

# **EPA Grantees: What You Need to Know about CERCLA Liability**



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# EPA Grantees: Why Worry about CERCLA Liability?

- **To be eligible** for an EPA Brownfields Grant to address contamination at a brownfields property (cleanup, RLF subgrant or loan):
  - Applicants must demonstrate that they are **NOT** liable under CERCLA for the contamination at the property to be addressed by grant monies.



# Can Government Entities be held Liable under CERCLA?

- **YES.**
- Under CERCLA, parties (including government entities) can be liable by virtue:
  - Of property ownership
  - Of their actions with respect to a property
    - Owned or operated property
    - Arranged for hazardous substances to be disposed or transported
    - Transported hazardous substances to property



# Liability under CERCLA

- Prior to the 2002 amendments to CERCLA, property owners could be held strictly, and jointly and severally, liable for prior contamination at a property.
  - **Strict liability**: without fault or culpability
  - **Joint and Several liability**: current and past owners can be held accountable individually or collectively
- Any owner within a property's chain of title could be held liable for contamination at a property, regardless of whether any particular owner caused the contamination.<sup>4</sup>



# SARA 1986: Innocent Landowner

Parties can claim defense to liability **if** they can demonstrate that they did not know AND had no reason to know of contamination at time of acquisition.

- Parties have to conduct all appropriate inquiries prior to acquisition to determine past uses and ownership.
- If reason to believe property could be contaminated is found, then defense is lost.



# Small Business Liability Relief and Brownfields Revitalization Act (2002)

- Amended CERCLA and provided liability protections for certain property owners.
  - Innocent landowners (amended 1986 provisions)
  - Contiguous property owners
  - **Bona fide prospective purchasers**



# Small Business Liability Relief and Brownfields Revitalization Act

- **Bona fide prospective purchasers:**  
Parties can purchase property, knowing of environmental contamination, and not be held liable.
  - Purchased property after January 11, 2002.
  - Must conduct all appropriate inquiries prior to purchase to assess prior contamination.
  - Must comply with “continuing obligations” after purchase.
  - Cannot be affiliated with responsible party.



# Small Business Liability Relief and Brownfields Revitalization Act

- **Contiguous Landowner:**

Property is contaminated by no fault of landowner, contamination is coming from a contiguous, adjacent, or nearby property

- Cannot be affiliated with responsible party
- Cannot have consented to contamination
- Must conduct all appropriate inquiries by to acquisition
- Must comply with continuing obligations after purchase



# CERCLA Liability Protections, including Bona fide Prospective Purchaser

- Must conduct all appropriate inquiries **prior to the date of acquisition** (the date on which purchaser takes title).
- Must comply with “continuing obligations” **after purchase**, as set for in the statute.



# Continuing Obligations (following acquisition)

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



# Applicability of the AAI Rule

- Parties who potentially may claim **protection from CERCLA liability** as:
  - Innocent property owners;
  - Contiguous property owners; or
  - Bona fide prospective purchasers.



# Applicability of the AAI Rule

- Parties applying for **site specific assessment grants** and **direct cleanup grants** under EPA's **Brownfields Grant** program.
- Parties receiving **Brownfields assessment grants**.
  - Must conduct assessments in compliance with **AAI Rule**.



# Brownfields Grant Applicants

- **Brownfields grant applicants** are prohibited from using grant money to pay for a response cost for which the recipient of the grant is potentially liable under CERCLA.
- Therefore, applicants applying for site-specific grants must demonstrate they are not liable for contamination.



# Brownfields Grant Applicants (cont.)

- Therefore grant applicants must demonstrate they are not liable for contamination to be addressed by grant.
  - Acquired property **involuntarily** (CERCLA 101(20)(D))
  - Acquired property by **eminent domain** (CERCLA 101(35)(A)(ii))
  - Are a **bona fide prospective purchaser**
  - Meet requirements for BFPP, but purchased property prior to January 11, 2002



# Bona Fide Prospective Purchasers

- Must conduct **all appropriate inquiries** prior to acquisition to assess prior contamination.
- Must comply with “**continuing obligations**” after purchase.
- Cannot be affiliated with responsible party.



# A Few Words About: Lender Liability

- CERCLA section 101(20) contains a **secured creditor exemption** from liability. It eliminates owner/operator liability for lenders who hold indicia of ownership in a CERCLA facility, provided the lender does not participate in the management of the facility.
- In addition, the statute at section 101(20)(E) provides an exemption from the definition of "owner or operator" for **lenders that do not participate in the management** of a property prior to foreclosure.
- The all appropriate inquiries rule **does not affect** a bank's liability status when the bank is only acting as a lender.

## And Now, a Bit about AAI

- **When** must AAI be Performed?
- **Who** must Perform AAI?
- What are the **Objectives** of AAI?
- What **Activities** must be Conducted?



# When Must AAI be Performed ?

- Any party seeking liability protection as a bona fide prospective purchaser (including eligible Brownfields grantees), contiguous property owner, or innocent landowner must perform all appropriate inquiries **before acquiring the property.**
- All appropriate inquiries must be conducted or updated **within one year prior to date of acquisition.**
- Certain aspects must be conducted or updated within **180 days prior to the date of acquisition** (interviews, records review, site inspection, lien search)

# Who Can Perform AAI?

- **Person who supervises or oversees the conduct of Phase I ESA must meet the definition of Environmental Professional (EP) in the AAI final rule**
- **A person who does not qualify as an EP may assist in the conduct of a Phase I ESA if he or she is under the supervision or responsible charge of an EP**



# AAI Final Rule: Objectives

- Identify **conditions indicative** of releases or threatened releases of hazardous substances
- Identify particular information:
  - 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

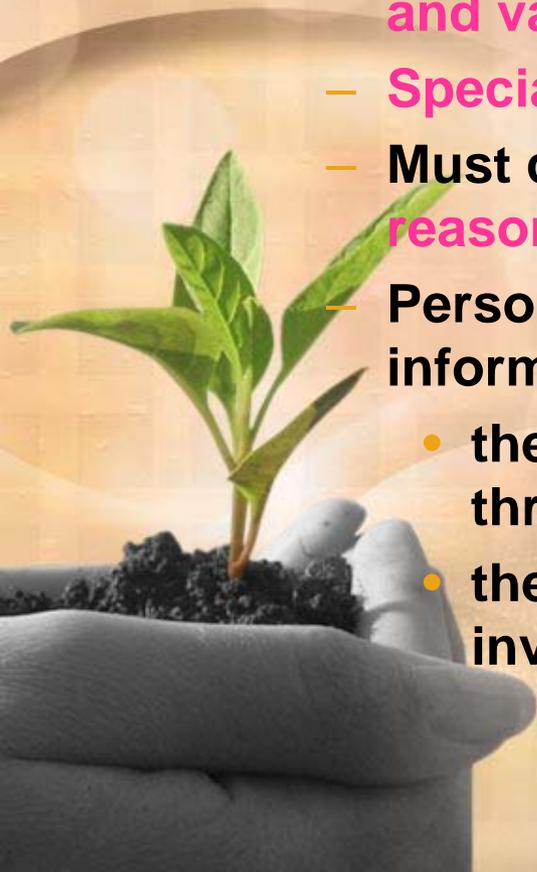
- **Interviews** with past and present owners, operators, and occupants
- Reviews of **historical sources of information**
- Reviews of federal, state, tribal, and local **government records**
- Reviews of **activity and use limitations**
- **Visual inspections** of the facility and of adjoining properties



# And, Some Other Things...

## Retention of AAI Considerations from 1986 SARA Amendments:

- Relationship between purchase price and value of property, if not contaminated
- Specialized Knowledge of purchaser
- Must consider information that is commonly known and reasonably ascertainable within the local community
- Persons conducting AAI must take into account all information collected and consider:
  - the degree obviousness of the presence or releases or threatened releases at subject property, and
  - the ability to detect contamination by appropriate investigation



# Data Gaps

- EP must identify data gaps that affect his or her ability to identify conditions indicative of releases or threatened releases of hazardous substances on, at, in, or to the subject property.
  - EP must comment on significance of data gaps.
- Sampling and analysis may be prudent to address data gaps, but not required.

# AAI Written Report

- **Results of a Phase I ESA must be documented in a written report**
- **Format, structure, length of the written report - not specified in regulation**
- **Report must be signed by the Environmental Professional**
- **Report must include an opinion as to whether the inquiry has identified conditions indicative of releases or threatened releases of hazardous substances**

# References:

## ASTM E1527-05 and E2247-08

- Final rule references the **ASTM E1527-05** and the **ASTM E2247-08** standards as consistent and compliant with the regulatory standards.
- Site assessments (AAI) conducted according to these standards will be recognized as compliant with final rule.



# RECAP – Please Remember

- Applicants for Brownfields **Cleanup Grants**, RLF subgrants, and RLF loans:
  - Must demonstrate they are not liable for the contamination to be addressed by grant monies.
- Recipients of Brownfields **Assessment Grants**:
  - Must conduct assessments in compliance with the All Appropriate Inquiries Rule.



# States Conducting Assessment with 128(a) funds

- Statute does not require assessments conducted using 128(a) funds to be done in compliance with the All Appropriate Inquiries Rule.
- However, if a state does not conduct an assessment in compliance with AAI, the community or applicant may lose the ability to apply for a brownfields cleanup grant in the future (i.e., community will not be able to demonstrate that it is not liable for contamination)



# Additional Information

- EPA Brownfields and Land Revitalization website: [www.epa.gov/brownfields](http://www.epa.gov/brownfields)
- Contacts:
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