



WV BROWNFIELDS
REVOLVING FUND

**BROWNFIELDS
REVOLVING FUND**

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TABLE OF CONTENTS

Table of Contents

Table of Contents	1
Overview	3
BACKGROUND	3
PURPOSE	3
AVAILABLE FUNDING.....	3
Eligibility	4
ELIGIBLE BORROWERS.....	4
ELIGIBLE SITES	5
Use of Funds	6
ELIGIBLE COSTS	6
INELIGIBLE COSTS	7
Loan Conditions	8
LOAN FEES	8
LOAN SIZE	8
INTEREST RATES	8
LOAN TERM AND REPAYMENT	9
PREPAYMENT	9
DEFERMENT OF REPAYMENT	9
COLLATERAL	9
Programmatic Requirements	10
ENROLLMENT IN THE WV VOLUNTARY REMEDIATION PROGRAM	10
MANDATORY 20% MATCH OF THE LOAN AMOUNT	10
PUBLIC NOTIFICATION AND COMMUNITY RELATIONS PLAN	10
COMPLIANCE WITH THE DAVIS-BACON ACT	11
COMPLIANCE WITH THE DISADVANTAGED BUSINESS ENTERPRISE REGULATIONS.....	12
CONSIDERATION OF HISTORIC PROPERTIES OR THREATENED AND ENDANGERED SPECIES	12
REPORTING	12
Application and Approval Process	14

TABLE OF CONTENTS

Loan Servicing	16
DISBURSEMENT OF FUNDS	16
ANNUAL LOAN REVIEW	16
DELINQUENT LOANS.....	16
COLLECTION ACTIONS.....	17
Contact Information	18
Appendices.....	19
APPENDIX A: ACRONYMS.....	20
APPENDIX B: DEFINITIONS	21
APPENDIX C: RESOURCES	25
Attachments.....	26
ATTACHMENT 1: BRF THRESHOLD ELIGIBILITY QUESTIONNAIRE	
ATTACHMENT 2: FACT SHEET – BROWNFIELDS GRANTS, CERCLA LIABILITY, AND AAI	

OVERVIEW

Overview

Background

The West Virginia Brownfields Revolving Fund (BRF) was authorized by the West Virginia Legislature through the West Virginia Voluntary Remediation and Redevelopment Act (W. Va. Code § 22-22) on July 1, 1997 and detailed in the corresponding Voluntary Remediation and Redevelopment Rule (60CSR3); however, the BRF remained idle for more than 20 years due to a lack of funding. On October 1, 2016, the BRF was capitalized by a United States Environmental Protection Agency (U.S. EPA) Brownfields Revolving Loan Fund (RLF) Grant.

Purpose

The West Virginia BRF offers low-interest loans to eligible local government entities, quasi-government agencies, nonprofit organizations, and private sector businesses to conduct cleanup activities at brownfield sites contaminated with petroleum and/or hazardous substances.

Financing the cleanup and redevelopment of brownfields sites is challenging because private lenders are often reluctant to provide loans for projects on these properties. BRF loans not only fill this critical gap in financing, but also provide incentive to remediate brownfields sites with flexible and favorable borrowing and repayment terms.

Remediation of brownfields in West Virginia protects human health and the environment, returns abandoned and under-utilized properties to productive use, and safeguards undeveloped pristine land.

Available Funding

The West Virginia BRF has been capitalized by a U.S. EPA Brownfields RLF Grant in the amount of \$820,000. As required by the grant cooperative agreement, \$660,000 is allocated for cleanup of hazardous substances, and \$160,000 is allocated for cleanup of petroleum substances.

ELIGIBILITY

Eligibility

Both the loan applicant and brownfield site must meet eligibility requirements to receive BRF monies. To document eligibility of the applicant and the brownfield site, prospective loan applicants must submit a completed Threshold Eligibility Questionnaire (Attachment 1) to the BRF Fund Manager for review and approval prior to submitting a loan application. Eligibility criteria are based on requirements outlined by the West Virginia Voluntary Remediation and Redevelopment Act (W. Va. Code § 22-22), West Virginia Voluntary Remediation and Redevelopment Rule (60CSR3), and the U.S. EPA Brownfields Program.

Eligible Borrowers

Loans are available to local government entities, quasi-government agencies, nonprofit organizations, and private sector businesses. To be eligible for BRF funding, an applicant must:

- Be a participant in the West Virginia Voluntary Remediation Program unless the remediation is limited to the removal of asbestos and lead-based paint and does not include environmental media such as soil, groundwater, etc.;
- Have a legal right to remediate the subject property through ownership or a legal access agreement;
- Be authorized to incur debt and enter into a legally binding loan agreement;
- Provide proof of ability to repay the loan; and
- Have established liability protection as a bona fide prospective purchaser (BFPP), contiguous property owner (CPO), or innocent landowner (ILO), as defined by the U.S. EPA All Appropriate Inquiry Rule prior to acquiring the property.

An applicant is not eligible for BRF funding if any of the following is true:

- Applicant or any member of their immediate family caused or contributed to the contamination on the subject property;
- Applicant was previously suspended, debarred, or declared ineligible for federal finance assistance programs;

ELIGIBILITY

- Applicant is currently delinquent in taxes, loan payments, or other indebtedness to the State of West Virginia or any political subdivision; or
- Applicant is currently out of compliance with a Voluntary Remediation Agreement executed as part of a West Virginia Voluntary Remediation Project.

Eligible Sites

Sites must meet the U.S. Environmental Protection Agency's definition of a brownfield:

The term 'brownfield site' means 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.

A property is not eligible for funding if any of the following is true:

- Property is listed or proposed for listing on the U.S. EPA National Priorities List (NPL);
- Property is subject to U.S. EPA unilateral administrative orders, court orders, administrative orders on consent, or judicial consent decrees issued to or entered into by parties under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA);
- Property is subject to a unilateral enforcement order under § 3008 or § 7003 of the Resource Conservation and Recovery Act (RCRA);
- Property is subject to a unilateral enforcement order for corrective action issued pursuant to any provision of Chapter 22 of the West Virginia Code; or
- Property is subject to the jurisdiction, custody, or control of the United States government.

Attachment 2 includes a fact sheet from U.S. EPA that provides additional information regarding eligibility for brownfields grants and CERCLA Liability.

USE OF FUNDS

Use of Funds

Eligible Costs

Borrowers may use a cleanup loan for the following activities:

- Preparing an Analysis of Brownfields Cleanup Alternatives (ABCA).
- Designing and performing a response action.
- Removing, mitigating, or preventing the release or threat of a release of a hazardous substance, pollutant, contaminant, petroleum product, or controlled substance into the environment. This includes the following activities:
 - a. Installing fences, warning signs, or other security or site control precautions.
 - b. Implementing drainage control.
 - c. Stabilizing berms, dikes, or impoundments.
 - d. Capping contaminated soils.
 - e. Using chemicals and other materials to retard the spread of the release or mitigate its effects.
 - f. Removing source materials, including free product recovery.
 - g. Excavating, consolidating, or removing contaminated soils.
 - h. Containing, treating, or disposing of hazardous materials and petroleum products.
 - i. Removing drums, barrels, tanks, or other bulk containers that contain or may contain hazardous substances, pollutants, or contaminants, including petroleum.
 - j. Performing demolition and/or site preparation that is part of the site cleanup.
- Performing site monitoring activities, such as sampling and analysis, that are reasonable and necessary during the cleanup process, including determination of the effectiveness of a cleanup.
- Paying fees associated with remediation through the West Virginia Voluntary Remediation Program, including regulatory oversight fees and Licensed Remediation Specialist fees.
- Meeting requirements for public participation, community notification, and worker health and safety.

USE OF FUNDS

Ineligible Costs

Borrowers cannot use loan funds for the following activities:

- Environmental assessment activities, including Phase I and Phase II Environmental Site Assessments;
- Monitoring and collecting data necessary to apply for, or comply with, environmental permits under other federal and state laws, unless such a permit is required as a component of the cleanup action;
- Performing construction, demolition, and development activities that are not cleanup actions (e.g., construction of a new facility or marketing of property);
- Addressing public or private drinking water supplies that have deteriorated through ordinary use;
- Cost sharing or matching funds for another federal grant;
- Paying a penalty or fine; or
- Covering administrative or indirect costs.

LOAN CONDITIONS

Loan Conditions

To encourage brownfield remediation throughout the state, the West Virginia BRF offers favorable and accommodating loan rates, schedules, and terms.

Loan Fees

- Administrative Fee
 - All loans will be charged an administrative fee of 0.5% as a means of supporting the administrative costs of the BRF in perpetuity. These fees will be maintained in a separate account outside of the BRF. The fee is initially calculated using the outstanding principal amount of the loan over its lifetime but repaid over the term of the loan in equal installments as contained in the loan amortization schedule.

Loan Size

Depending upon available funding, loan amounts can range from \$25,000 to available funds.

Interest Rates

Interest rates are negotiated on a case-specific basis in consideration of the borrower, the project, the repayment term, and community need. Short-term (<2 yr. term) loans will generally be made at the lowest rates and may be eligible for a 0% interest rate where the loan applicant demonstrates strong redevelopment potential and community need. Mid-term loans (2 – 5 yr. terms) may be eligible for a 0.75% interest rate, while longer-term loans (5 – 10 yr. terms) will typically be made at the full interest rate of 1.5%. However, the DEP will review each project individually and adjust interest rates as appropriate to encourage brownfields redevelopment.

Applicant	Example Rate
Local government entities	0.0% - 1.5%
Nonprofit Organizations	0.0% - 1.5%
Private Businesses	1.0% - 3.0%
Quasi-Government Agencies	0.0% - 1.5%

LOAN CONDITIONS

Loan Term and Repayment

Loan terms shall not exceed ten (10) years. Repayment of the loan begins six (6) months after substantial completion of remediation, which is determined by WVDEP approval of the Remediation Completion Report or issuance of the Voluntary Remediation Certificate of Completion, whichever occurs first. Loans are to be repaid in equal monthly installments of principal and interest.

Leasing of the property during the term of the loan will also trigger the repayment schedule, regardless of completion of remediation. Sale of the property during the term of the loan will trigger immediate repayment of the outstanding principal in full.

Prepayment

There is no penalty for early payoff of the loan.

Deferment of Repayment

A borrower may submit a request to the WVDEP to defer payment for a maximum of two (2) years. Deferments will be considered by the WVDEP to allow project completion and generate positive cash flow for borrowers with less access to capital or whose projects will have substantial positive economic impacts. If payment is deferred, the balance of the loan will be amortized within the remaining term of the loan. Any interest accrued on the deferment will be capitalized as of the original starting repayment date.

Collateral

Collateral is required to secure a loan and will be collected in the event of failure to repay a loan. If the applicant is the owner of the subject brownfield site, a deed of trust must be executed, or other collateral of equal or greater value will be obtained to secure the loan.

If the applicant is not the owner of the subject brownfield site, other appropriate collateral will be required to secure the loan, except where the applicant is a development authority or other public entity.

PROGRAMMATIC REQUIREMENTS

Programmatic Requirements

Enrollment in the WV Voluntary Remediation Program

Unless the remediation is limited to asbestos and lead-based paint building materials and does not include environmental media such as soil, groundwater, etc., sites receiving funding from the Brownfields Revolving Fund must be enrolled in the West Virginia Voluntary Remediation Program (VRP). For building materials remediation, loan applications may be submitted at any time. For cleanup involving environmental media, loan applications may be submitted after acceptance into the VRP.

Mandatory 20% Match of the Loan Amount

Borrowers must contribute at least a 20% match of the loan amount. The match may be in the form of funding (cash, grants, or loans) or resources (in-kind labor, material, or services) from the borrower or a project partner; however, the funding must be from a non-federal source, and all activities being funded by the match must be Eligible Costs as defined in this guidance.

Public Notification and Community Relations Plan

Public involvement is essential for a successful brownfield cleanup and is required by both the West Virginia VRP and the U.S. EPA Brownfields Program. The VRP regulations require public notification and involvement for all VRP projects, however, these requirements are not applicable to asbestos and lead-based paint removal projects. VRP requirements include publishing a public notice and issuing a press release upon receipt of an application; making the VRP application available for viewing by the public; and community engagement when the applicant considers remediation goals with a carcinogenic risk above a defined threshold. The U.S. EPA Brownfields Program requires that all cleanup projects funded by a revolving loan have a site-specific community relations plan.

In addition to the VRP requirements described above (if applicable), each project funded by the BRF must include public involvement activities described in Section 15 of the Voluntary Remediation and Redevelopment Rule (60CSR3). Completing the requirements of the VRP will also meet the U.S. EPA Brownfields Program requirements for a site-specific community relations plan. Examples of public information activities include:

- A borrower using BRF funds must provide a 30-day public comment period and hold an informational meeting in the community where the brownfield is located.

PROGRAMMATIC REQUIREMENTS

- The informational meeting must address how remediation concerns apply to the site, including risk issues and how the remedy will address site risks.
- The notice must be published once a week for four consecutive weeks in a local newspaper of general circulation in the county where the brownfield remediation is proposed and include a summary of the public's right to become involved in the development, remediation and reuse of the site, as well as the time, date, and location of an informational meeting.
- The borrower must also erect a sign on the brownfield site that informs that community the site is funded through the Brownfield Revolving Fund program.

A Public Involvement Plan (PIP) must be developed by the borrower if one is requested by the public, county, or municipality. The applicant must develop the PIP in consultation with the persons requesting the plan within 30 days of receiving notice that it has been requested. The plan provides for further community meetings and opportunities for the public to review and comment on work plans related to the remediation of the brownfield site. The WVDEP must review and approve the PIP prior to implementation, and the plan will remain in effect until approval of the Remediation Completion Report or the Certificate of Completion is issued. Comments from participants and applicant responses will be considered by WVDEP in the review and approval of plans and other documents related to cleanup of the brownfield site.

Compliance with the Davis-Bacon Act

Borrowers must complete remediation projects funded in whole or in part from BRF monies in accordance with the Davis-Bacon Act of 1931 and will be responsible for obtaining recent and applicable wage rates from the U.S. Department of Labor, posting the fair compensation notice along with the prevailing wage rate at the work site, and incorporating the prevailing wage rate into the construction contract.

Compliance with the Davis-Bacon Act requires payment of federal prevailing wage rates for all construction, alteration, and repair activity involving the remediation of hazardous substances, including excavation and removal of hazardous substances, construction of caps, barriers, structures which house treatment equipment, and abatement of contamination in buildings.

With regard to remediation of petroleum contamination, the prevailing wage requirement applies when the project includes one or more of the following:

PROGRAMMATIC REQUIREMENTS

- Installing piping to connect households or businesses to public water systems or replacing public water system supply well(s) and associated piping due to groundwater contamination.
- Soil excavation/replacement when undertaken in conjunction with the installation of public water lines/wells described above.
- Soil excavation/replacement, tank removal, and restoring the area by paving or pouring concrete when the soil excavation/replacement occurs in conjunction with both tank removal and paving or concrete placement.

Other cleanup activities at brownfields sites contaminated by petroleum such as in situ remediation, soil excavation/replacement, and tank removal when not in conjunction with paving or concrete replacement, will normally not trigger Davis-Bacon Act requirements.

Compliance with the Disadvantaged Business Enterprise Regulations

Borrowers must complete remediation projects funded in whole or in part from BRF monies in accordance with the Disadvantaged Business Enterprise (DBE) Requirements as prescribed by EPA-issued documents and comply with the six “Good Faith Efforts” for DBEs.

Consideration of Historic Properties or Threatened and Endangered Species

If historic properties or threatened and endangered (T&E) species may be impacted by the cleanup of a site, the requirements of the National Historic Preservation Act (NHPA) or the Endangered Species Act (ESA) may apply, respectively. Borrowers are required to provide documentation that they have met the requirements of Section 106 of NHPA and Section 7(a)(2) of the ESA prior to completing a loan application.

Reporting

During cleanup, borrowers are required to comply with the BRF reporting requirements. These reports include, but are not limited to, the following:

- Quarterly reports detailing activities and any additional funds leveraged through the cleanup.
- Documentation that all federal and state worker health and safety requirements are met.
- Documentation that funds were used only for eligible activities at the eligible site.

Additionally, borrowers are required to:

PROGRAMMATIC REQUIREMENTS

- Keep records of compliance with the terms and conditions of the loan, including applicable federal and state requirements.
- Retain a third party to perform the verification and certify that wages are correct.

APPLICATION AND APPROVAL PROCESS

Application and Approval Process

The process to apply for a BRF loan is as follows:

1. Applicant requests a pre-application meeting with the WVDEP.
2. If the WVDEP makes a preliminary determination that the applicant and the site are eligible to apply for a BRF loan, the applicant must enter the Voluntary Remediation Program (VRP) if the remediation includes environmental media (e.g., soil, groundwater, etc.). The requirement to enter the VRP does not apply where remediation is limited to asbestos or lead-based paint building materials.
3. Once applicants are accepted to participate in the VRP (as applicable), they may submit a BRF Threshold Eligibility Questionnaire (Attachment 1).
4. If the BRF Threshold Eligibility Questionnaire confirms that the site and the applicant are eligible, the applicant submits a remediation project cost estimate and any necessary clearance letters from the State Historic Preservation office (SHPO), U.S. Fish & Wildlife, and the WV Division of Natural Resources concerning any historic properties and any rare, threatened, or endangered species.
5. Once the documents are approved by the WVDEP, the applicant may submit a BRF Loan Application.
6. The WV Economic Development Authority (WVEDA) reviews the BRF Loan Application to determine applicant ability to service the debt and performs due diligence. WVEDA specifically reviews:
 - Applicant creditworthiness
 - Applicant capacity to repay obligations
 - Applicant proposed collateral and associated value
 - Applicant character
 - Conditions of the local economy and industry

APPLICATION AND APPROVAL PROCESS

7. Within 45 days of receiving a BRF loan application the WVDEP will approve the application, reject the application, or accept the application subject to correction. If the application is accepted subject to correction, the applicant must submit a corrected application within 60 days unless an extension to that schedule is approved by the WVDEP in writing. If the application is approved, WVDEP will enter into a BRF Loan Agreement with the applicant.

LOAN SERVICING

Loan Servicing

All loans will be documented with a written loan agreement that sets reporting requirements for the borrower and guarantors.

Disbursement of Funds

Loan funds are distributed on a reimbursement basis. Borrowers must submit a reimbursement request form with attached documentation of expenditures (e.g., invoices) to be approved by the BRF Fund Manager or their designee on a monthly basis. Funds will be transferred upon approval.

Annual Loan Review

Throughout the life of the loan, the loan recipient must submit information at least annually to the WVDEP to document their financial stability.

Delinquent Loans

Delinquent loans are loans that are thirty (30) days in arrears. The WVDEP as the Administrator of the BRF will provide its best effort to collect all monies lent under the BRF program. If the applicant is more than 30 days in arrears, they must notify the WVDEP of a plan to become current, which must be approved by the WVDEP Fund Manager. The WVDEP will monitor the monthly repayment activity of all outstanding loan accounts and initiate normal collection procedures (i.e., notice for payments, collection calls and other legal means necessary to collect the outstanding debt). In the event of a loan default, the WVDEP will take all reasonable measures to enforce the terms of the loan agreement including proceeding against the assets pledged as collateral to cover losses to the loan. When normal procedures fail to produce the desired results, the account will be turned over for legal action and pursued to a conclusion. All legal fees and any other fees associated with collection procedures will be the sole responsibility of the applicant.

If the cleanup is not complete at the time of default, the WVDEP will: document the nexus between the amount paid to the borrower (bank or other financial institution) and the cleanup that took place prior to the default; and secure the site (e.g., ensuring public safety) and inform the EPA Project Officer.

LOAN SERVICING

Collection Actions

Collection actions including collateral foreclosure, repossession, and legal actions taken to preserve the BRF interest in collateral will be taken on behalf of the BRF and approved by the BRF Program.

CONTACT INFORMATION

Contact Information

The West Virginia Brownfields Revolving Fund is a component of the West Virginia Department of Environmental Protection Brownfields Program and administered by the Office of Environmental Remediation within the Division of Land Restoration.

Office of Environmental Remediation

West Virginia Department of Environmental Protection

601 57th Street SE

Charleston, WV 25304

www.dep.wv.gov

BRF Program Manager

Contact: John Meeks, PG, LRS

Phone: 304-926-0499, ext. 41212

BRF Fund Manager

Contact: Katheryn Emery, P.E.

Phone: 304-926-0499, ext. 43830

Email: BrownfieldsRevolvingFund@wv.gov



APPENDICES

Appendices

Appendix A:	Acronyms
Appendix B:	Definitions
Appendix C:	Resources

APPENDIX A

Appendix A: Acronyms

AAI	All Appropriate Inquiries
ABCA	Analysis of Brownfields Cleanup Alternatives
BFPP	Bona Fide Prospective Purchaser
BRF	Brownfields Revolving Fund
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
CPO	Contiguous Property Owner
CRP	Community Relations Plan
DBE	Disadvantaged Business Enterprise
EPA	United States Environmental Protection Agency
FOIA	Freedom of Information Act
ILO	Innocent Land Owner
LRS	Licensed Remediation Specialist
LUST	Leaking Underground Storage Tank
NPL	National Priorities List
RCRA	Resource Conservation and Recovery Act
RLF	Revolving Loan Fund (Grant)
VRA	Voluntary Remediation Agreement
VRP	Voluntary Remediation Program
WVDEP	West Virginia Department of Environmental Protection
WVDOH	West Virginia Division of Highways
WVEDA	West Virginia Economic Development Authority

APPENDIX B

Appendix B: Definitions

All Appropriate Inquiries (AAI)

Steps a prospective owner must take to qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner liability protections. A property owner must perform “all appropriate inquiry” into the previous ownership and uses of property before acquisition of the property. EPA published the Final Rule for All Appropriate Inquiries (AAI) on November 1, 2005. This rule became effective on November 1, 2006. The ASTM E1527-13 Phase I Environmental Site Assessment standard is consistent and compliant with the EPA final rule and may be used to comply with the requirements for AAI.

Analysis of Brownfields Cleanup Alternatives (ABCA)

Documents information about the site and contamination issues (i.e., exposure pathways, contaminant sources, etc.); cleanup standards; applicable laws; alternatives considered; and the proposed cleanup. The evaluation of alternatives must include effectiveness, implementability, and the cost of the response proposed. The evaluation of alternatives must also consider the resilience of the remedial options in light of reasonably foreseeable changing climate conditions (e.g., sea level rise, increased frequency and intensity of flooding, and/or extreme weather events, etc.). The evaluation will include an analysis of reasonable alternatives, including no action. The cleanup method chosen must be based on this analysis.

ASTM International Phase I Environmental Site Assessment

Provides standards for conducting an environmental site assessment of a parcel of commercial real estate with respect to the range of contaminants within the scope of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) and petroleum products. Use of this practice permits a user to satisfy one of the requirements to qualify for the innocent landowner, bona fide prospective purchaser, and contiguous property owner, defenses to CERCLA liability: that is, the practices that constitute “all appropriate inquiry into the previous ownership and uses of the facility in accordance with generally accepted good commercial or customary standards and practices” as defined in 42 USC § 9601(35)(B).

APPENDIX B

Bona Fide Prospective Purchaser (BFPP)

A CERCLA liability protection for property owners that have acquired property after January 11, 2002. The specific requirements that a landowner must meet to qualify for this liability protection are described in CERCLA § 101(40) and § 107(r).

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. (CERCLA § 101(39)(A).)

Certificate of Completion (COC)

A document issued by the WVDEP to a Voluntary Remediation Program applicant when site remediation is complete, and no further action is required.

Community Relations Plan

Specifies the community involvement activities that the borrower plans to undertake during the cleanup.

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

Commonly known as Superfund, this law was enacted by Congress on December 11, 1980. CERCLA provides broad federal authority to respond directly to releases or threatened releases of hazardous substances that may endanger public health or the environment.

Contiguous Property Owner (CPO)

A CERCLA liability protection that “protects parties that are essentially victims of pollution incidents caused by their neighbor’s actions.” Contiguous property owners must perform all appropriate inquiry prior to acquiring property to qualify for this protection. Persons who know, or have reason to know, prior to purchase, that the property is or could be contaminated, cannot qualify for the CPO liability protection. A landowner must meet the criteria set forth in CERCLA § 107(q) to qualify. Note that a purchaser who does not qualify as a CPO may still qualify as a bona fide prospective purchaser (BFPP).

APPENDIX B

Greenfields

Greenfields are generally parkland, undeveloped open space and agricultural lands located near the outskirts of towns, cities, and larger metropolitan areas. These areas help delineate one village, city, or town from another, or where development is occurring and where it is not. When they are protected, greenfields can serve to promote growth in already-developed areas and curb urban sprawl. As parks and greenways, they also provide the green infrastructure essential to livable communities.

Innocent Landowner (ILO)

A CERCLA liability protection for property owners who have performed all appropriate inquiry prior to purchase and who did not know, or have reason to know, of contamination. A person must meet the criteria set forth in CERCLA § 107(b)(3) and CERCLA § 101(35) to qualify as an innocent landowner.

Licensed Remediation Specialist (LRS)

An individual certified by the WVDEP to perform professional environmental services and to supervise the remediation of contaminated sites through the West Virginia Voluntary Remediation Program.

Resource Conservation and Recovery Act (RCRA)

This law was enacted by Congress on October 21, 1976 to address the increasing problems the nation faced from the growing volume of municipal and industrial waste. RCRA gives the U.S. EPA authority to control hazardous waste from “cradle-to-grave.” This includes the generation, transportation, treatment, storage, and disposal of hazardous waste. RCRA also sets forth a framework for the management of non-hazardous solid wastes.

Resource Conservation and Recovery Act Corrective Action (RCRA CA)

Corrective action is a provision under the Resource Conservation and Recovery Act that requires facilities which treat, store, or dispose of hazardous wastes to investigate and clean up releases into soil, groundwater, surface water, and air. Corrective action is principally implemented through RCRA permits and orders.

APPENDIX B

Revolving Loan Fund (RLF)

RLF is a self-replenishing pool of money, utilizing interest and principal payments on old loans to issue new ones. RLFs are a gap-financing measure primarily used for development and expansion of small businesses.

APPENDIX C

Appendix C: Resources

Following is a list of website links to the agencies, laws, codes, and rules mentioned throughout the document:

U.S. EPA Brownfields Program:

<https://www.epa.gov/brownfields>

WVDEP Office of Environmental Remediation:

<https://dep.wv.gov/dlr/oer/Pages/default.aspx>

Voluntary Remediation and Redevelopment Act (W. Va. Code § 22-22):

<http://www.wvlegislature.gov/wvcode/code.cfm?chap=22&art=22>

Voluntary Remediation and Redevelopment Rule (60CSR3):

<http://apps.sos.wv.gov/adlaw/csr/rule.aspx?rule=60-03>

Comprehensive Environmental Response, Compensation, and Liability Act (Superfund):

<https://www.epa.gov/laws-regulations/summary-comprehensive-environmental-response-compensation-and-liability-act>

Brownfields All Appropriate Inquiries

<https://www.epa.gov/brownfields/brownfields-all-appropriate-inquiries>

CERCLA Liability and Local Government Acquisitions:

<https://www.epa.gov/sites/production/files/documents/local-gov-liab-acq-fs-rev.pdf>

Resource Conservation and Recovery Act (RCRA):

<https://www.epa.gov/rcra>

ATTACHMENTS

Attachments

Attachment 1: BRF Threshold Eligibility Questionnaire

Attachment 2: Fact Sheet – Brownfields Grants, CERCLA Liability, and AAI

ATTACHMENT 1

Attachment 1: BRF Threshold Eligibility Questionnaire

The attached questionnaire must be completed and approved by the RLF Manager prior to submitting a BRF Loan Application.



Threshold Eligibility Questionnaire

Instructions

All prospective loan applicants must submit a completed Eligibility Questionnaire to the BRF Fund Manager for review and approval prior to submitting a loan application. Applications for a BRF Loan will only be accepted after the prospective applicant successfully demonstrates they meet the threshold eligibility criteria for receiving a loan.

Borrower Information

Prospective Applicant	
Mailing Address	
City, State, Zip	
Contact Person	
Phone Number	
Email Address	

Borrower Qualifications

The proposed loan applicant must meet the following qualifications and upon request provide any supporting documentation requested by the BRF Fund Manager:

	YES	NO
Applicant is local government entity, quasi-government agency, or private sector business.		
Owns the subject property or has a legal access agreement (provide title opinion).		
Is authorized to incur debt and enter into a legally binding loan agreement.		
Can provide credible proof of their ability to repay the loan.		
Have established liability protection as a bona fide prospective purchaser, contiguous property owner, or innocent landowner, as defined by the U.S. EPA All Appropriate Inquiry Rule.		
Applicant or any member of their immediate family did not cause or contribute to the contamination on the subject property.		
Was not previously suspended, debarred, or declared ineligible for federal finance assistance programs.		



Threshold Eligibility Questionnaire

	YES	NO
Is not currently delinquent in taxes, loan payments, or other indebtedness to the State of West Virginia or any political subdivision.		
Is not currently out of compliance with a Voluntary Remediation Agreement executed as part of a West Virginia Voluntary Remediation Project.		
Are not currently, nor have been, subject to any penalties resulting from environmental non-compliance at the site subject to the loan.		

Site-Related Qualifications

The site where the loan is proposed to be used must meet the following qualifications:

	YES	NO
If the cleanup includes environmental media (e.g., soil, groundwater, etc.), the site is currently enrolled in the Voluntary Remediation Program.		
Is not listed or proposed for listing on the U.S. EPA National Priorities List.		
Is not subject to U.S. EPA unilateral administrative orders, court orders, administrative orders on consent, or judicial consent decrees issued to or entered into by parties under the Comprehensive Environmental Response, Compensation, and Liability Act.		
Is not subject to a unilateral enforcement order under § 3008 or § 7003 of the Resource Conservation and Recovery Act.		
Is not subject to a unilateral enforcement order for corrective action issued pursuant to any provision of Chapter 22 of the West Virginia Code.		
Is not subject to the jurisdiction, custody, or control of the United States government.		

Petroleum Site-Related Qualifications

Any petroleum-contaminated site where the loan is proposed to be used must meet the following qualifications:



Threshold Eligibility Questionnaire

	YES	NO
Is of relatively low risk, as compared to other petroleum sites in West Virginia.		
There is “no viable responsible party” for the petroleum contamination.		
Is not subject to any order issued under section 9003(h) of the Solid Waste Disposal Act.		

Certification

As a representative for the prospective loan applicant, the undersigned certifies that the information provided herein is accurate, was collected in a manner and using a process that ensures accuracy, and that I am authorized to provide this information and certify its accuracy on behalf of the prospective loan applicant.

Printed Name

Signature

Date

ATTACHMENT 2

Attachment 2: Fact Sheet – Brownfields Grants, CERCLA Liability, and AAI

To be eligible for an EPA Brownfields Grant to address contamination at brownfield properties, eligible entities must demonstrate that they are not liable under CERCLA for the contamination at the site.

Accordingly, eligible entities who may be considered “potentially responsible parties” under CERCLA must demonstrate they meet one of the liability protections or defenses set forth in CERCLA by establishing that they are:

- (1) an innocent landowner,
- (2) a contiguous property owner,
- (3) a bona fide prospective purchaser, or
- (4) a government entity that acquired the property involuntarily through bankruptcy, tax delinquency, or abandonment, or by exercising its power of eminent domain.

To claim protection from liability as an innocent landowner, contiguous property owner, or bona fide prospective purchase, property owners, including state and local governments, must conduct all appropriate inquiries prior to acquiring the property.

The attached fact sheet produced by the U.S. Environmental Protection Agency provides details about CERCLA liability protection.



EPA Brownfields Grants, CERCLA Liability, and All Appropriate Inquiries

Environmental Protection Agency's (EPA) Brownfields Program provides direct funding, in the form of competitive grants, for brownfields assessments and cleanup, for the capitalization of revolving loan funds, and to support environmental job training programs. Eligible entities for brownfields grants include states, tribes, local governments, regional governments, and quasi-governmental entities. Nonprofit organizations are eligible for brownfields cleanup grants. To be eligible for a brownfields cleanup grant, the eligible entity must own the brownfield that will be cleaned up using grant funds, and the entity cannot be potentially responsible, or liable, for the contamination at the brownfield.

To be eligible for a U.S. EPA Brownfields grant to address contamination at brownfields properties, eligible entities must demonstrate that they are not liable under CERCLA for contamination at the site. Eligible entities who can be considered "potentially responsible parties" under CERCLA must demonstrate that they meet one of the liability protections or defenses set forth in CERCLA by establishing that they are an innocent landowner, contiguous property owner, bona fide prospective purchaser or government entity that acquired the property involuntarily through bankruptcy, tax delinquency or abandonment, or by exercising power of eminent domain.

To claim protection from liability as an innocent landowner, contiguous property owner or bona fide prospective purchaser, property owners, including state and local governments, must conduct all appropriate inquiries (AAI) before acquiring the property.

What is CERCLA?

Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as Superfund, persons can be held strictly liable for cleaning up hazardous substances at properties they either currently own or operate, or owned or operated in the past. Strict liability under CERCLA means that liability for environmental contamination can be assigned based solely on property ownership.

The Small Business Liability Relief and Brownfields Revitalization Act (the Brownfields Amendments) amended CERCLA to provide liability protections for certain landowners and potential property owners. The Brownfields Amendments provide liability protections for certain property owners if the property owners comply with specific provisions outlined in the statute, including conducting AAI for present and past use of the property.

Can state and local governments be found liable for contamination at brownfields?

Yes. Under CERCLA, state and local governments (and individuals) can be liable by virtue of property ownership or by virtue of their actions with respect to a particular site. For sites with a release or threatened release of hazardous substances, potentially responsible parties include any person or party that:

- Currently owns or operates the property.
- Formerly owned or operated the property at the time of the disposal of hazardous substances.
- Arranged for hazardous substances to be disposed of at the site or transported to the site for disposal.
- Transported hazardous substances to the site.



Eastern Manufacturer Brewer, Maine, prior to cleanup



Eastern Manufacturer Brewer, Maine, after cleanup

Brownfields grant applicants should note that CERCLA employs a “strict liability” scheme—that means it is without regard to fault. A person who owns a property that has had a release of hazardous substances can be held liable by virtue of ownership, despite intent.

If I am applying for a Brownfields grant, do I have to worry about CERCLA liability?

Yes. Brownfields grantees are prohibited from using grant money to pay response costs at a brownfields site for which the grantee is potentially liable under CERCLA.

All brownfields grantees who are potentially liable at the site for which they are seeking funds must demonstrate that they are not liable for the contamination that will be addressed by the grant, subgrant or loan. Applicants who own or operate the property for which they are seeking funding, or who may have owned or operated the property at the time of disposal of hazardous substances, must demonstrate that they fall within one of the liability protections.

Cleanup grant applicants, in particular, should note this prohibition. Because cleanup grantees are required to own a site to receive brownfields funding—and because owners of contaminated property are liable under CERCLA—cleanup grant applicants must demonstrate they meet one of the liability protections described above. Some grant applicants who do not own the property for which they are seeking funding, or who are not seeking site-specific grant funds, may not fall within one of the categories of potentially responsible parties, and they may not have to demonstrate that they qualify for liability protection.

Please contact your EPA Regional Brownfields representative if you are not sure whether you need to demonstrate liability protection to be eligible for a grant.

Who is protected from liability under CERCLA?

The CERCLA statute provides protection from liability for certain parties, provided they comply with specific criteria. Parties with liability protection under CERCLA include:

- Innocent landowners, CERCLA Section 101(35)(A).
- Contiguous property owners, CERCLA Section 107(q).
- Bona fide prospective purchasers, CERCLA Sections 101(40) and 107(r).
- Units of state or local government that acquire ownership or control involuntarily through bankruptcy, tax delinquency or abandonment, CERCLA Section 101(20)(D).
- Government entities that acquire property through eminent domain, CERCLA Section 101(35)(A)(ii).

What are the conditions for attaining liability protection under CERCLA?

To be eligible for liability protection under CERCLA as an innocent landowner, contiguous property owner or bona fide prospective purchaser, prospective property owners must:

- Conduct AAI in compliance with the Code of Federal Regulations (CFR), 40 CFR Part 312, before acquiring the property.
- Comply with all continuing obligations after acquiring the property, CERCLA Sections 101(40)(C-G) and Sections 107(q)(A) (iii-viii)).
- Not be affiliated with any liable party through any familial relationship or any contractual, corporate or financial relationship (other than a relationship created by conveying or financing the property).

Note: Property acquisition includes properties acquired as gifts or through zero-price transactions.

How can a state or local government demonstrate that it is not liable for contamination at a brownfields site?

All state and local governments that are potentially liable for a site for which they are applying for funding, including site-specific assessment grants, cleanup grants or subgrants or loans from revolving loan funds, must demonstrate that they qualify for one of the CERCLA liability protections. All nonprofit entities applying for Brownfields cleanup grants also must demonstrate that they are protected from liability under CERCLA.

To demonstrate qualification as an innocent landowner, contiguous landowner, or bona fide prospective purchaser, the applicant must:

- Conduct AAI before acquiring the property, and
- Comply with all continuing obligations after acquiring the property.

State and local governments that acquired a property involuntarily through bankruptcy, tax delinquency, or abandonment, or by exercising the power of eminent domain, do not have to conduct AAI before acquiring the property, but they must exercise “due care” after acquiring the property (CERCLA Sections 101(35)(A) and 107(b)(3) (a-b)). Note: One threshold criterion for applicants seeking cleanup grant funding is that a Phase I environmental site assessment must be conducted before application submission. Although state and local governments that acquired property involuntarily are not required to conduct AAI to establish liability protection, they may have to conduct AAI to be eligible for a cleanup grant.

What are “All Appropriate Inquiries”?

AAI is the process of evaluating a property’s environmental conditions and assessing potential liability for any contamination.

EPA recognizes two ASTM International Standards as compliant with AAI requirements: ASTM E1527-13 “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process” and E2247-16 “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process for Forestland or Rural Property.”

When must AAI be conducted?

- AAI must be conducted or updated within one year before the date of acquisition of a property.
- Certain aspects or provisions of AAI (i.e., interviews of current and past owners, review of government records, on-site visual inspection and searches for environmental cleanup liens) must be conducted or updated within 180 days before acquiring ownership of a property.

Who can perform AAI?

The individual who supervises or oversees the conduct of the AAI and signs the final required report must meet the definition of an “environmental professional” stated in the AAI final rule, 40 CFR Section 312.10.

A person who does not qualify as an environmental professional can assist in the conduct of the AAI if he or she is under the responsible charge of a person meeting the definition.

What are continuing obligations?

After acquiring a property, to maintain liability protections, landowners must comply with “continuing obligations” during their property ownership. The continuing obligations include:

- Provide all legally required notices for the discovery or release of a hazardous substance.
- Exercise appropriate care of the hazardous substances by taking reasonable steps to stop or prevent continuing or threatened future releases and exposures, and to prevent or limit human and environmental exposure to previous releases.
- Provide full cooperation, assistance, and access to individuals authorized to conduct response actions or natural resource restoration.
- Comply with land-use restrictions and not impede the effectiveness of institutional controls.
- Comply with information requests and subpoenas.

Further information

For more information, visit the EPA Brownfields website at www.epa.gov/brownfields.

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