

The Draft Proposal Guidelines for Brownfields Assessment, Revolving Loan Fund, and Cleanup Grants posted on EPA's brownfields website and dated August 25, 2003, “reserved” a portion of Appendix 3, *Guidance on Sites Eligible for Brownfields Funding Under CERCLA Sec. 104(k)* pertaining to paragraph 3.3.2 *Contamination by Petroleum or Petroleum Product*. EPA is removing the reserve and providing additional information for applicants submitting proposals for petroleum assessment, revolving loan fund, and cleanup grants.

Two (2) changes were made to Appendix 3: *Guidance on Sites Eligible for Brownfields Funding Under CERCLA Sec. 104(k)* pertaining to paragraph 3.3.2 *Contamination by Petroleum or Petroleum Product*. These changes are identified in **\*UNDERLINE/ITALIC/BOLD.**

### **3.3.2 Contamination by Petroleum or Petroleum Product**

Petroleum-contaminated sites (except those sites receiving LUST trust fund monies) may be eligible for brownfields funding if the applicant can provide information that will enable EPA or the state to make certain statutory determinations, as described in *Appendix 4*. (EPA will make the statutory determinations for tribes).

Petroleum-contaminated sites (or portions of properties contaminated with petroleum) that are eligible for brownfields funding include certain sites that are not underground storage tank (UST) sites. Petroleum is defined under CERCLA as “crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under that section.”

For a petroleum contaminated site(s) that otherwise meets the definition of a brownfields site to be eligible for funding, EPA **or the state must determine:**

1. the site is of “relatively low risk” compared with other “petroleum-only” sites in the state; and
2. there is no viable responsible party; and
3. funding will be used by a party that is not potentially liable for the petroleum contamination to assess, investigate, or clean up the site.

In addition, petroleum-contaminated sites must not be subject to a corrective action order under the Resource Conservation and Recovery Act (RCRA) §9003(h).

***\*With the exception of Tribes, applicants must first request that their state make these determinations. If the state is unable to make the determinations in time to meet the application deadline, the applicant may request that EPA make the determinations. The applicant must make this request to EPA no later than 2 weeks prior to the application deadline.***

In the case of proposals that include requests for an assessment or direct cleanup grant to address petroleum-contaminated sites, applicants must provide information in their proposal indicating whether the site meets each of the criteria listed above. If EPA awards an applicant a revolving loan fund grant, the state or EPA must make the same determinations for site(s) that will be cleaned up under a loan or subgrant. These criteria are explained below.

**Note: A determination by the Administrator or a state under CERCLA section 101(39)(D) for the purpose of brownfields funding does not release any party from obligations under the Resource Conservation and Recovery Act, the Clean Water Act, the Oil Pollution Act, the Safe Drinking Water Act, the Clean Air Act, or any other federal or state statute or regulation, or under the common law.**

“Relatively Low Risk”:

Applicants whose brownfield site(s) include properties or portions of properties contaminated with petroleum or petroleum products must provide information in their proposal indicating that the property represents a relatively low risk (compared to other petroleum-only sites). Our preliminary view is that the following types of petroleum-contaminated sites are high risk sites, or are not of “relatively low risk.” Our preliminary view is that petroleum-contaminated sites that do not fall within the scope of high risk sites will be considered to be “relatively low-risk” sites.

- “High risk” sites currently being cleaned up using LUST trust fund monies.
- Any petroleum-contaminated site that currently is subject to a response under the Oil Pollution Act (OPA).

Note: Any site that does not fall under any of the provisions listed above would be considered to be of relatively low risk for purposes of determining eligibility for a brownfields grant.

“A Site for Which There is No Viable Responsible Party”

**\*EPA or the State is required to determine that there is no “viable responsible party” that can address the petroleum contamination at the site. This determination is based on both viability and responsibility. If EPA or the State identifies a viable responsible party, then EPA cannot make the grant.**

**Solely for the purpose of EPA’s awarding of a Brownfields petroleum grant, a viable party exists if, at the time EPA awards the grant, ALL of the following factors are present:**

**(1) a party is subject to either:**

**(a) a judgment rendered in a court of law or an administrative order issued by an administrative body that would require that party to assess, investigate, or**

clean up the site; or  
(b) a pending or imminent enforcement action brought by Federal or State authorities, or is party to a citizen suit, that would, if successful, require that party to assess, investigate, or clean up the site;

and

(2) that party is financially capable of satisfying obligations under Federal or State law to assess, investigate or clean up the site. For example, a dissolved corporation will generally not have the legal capacity to satisfy its obligations. Similarly, a party that is in bankruptcy or receivership is unlikely to have adequate financial resources to satisfy its obligations.

“Cleaned Up by a Person Not Potentially Liable”:

Brownfields funding may be awarded to eligible entities for the assessment and cleanup of petroleum-contaminated sites in those instances where the eligible entity has not caused or contributed to the petroleum contamination. When responding to the threshold criteria in their funding proposals, applicants are asked to indicate whether or not the applicant owns the site or sites for which funding is requested and describe whether the applicant caused or contributed to the petroleum contamination or other environmental concerns at the site(s).

“Is not subject to any order issued under §9003(h) of the Solid Waste Disposal Act”:

Proposals that include requests for an assessment or direct cleanup grant to address petroleum-contaminated sites must not be subject to a corrective action order under a Resource Conservation and Recovery Act (RCRA) §9003(h). If EPA awards an applicant a revolving loan fund grant, the State or EPA must make the same determination for site(s) that will be cleaned up under a loan or subgrant.