



**WV BROWNFIELDS**  
**REVOLVING FUND**

# GUIDANCE MANUAL

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Managed by the West Virginia Department of Environmental Protection

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# OVERVIEW

## Overview

### **Background**

The West Virginia Brownfields Revolving Fund (BRF) was authorized by the WV Legislature through the 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 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. When appropriate, the BRF may also offer subgrants to eligible local government entities, quasi-government agencies, and nonprofit organizations; private entities are not eligible for subgrants.

Financing the cleanup and redevelopment of brownfields can be 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 throughout the state 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 BRF has been capitalized by a U.S. EPA Brownfields RLF Grant in the amount of \$820,000. As required by the grant's cooperative agreement, \$750,000 is allocated for cleanup of hazardous substances.

# ELIGIBILITY

## Eligibility

Both the loan/subgrant applicant and brownfield site must meet eligibility requirements to receive BRF monies. To document eligibility of the applicant and the brownfield site, prospective applicants must submit a completed BRF Threshold Eligibility Questionnaire (*Attachment 1*) to the BRF Program Manager for review and approval prior to submitting a loan/subgrant application. Eligibility criteria are based on requirements outlined by the Voluntary Remediation and Redevelopment Act (W. Va. Code § 22-22), 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. Subgrants are available only to eligible local government entities, quasi-government agencies, and nonprofit organizations. To be eligible for BRF funding, an applicant must:

1. Be a participant in the WV 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.;
2. Have legal title to the subject property through fee simple ownership;
3. Be authorized to incur debt and enter into a legally binding loan agreement;
4. Provide proof of ability to repay the loan; and
5. 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's All Appropriate Inquiry Rule.

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

- Applicant or any member of his or her 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.
- Applicant is currently out of compliance with a Voluntary Remediation Agreement executed as part of a WV Voluntary Remediation Program project.

## Eligible Sites

Sites must meet the U.S. EPA'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's 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.
- Property is subject to the jurisdiction, custody, or control of the United States government.

*Attachment 2* includes a fact sheet from the U.S. EPA that provides additional information regarding CERCLA liability and eligibility for U.S. EPA Brownfields Grants.

# USE OF FUNDS

## Use of Funds

### Eligible Costs

Borrowers may use a cleanup loan/subgrant 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 draining 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 WV 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/subgrant funds for any of the following activities:

- Conducting environmental assessment activities not part of the Voluntary Remediation Agreement.
- 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., marketing of property or construction of a new facility).
- 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.
- Covering administrative or indirect costs.



# LOAN CONDITIONS

## Loan Conditions

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

### Loan Fees

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 the total amount of 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.

<b>Applicant</b>	<b>Example Rate</b>
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 comes first.

- In cases of Asbestos Containing Materials (ACM) abatement, a Report of ACM Abatement Completion is required to document compliance with state and federal ACM abatement regulations and policies. This includes all information required by the WV Department of Health and Human Resource's Radiation, Toxics, and Indoor Air Division, including, at a minimum, abatement contractor licenses/insurance; project design; site workers license/fit tests; Notification of Abatement, Demolition, or Renovation; ACM disposal manifests; and air clearance monitoring report.
- In cases of Lead-Based Paint (LBP) abatement, a Report of LBP Abatement Completion is required to document compliance with state and federal LBP abatement regulations and policies. This includes all information required by W. Va. Code §§ 16-35-5, 16-35-6, and 16-35-9, pertaining to contractor licenses, duties, and notification, as well as 40 CFR 745, including, at a minimum, certification of compliance with the Recordkeeping and Reporting Requirements described in 40 CFR 745.86.

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 WVDEP to defer payment for a maximum of two (2) years beyond when the standard repayment period would begin (six months after substantial completion of remediation). Deferments will be considered by 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

# LOAN CONDITIONS

the loan will be amortized within the remaining term of the loan. Any interest accrued on the deferment will be capitalized beginning 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. A deed of trust must be executed for the subject brownfield site, or other collateral of equal or greater value will be obtained to secure the loan.

# PROGRAMMATIC REQUIREMENTS

## Programmatic Requirements

### **Enrollment in WV Voluntary Remediation Program**

Unless the remediation is limited to Asbestos Containing Materials and/or Lead-Based Paint building materials and does not include impacted environmental media such as soil, groundwater, etc., sites receiving funding from the Brownfields Revolving Fund must be enrolled in the WV 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 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 nonfederal source, and all activities being funded by the match must be eligible costs as defined in this guidance.

In addition to those activities previously listed, costs associated with travel and training at the WV Brownfields Conference and National Brownfields Conference may be applied to the 20% match.

### **Public Notification and Community Relations Plan**

Public involvement is essential for a successful brownfield cleanup and required by both the WV VRP and U.S. EPA Brownfields Program. Local communities have a vested economic and social interest in brownfield redevelopment, and a process involving the community in the decision making from the outset will help ensure that the cleanup and redevelopment addresses community needs and has community support.

The VRP requires public notification and involvement for all projects. This includes 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 engaging the community when the applicant considers remediation goals with a carcinogenic risk above a defined threshold.

In addition to the VRP requirements described above (if applicable), each project funded by the BRF must have a site-specific community relations plan that includes public involvement

# PROGRAMMATIC REQUIREMENTS

activities described in Section 15 of the Voluntary Remediation and Redevelopment Rule (60CSR3). These activities include:

- Erecting a sign on the brownfield site that informs the community that the site is entering the VRP and funded through the BRF.
- Issuing a notice of application to the VRP, to be published once a week for four (4) 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.
- Providing a 30-day public comment period and holding an informational meeting in the community where the brownfield is located. The information meeting must address how remediation concerns apply to the site, including risk issues and how the remedy will address site risks.

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,

# PROGRAMMATIC REQUIREMENTS

including excavation and removal of hazardous substances; construction of caps, barriers, and 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:

- 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.

*Attachment 3* includes a fact sheet from the U.S. EPA that provides additional information regarding the Davis-Bacon Act and its applicability to brownfield cleanup projects.

## **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 U.S. 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 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 the NHPA and Section 7(a)(2) of the ESA prior to completing a loan/subgrant application.

# PROGRAMMATIC REQUIREMENTS

## Reporting

During cleanup, borrowers are required to comply with 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:

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

# APPLICATION AND AGREEMENT PROCESS

## Application and Agreement Process

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

1. Applicant requests a pre-application meeting with WVDEP.
2. If WVDEP makes a preliminary determination that the applicant and the site are eligible to apply for a BRF loan, the applicant must enter the VRP if the remediation includes impacted environmental media (e.g., soil, groundwater, etc.). The requirement to enter the VRP does not apply where remediation is limited to Asbestos Containing Materials 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 Service, 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 WVDEP, the applicant may submit a BRF Loan Application.
6. The WV Economic Development Authority (WVEDA) reviews the BRF Loan Application to determine applicant's ability to service the debt and performs due diligence. WVEDA will specifically review:
  - Applicant's creditworthiness
  - Applicant's capacity to repay obligations
  - Applicant's proposed collateral and associated value
  - Applicant's character
  - Conditions of the local economy and industry



## APPLICATION AND AGREEMENT PROCESS

7. Within 45 days of receiving a BRF Loan Application, 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 WVDEP in writing.
8. Upon request, WVDEP will issue a binding commitment letter to the applicant.
9. After application is approved and accepted, and upon receipt of authorization, applicant will advertise for bids.
10. After a bid is accepted, 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 an annual financial audit to WVDEP to document their financial stability.

### **Delinquent Loans**

Delinquent loans are loans that are 30 days in arrears. WVDEP, as the administrator of the BRF, will provide its best effort to collect all monies lent under the BRF. If the applicant is more than 30 days in arrears, they must notify WVDEP of a plan to become current, which must be approved by the WVDEP Fund Manager. WVDEP will monitor the monthly repayment activity of all outstanding loan accounts and initiate normal collection procedures (e.g., notice for payments, collection calls and other legal means necessary to collect the outstanding debt). In the event of a loan default, 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, WVDEP will document the nexus between the amount paid to the borrower and the cleanup that took place prior to the default, secure the site to ensure public safety, and inform the U.S. EPA Project Officer.

# LOAN SERVICING

## **Collection Actions**

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

# SUBGRANTS

## Subgrants

The BRF has limited funding to award cleanup subgrants to eligible entities.

### **Eligible Entities**

Only local government entities as defined under CERCLA § 104(l)(1) or nonprofit 501(c)(3) organizations as defined in Section 4(6) of the Federal Financial Assistance Management Improvement Act of 1999 are eligible to receive subgrants. Nonprofit organizations described in Section 501(c)(4) of the Internal Revenue Code that engage in lobbying activities as defined in Section 3 of the Lobbying Disclosure Act of 1995 are not eligible for subgrants.

### **Eligible Projects**

Subgrants are exclusively for community projects that:

- Facilitate the creation of, preservation of, or addition to a park, greenway, undeveloped property, recreational property, or other property used for nonprofit purposes;
- Meet the needs of a community that has the inability to draw on other sources of funding for environmental remediation and subsequent redevelopment of the area in which a brownfield site is located because of the small population or low income of the community; and/or
- Facilitate the use or reuse of existing infrastructure.

### **Programmatic Requirements**

Subgrant recipients are subject to the same programmatic requirements as loan recipients. In addition, subgrant recipients are required to comply with applicable U.S. EPA assistance regulations (2 CFR Parts 200 and 1500), and all procurements conducted with subaward funds must comply with procurement standards of 2 CFR 200.317 through 200.326, as applicable.

# CONTACT INFORMATION

## Contact Information

The Brownfields Revolving Fund is a component of the WV Department of Environmental Protection's Brownfields Assistance 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 57<sup>th</sup> Street SE

Charleston, WV 25304

[www.dep.wv.gov](http://www.dep.wv.gov)

### BRF Program Manager

**Contact:** Erin Brittain, CHMM

**Phone:** 304-926-0499, ext. 30201

### BRF Fund Manager

**Contact:** Katheryn Emery, P.E.

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# APPENDICES

## Appendices

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

# APPENDIX A

## Appendix A: Acronyms

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AAI	All Appropriate Inquiries
ABCA	Analysis of Brownfields Cleanup Alternatives
ACM	Asbestos Containing Materials
BFPP	Bona Fide Prospective Purchaser
BRF	Brownfields Revolving Fund
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
CPO	Contiguous Property Owner
DBE	Disadvantaged Business Enterprise
EPA	United States Environmental Protection Agency
ESA	Endangered Species Act
ILO	Innocent Landowner
LBP	Lead-Based Paint
LRS	Licensed Remediation Specialist
LUST	Leaking Underground Storage Tank
NHPA	National Historic Preservation Act
NPL	National Priorities List
RCRA	Resource Conservation and Recovery Act
RLF	Revolving Loan Fund (Grant)
SHPO	State Historic Preservation Office
VRA	Voluntary Remediation Agreement
VRP	Voluntary Remediation Program
WVDEP	West Virginia Department of Environmental Protection

# APPENDIX A

WVEDA      West Virginia Economic Development Authority



# APPENDIX B

## Appendix B: Definitions

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### All Appropriate Inquiry (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. The U.S. 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 U.S. EPA’s final rule, and may be used to comply with the provision of the final rule 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

## **Bone Fide Prospective Purchaser (BFPP)**

A CERCLA liability protection for property owners that have acquired property after January 11, 2002. The specific requirements 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. (See CERCLA § 101(39)(A).)

## **Certificate of Completion (COC)**

A document issued by 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 expects 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. 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 as a CPO. Note that a purchaser who does not qualify as a CPO may still qualify as a bona fide prospective purchaser.

## **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

## APPENDIX B

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 ILO.

### **Licensed Remediation Specialist (LRS)**

An individual certified by WVDEP to perform professional environmental services and to supervise the remediation of contaminated sites through the WV 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 the authority to control hazardous waste from the “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.

### **Revolving Loan Fund (RLF)**

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

# APPENDIX C

## Appendix C: Resources

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

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>

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

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

Resource Conservation and Recovery Act (RCRA)

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

U.S. EPA Brownfields Program

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

U.S. EPA Disadvantaged Business Enterprise (DBE) Program Resources

<https://www.epa.gov/resources-small-businesses/disadvantaged-business-enterprise-program-resources>

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>

# APPENDIX C

WVDEP Office of Environmental Remediation

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

# ATTACHMENTS

## Attachments

- Attachment 1:       BRF Threshold Eligibility Questionnaire
- Attachment 2:       Fact Sheet – Brownfields Grants, CERCLA Liability, and AAI
- Attachment 3:       The Davis-Bacon Act and Brownfields

# ATTACHMENT 1

## **Attachment 1: BRF Threshold Eligibility Questionnaire**

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The BRF Threshold Eligibility Questionnaire must be completed and approved by the BRF Program 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

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	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.

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Printed Name

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Signature

Date

## ATTACHMENT 2

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

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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 purchaser, 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. EPA provides details about CERCLA liability and eligibility for U.S. EPA Brownfields Grants.



# EPA Brownfields Grants, CERCLA Liability, and All Appropriate Inquiries

The U. S. Environmental Protection Agency's (EPA) Brownfields Program provides grant funds for brownfields assessments, cleanup and capitalization of revolving loan funds. Eligible entities for Brownfield Grants include states, tribes, local governments, regional governments, quasi-governmental entities, and nonprofit organizations.<sup>1</sup>

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 contamination at the site or that they do not have to meet the requirements for asserting an affirmative defense to CERCLA liability.

## Who can be found liable for contamination at a brownfield site?

Under CERCLA, state and local governments, nonprofit organizations, and other entities can be found to be liable by virtue of property ownership or by virtue of their actions with respect to a site. For sites with a release or threatened release of hazardous substances, potentially responsible parties include any person or party that:

- 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.

## 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 2002 Small Business Liability Relief and Brownfields Revitalization Act (Brownfields Amendments) amended CERCLA to provide liability protections for certain landowners and potential property owners. These liability protections apply to certain property owners if they comply with specific provisions in the statute, including conducting [All Appropriate Inquiries \(AAI\)](#) for present and past use of the property. The 2018 Brownfields Utilization, Investment and Local Development (BUILD) Act further amended CERCLA by, in part, clarifying the liability protections for state or local governments, for parties with tenancy or leasehold interests, and for Alaska Native villages and Native Corporations.

<sup>1</sup> 501(c)(3) organizations may apply for Brownfields Assessment, Cleanup, and Revolving Loan Fund Grants. Other nonprofit organizations may only apply for Brownfields Cleanup Grants. More information is available in most recent [EPA Brownfields Cleanup Grant Guidelines](#).



Eastern Manufacturer Brewer, Maine, prior to cleanup



Eastern Manufacturer Brewer, Maine, after cleanup

## Do I need to be concerned about CERCLA liability if I am applying for a Brownfields Grant?

Yes. Brownfield Grant recipients are prohibited from using grant money to pay response costs at a brownfield site for which the recipient is potentially liable under CERCLA.

All Brownfield Grant applicants who may be 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.

Cleanup Grant applicants, in particular, must note this prohibition. Cleanup Grant applicants are required to own a site to receive brownfields funding to address contamination at the property. Cleanup Grant applicants must demonstrate they meet one of the liability protections because owners of contaminated property may be liable under CERCLA.

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 have to demonstrate that they qualify for liability protection.

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

## What are the different ways I can demonstrate that I am not liable under CERCLA?

CERCLA provides several ways for eligible entities to demonstrate that they are not liable for the contamination at the site.

Brownfield 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, regardless of intent.

## Exemptions to CERCLA liability:

The CERCLA statute exempts certain entities from liability when properties are acquired under specific circumstances and when the entity did not cause or contribute to the contamination. Exempt entities include the following:

- Units of state or local government that acquire ownership or control through seizure or otherwise in connection with law enforcement activity, or through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government acquired title by virtue of its function as sovereign, per CERCLA Section 101(20)(D).
- Alaska Native villages and Native Corporations that acquired property via a conveyance from the U.S. government under the Alaska Native Claims Settlement Act, per CERCLA Section 101(20)(E).
- CERCLA provides an exemption for eligible entities (such as a state or local government) that acquired property prior to January 11, 2002 from meeting the requirements for asserting an affirmative defense to CERCLA liability, per CERCLA Sections 104(k)(2)(C) and 104(k)(3)(E), provided that the eligible entity has not caused or contributed to a release or threatened release of a hazardous substance at the property.

Indian tribes are not considered to be liable under CERCLA.

## CERCLA liability protections available to landowners:

CERCLA provides protection from liability for certain parties, provided they comply with specific criteria. Parties who may claim liability protection under CERCLA include the following:

- Innocent landowners (ILOs), per CERCLA Section 101(35)(A) and 107(b)(3).
- Contiguous property owners (CPOs), per CERCLA Section 107(q).
- Bona fide prospective purchasers (BFPPs), per CERCLA Sections 101(40) and 107(r).
- Government entities that acquire property through an involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation, per CERCLA Section 101(35)(A)(ii).

To be eligible for liability protection under CERCLA as an ILO, CPO, or BFPP, prospective property owners must:

- Conduct AAI in compliance with the Code of Federal Regulations (CFR), per 40 CFR Part 312, before acquiring the property.
- Not be affiliated with any person who is potentially liable through any familial relationship or any contractual, corporate or financial relationship (other than a relationship created by the instruments by which title to the property is conveyed or financed or by a contract for the sale of goods or services).<sup>2</sup>
- Comply with all continuing obligations after acquiring the property, per CERCLA Sections 101(40)(B) (BFPP), 107(q)(A) (CPO), and 101(35)(A) and (B) (ILO) (see next section, "What are continuing obligations?").

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

## What are continuing obligations?

After acquiring a property, to maintain liability protections, landowners must comply with "continuing obligations" during their property ownership. To comply, landowners must:

- Demonstrate that no disposal of hazardous substances occurred at the facility after acquisition (for BFPPs and ILOs).
- Comply with land use restrictions and not impede the effectiveness or integrity of institutional controls.

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<sup>2</sup> The innocent landowner provision does not contain similar "no affiliation" language. In order to meet the statutory criteria of the innocent landowner liability protection, however, a person must establish by a preponderance of the evidence that the act or omission that caused the release or threat of release of hazardous substances and the resulting damages were caused by a third party with whom the person does not have an employment, agency, or contractual relationship. The term "contractual relationship" for the purpose of the innocent landowner liability protection is defined in CERCLA § 101(35)(A).

- Take “reasonable steps” to stop continuing releases, prevent threatened future releases, and prevent or limit human, environmental, or natural resources exposure to earlier releases.
- Provide full cooperation, assistance, and access to persons authorized to conduct response actions or natural resource restoration.
- Comply with any request for information and administrative subpoenas (for BFPPs and CPOs).
- Provide all legally required notices with respect to the discovery or release of any hazardous substance (for BFPPs and CPOs).

## What are “All Appropriate Inquiries”?

AAI is the process of evaluating a property’s environmental conditions, which may be relevant to assessing potential liability for any contamination, per CERCLA Section 101(35)(B).

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?

Some aspects of AAI must be conducted or updated within one year before the date of acquisition of a property and other aspects within 180 days before the date of acquisition.

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 conducts the AAI and signs the final required report must meet the definition of an “environmental professional” defined 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.

## Further information

For more information about brownfield grants and AAI, visit the EPA Brownfields website at <http://www.epa.gov/brownfields>.

For more information about CERCLA’s liability protections, please visit EPA’s Cleanup Enforcement website at <https://www.epa.gov/enforcement/addressing-liability-concerns-support-cleanup-and-reuse-contaminated-lands>.

# ATTACHMENT 3

## Attachment 3: The Davis-Bacon Act and Brownfields

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The Davis-Bacon Act applies to U.S. EPA Brownfields Grants by way of section 104(g) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), under which:

*“...all laborers and mechanics employed by contractors or subcontractors employed in the performance of construction, alteration, or repair work funded in whole or in part [by brownfields grants] shall be paid locally prevailing wages.”*

The Davis-Bacon Act applies to all construction, alteration, and repair (including painting and decorating) contracts and subcontracts awarded with U.S. EPA grant funds. For cleanup activities funded through U.S. EPA Brownfields Revolving Loan Fund grants, recent and applicable wage rates from the U.S. Department of Labor must be incorporated into construction, alteration, and repair (including painting and decorating) solicitation and contracts.

The attached fact sheet produced by the U.S. EPA provides details about the Davis-Bacon Act and its applicability to brownfield cleanup projects.



# The Davis-Bacon Act and Brownfields

## Introduction

By their design, EPA Brownfields grants depend upon the efforts of a wide range of participants, including public- and private-sector entities who finance transformation of brownfields sites, as well as the individual workers and laborers on the front lines of cleanup and redevelopment. The U.S. government has laws in place to ensure that any worker involved in a federally-funded public works project is compensated in a fair and timely manner. This legislation, known as the Davis-Bacon Act, applies to EPA-funded brownfields cleanup activities and projects funded under EPA Brownfields Cleanup and Revolving Loan Fund (RLF) grants.

## Background on the Davis-Bacon Act

The Davis-Bacon Act was enacted in 1931 in response to the rampant unemployment of the depression era. At the time, the primary intent of the Act was to promote the hiring of skilled, local workers, by discouraging the import of laborers from other regions who would work for lower wages.

Since its enactment, Davis-Bacon has been amended three times, in 1935, 1964, and 1994. The Act was briefly suspended twice—in 1992 and 2005—to facilitate emergency response activities following Hurricanes Andrew and Katrina. The Act is administered and enforced by the Wage and Hour Division of the Employment Standards Administration, which falls under the U.S. Department of Labor (DOL).

## How Davis-Bacon Applies to Brownfields Grants Funded Through the American Recovery and Reinvestment Act

It should be noted that the same Davis-Bacon requirements apply to Brownfields Cleanup and RLF grants funded through the American Recovery and Reinvestment Act. There are no differences as to how Davis-Bacon requirements should be met for such grants.

## Overview of the Act

The Davis-Bacon Act applies to EPA Brownfields grants by way of section 104(g) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), under which:

*“...all laborers and mechanics employed by contractors or subcontractors employed in the performance of construction, alteration, or repair work funded in whole or in part [by Brownfields grants] shall be paid locally prevailing wages.”*

These locally prevailing wage rates are determined by the U.S. Department of Labor, and can be accessed in a searchable database at the following address: <http://www.access.gpo.gov/davisbacon/>.

The Act covers all contractors and subcontractors performing work on federally-funded or -assisted construction contracts in excess of \$2,000. While apprentices and trainees may be employed at less than predetermined rates, apprentices must be employed pursuant to an apprenticeship program registered with the Department of Labor or with a state apprenticeship agency recognized by the Department.

## How Does the Act Apply to Brownfields Projects?

The Davis-Bacon Act applies to all construction, alteration, and repair (including painting and decorating) contracts and sub-contracts awarded with EPA grant funds. For cleanup activities funded through EPA Brownfields Cleanup and Revolving Loan Fund grants, recent and applicable wage rates from the U.S. Department of Labor must be incorporated into construction, alteration, and repair (including painting and decorating) solicitation and contracts.

## How Davis-Bacon Applies to Cleanup of Petroleum-Contaminated Brownfields

Some cleanup activities at sites contaminated by petroleum are not subject to Davis-Bacon Act requirements. Such activities include site remediation through drilling temporary



Workers clean up petroleum at a brownfields site in Prineville, Oregon.

recovery wells, drawing out contaminated soil or water, treating the contaminated soil/water on site, removing the treatment technology and closing recovery wells, and restoration of the area surrounding tank removal that involves only filling and compaction of soil. However, the Davis-Bacon Act does apply to the following petroleum-related cleanup activities:

- 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 replacement.

Note: if a Brownfields grant recipient is uncertain about whether a cleanup activity falls under Davis-Bacon Act requirements, the recipient should discuss the situation with EPA before authorizing work on the site.

In specific legal terms, "the recipient must ensure that solicitations and contracts contain the clauses required by 29 CFR 5.5 and any applicable EPA guidance." Please note that EPA and the U.S. Department of Labor are responsible for overseeing Brownfields grantees' compliance with Davis-Bacon Act requirements, and EPA Regional project managers are available to assist grantees (and in the case of RLFs, subgrant recipients) in this regard.

RLF grantees may require that RLF borrowers and/or subgrantees perform portions of the Davis-Bacon Act requirements identified in the flow chart below.



For more detailed information, including copies of explanatory brochures and regulatory and interpretative materials, please refer to the links below or contact your local Wage and Hour Division office (a list of local Wage and Hour Division offices is available at <http://www.dol.gov/esa/whd/america2.htm>). A Wage and Hour Division help line is also available at 1-866-4US-WAGE (487-9243).

### Related Links

Davis-Bacon and Related Acts Home Page at the U.S. Department of Labor  
<http://www.dol.gov/esa/whd/programs/dbra/index.htm>

Davis-Bacon Act Compliance Guide  
(U.S. Department of Labor's Office of Compliance Assistance Policy)  
<http://www.dol.gov/compliance/guide/dbra.htm>

Additional Davis-Bacon Wage Determination Reference Material  
<http://www.access.gpo.gov/davisbacon/referencemat.html>



Brownfields cleanup in Boston, Massachusetts.

### Contact Information

EPA's Office of Brownfields and Land Revitalization (OBLR)  
<http://www.epa.gov/brownfields> • (202) 566-2777