowners who qualify as:
  - contiguous property owners,
  - bona fide prospective purchasers, or
  - innocent landowners.

# CERCLA Liability (cont.)

- To qualify for the liability protections, landowners must:
  - Meet certain threshold criteria prior to purchase
  - Satisfy certain continuing obligations after purchase.

# Threshold Criteria

- No affiliation with liable party
- No waste management activities after purchase
- Conduct all appropriate inquiries prior to date property is acquired

# Continuing Obligations

- Comply with land use restrictions
- Do not impede effectiveness or integrity of institutional controls
- Take “reasonable steps”
- Prevent or limit human and environmental exposure to any previous releases
- Provide cooperation, assistance and access
- Comply with CERCLA information requests and subpoenas

# Highlights of AAI Rule

- Structured around specific objectives and performance factors
- Definition of Environmental Professional – establishes who must oversee
- Report of findings
- Can use ASTM E1527 ESA standard to comply

# Objectives of AAI

- Identify conditions indicative of releases or threatened releases of hazardous substances.
- Identify particular information about a property:
  - Uses and occupancies of property
  - Uses of hazardous substances
  - Waste management activities
  - Corrective actions and response activities
  - Institutional and engineering controls
  - Nearby and adjoining properties with environmental conditions

# Key AAI Activities

- Interviews with past and present owners and occupants
- Reviews of historical sources of information
- Reviews of federal, state, tribal, and local government records
- Reviews of activity and use limitations
- On-site visual inspection

# Other AAI Requirements

- Specialized Knowledge
- Relation of Purchase Price to Value of Property
- Search for Environmental Cleanup Liens
- **Significant data gaps** must be identified and discussed *if* they affect the ability of the environmental professional to identify conditions indicative of releases or threatened releases.
- Final Report with EP Opinion and signature



# Recent Amendment to AAI

- On December 30, 2013, EPA published a final rule recognizing the updated ASTM E1527-13 standard as compliant with AAI.
- On June 17, 2014, EPA published a proposed rule to remove reference to the ASTM E1527-05 standard.

# Updates to ASTM E1527

The updated **ASTM E1527-13** standard:

- Clarifies definition of “de minimis condition.”
  - Cannot use the term to describe a “controlled recognized environmental condition” (CREC).
  - EP must provide necessary and available information on past corrective actions at the property.
- Updates definition of “Historical Recognized Environmental Condition” (HREC)
  - Only past releases addressed to unrestricted residential use.
- Adds a definition of “Controlled Recognized Environmental Condition” (CREC)
  - Past releases addressed to level of allowing for restricted use (e.g., risk based closures).

# Updates and Revisions to ASTM E1527 (cont.)

- ASTM revised the definition of “migrate/migration” to specifically include vapor migrations.
  - Clarifies that releases of contaminants that migrate via vapor in subsurface or in soils are RECs.
- ASTM revised the definitions of “release” and “environment” to clarify that the definitions have the same meaning as the definitions in CERCLA.
- ASTM revised scope of “user responsibilities.”
  - Clarifies which aspects of investigation are responsibility of user, or user’s chosen representative, and not necessarily responsibility of the EP.

# Updates and Revisions to ASTM E1527 Standard (cont.)

- Updated Agency File and Records review section
  - If property of adjoining property is identified on one or more environmental record (data base) sources, EPA should review pertinent regulatory files.
- ASTM revised language in Conclusions section to allow flexibility in wording of the conclusion statement (i.e., “language substantially similar to...”).
- ASTM updated information provided in the non-binding appendices.
  - Updated legal appendix (not reviewed by EPA)
  - Updated suggested report outline

# More Information

- EPA Website: [www.epa.gov/brownfields](http://www.epa.gov/brownfields)
- Email: [overmeyer.patricia@epa.gov](mailto:overmeyer.patricia@epa.gov)
- Brownfields 2015:
  - Chicago, September 2 - 4