CERCLA Liability and Land Banks

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Brownfields
EPA’s Brownfields Program is designed to empower states, communities, and other stakeholders in economic redevelopment to work together in a timely manner to prevent, assess, safely clean up, and promote sustainable reuse of brownfields.

The Program provides financial and technical assistance for brownfield revitalization, including grants for:

- Environmental Assessment
- Cleanup
- Job Training
- Area Wide Planning
EPA works everyday to protect and support the sustainable growth of States, Tribes, and Communities
EPA's Brownfields investments have leveraged about $20 billion in cleanup and redevelopment funding from a variety of public and private sources and have resulted in 80,000 jobs. EPA has awarded almost a $1 billion of Assessment, Cleanup and Revolving Loan Grants.
EPA involves, educates, and empowers communities to improve their environment

Community members are part of the cleanup process. They are also involved in the reuse of contaminated sites.
All of this work is done in accordance to the CERCLA/ Superfund Law
What is CERCLA Liability?

- 1980 CERCLA/Superfund Law established a strict joint and severable liability system and provides for robust enforcement authorities to compel the clean up of contaminated sites.

- 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.
Brownfields Amendments to CERCLA

• 2002 Small Business Liability Relief and Brownfields Revitalization Act amended CERCLA and provided liability protection for certain types of owners.
  
  ➢ Innocent land owners
  ➢ Contiguous property owners
  ➢ Bona fide prospective purchasers
  ➢ Local governments who acquire property “involuntarily”
Involuntary Acquisition by Local Governments

- Involuntary acquisition through
  - Tax foreclosure
  - Bankruptcy
  - Escheat
  - Abandonment
  - Eminent Domain (sometimes)
Can Land Banks Acquire Properties Involuntarily?

- **Maybe.** EPA needs to determine whether a land bank is offered liability protection by being exempt from the definition of “Owner or Operator” for involuntary acquisition by virtue of an entity’s function as sovereign.

- **Best Bet:** Become a Bona Fide Perspective Purchaser (BFPP) by conducting All Appropriate Inquiry.
  - Must do Phase I Assessment
  - Disposal of hazardous substances must have occurred before LB took property
  - LB has “no affiliation” with liable or potentially liable party
**How to become a BFPP**

- **Phase I Assessment** in compliance with ASTM 1527-13
- **Phase II Assessment** (not required for AAI but entity can be held liable for contamination it should have been aware of)
  - Purchase property with “eyes wide open”
- **Meet “Continuing Obligations”**
  - Comply with land use restrictions
  - Take “reasonable steps” to prevent release of hazardous substances
  - Provide full cooperation, assistance, and access
  - Comply with information requests
  - Provide legally required notices
Notes:

- Phase I assessment is good for 1 year but must be updated if it is > 180 days old. Update is good for an additional 180 days.

- Multiple property transactions can be made within the lifetime of a Phase I assessment
  - ie. transfer of property to LB and then to municipality within 180 days of Phase I completion or update does not require a new Phase I
VAP Sites Protected From CERCLA Enforcement

- CERCLA Section 128(b)
  - Protects local governments and other entities from EPA enforcement when they comply with a state response program and are conducting or have completed a clean up at “an eligible response site” - Brownfields.
  - Cleaning up site in compliance with Ohio’s Voluntary Action Program (VAP) provides U.S.EPA enforcement protection.
  - Does not protect entity from 3rd party litigation.
Land Banks are Eligible for BF Grants

- For U.S. EPA Brownfield Grants Region V Considers a Land Banks as a:
  - Land Clearance Authority or quasi-governmental authority that operates under the supervision and control of, or as an agent of, a general purpose unit of local government and meets the definition of an eligible entity as set forth in CERCLA Section 104(k)
Land Banks are Eligible for BF Grants

- Land Banks are clearly eligible to apply for Brownfields Community Wide Assessment grants because they are not site specific.

- For Site Specific Assessment Grants LBs should follow AAI before acquiring site or apply for grant for a site owned by an eligible entity within the LSs jurisdiction (grant applicant is not required to own property being assessed).

- Land Banks should complete AAI/Phase I assessment before purchasing a property they want to clean up with BF Cleanup Grant (property ownership is a requirement for Cleanup Grant Application)
Weigh Your Risks Before Taking Property

- What are the chances that a commercial industrial property would have enough contamination to draw the attention of U.S.EPA?

- Historically, for the purposes of Brownfields Grant eligibility Region V has determined that the governmental or quasi-governmental entity that takes property from the foreclosure list has done so involuntarily. HOWEVER, subsequent transactions have been determined to be voluntary.
Funding Sources for Phase I Assessments

City, County, or Planning Agency with BF Assessment Grant

Ohio EPA Targeted BF Assessment Program—LB can request a Phase I be completed by Ohio EPA

U.S.EPA - Targeted BF Assessment Program (usually Phase IIs only)

Ohio EPA also has Petroleum Assessment Grant

LBs can apply for U.S.EPA BF Assessment and Clean up Grants
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U.S. EPA Brownfields Grants
An Overview

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Types of Federal Brownfields Grants

- Assessment
- Clean Up
- Targeted Brownfields Assessments (TBA)
- Revolving Loan Fund
- Area Wide Planning
- Environmental Workforce Development and Job Training*
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Who’s Eligible to Receive BF Grant Funds?

- Tribes, Governmental, and Quasi-Governmental Agencies
- Non-Profits: only eligible for clean up grants
Assessment Grants

• How Much Money?
  ➢ Single applicant
    ■ Up to $200K
    ■ Waiver up to $350,000 for site specific grant
  ➢ Coalition of 3 - 5 applicants
    ■ Up to $1M
Assessment Grants

- Phase I, Phase II, Remedial Action Planning
  - Grantee can do assessments for private entities
  - Example – City pays for Phase I and/or Phase II on property so potential purchaser can obtain financing

- 3 Year Project Period

- Petroleum or Hazardous Substance
Assessment Grants

- Community Wide or Site Specific
  - Community Wide offers more flexibility
  - Private developer can ask public entity to get an assessment grant to be used on their site.
  - Up to $350K for site specific grant

- No Cost Share Requirement

- Grantee Does Not Have to Own Site
Clean Up Grants

- Up to $200,000
- Petroleum or Hazardous Substance
- 3 year Project Period
- Limited Sampling, Remedial Action Planning, Clean Up
Clean Up Grants

- Only Site Specific

- 20% Cost Share Requirement
  - Cost share can come from private entity

- Grantee Must Own Site
  - Okay to flip title to the public entity for clean up then back to private entity

- Tribes, Governmental and Quasi-Governmental Agencies, and Non-Profits are Eligible Applicants
Uses Common to all Grants

- Local Gov’t can use up to 10% of grant for:
  - Health monitoring of population exposed to contaminants
  - Monitoring and enforcement of institutional controls at a brownfields site
  - Program development – such as writing BF ordinances
Uses Common to All Grants

- Programmatic Costs
  - Time to oversee projects and meet reporting requirements

- “Portion” of grant can be used to purchase environmental liability insurance
How/When to Apply

- Guidelines
- [www.epa.gov/brownfields](http://www.epa.gov/brownfields), then click ‘Types of Grants Funding’

- Grant guidelines were published in the Federal Register on October 12th; proposal submission deadline is December 20th
Awards

- Award Announcements in May/June 2017

- Cooperative Agreements Signed (actually get money) by Oct 30, 2017
  - Pre-award costs possible up to 90 day prior to award, with approval
Targeted Brownfields Assessment (TBA)

“A service provided by the U.S EPA (or Ohio EPA) to conduct an all-appropriate inquiry (or VAP) Phase I ESA and/or Phase II ESA which documents environmental conditions at a property under consideration for development.”
Targeted Brownfields Assessment (TBA)

- Considered on a site-by-site basis
- Two sources of money (state and federal)
- U.S. EPA and OEPA coordinate to fund the projects
Additional Information

- Additional Information available at www.epa.gov/brownfields
  - Federal Register Notice
  - Fact sheets

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