

Information on Sites Eligible for Brownfields Funding under CERCLA § 104(k)

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1.1. Introduction

EPA will use the information below to determine if sites are eligible for brownfields grant funding under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) § 104(k).

Applicants requesting funding for a specific site(s) (i.e., applying for Site-specific Assessment Grants and Cleanup Grants) may use the information below in developing responses to the threshold criteria outlined in the Guidelines.

Current Brownfield Grant recipients managing Community-wide Assessment Grants (including Assessment Coalition Grants) Revolving Loan Fund (RLF) Grants, or Multipurpose Grants will submit site-specific eligibility determination requests during the cooperative agreement period of performance. EPA will use the information below to determine if the site is eligible for funding.

This information is used by EPA solely to make applicant and site eligibility determinations for Brownfield Grants and is not legally binding for other purposes including federal, state, or tribal enforcement actions.

1.2. General Definition of Brownfield Site

CERCLA¹ defines a “Brownfield Site” as:

“...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.”

Brownfield sites include residential, commercial, and industrial properties.

1.3. Additional Areas Specifically Eligible for Funding

CERCLA also identifies three additional types of properties that are specifically eligible for funding:

1. Sites contaminated by **controlled substances**.
2. Sites contaminated by **petroleum or a petroleum product**.
3. **Mine-scarred lands**.

See below for guidance on determining the scope of each of these three types of sites.

1.3.1. Contamination by Controlled Substance

Sites eligible for funding include real property, including residential property, that is contaminated by a controlled substance. A “controlled substance” is defined under the Controlled Substances Act as “a drug or other substance, or immediate precursor, included in Schedule I, II, III, IV, or V of Part B of this title (21 USC § 812). The term does not include distilled spirits, wine, malt beverages, or tobacco...” For example, sites eligible for brownfields grant funding may include private residences formerly used for the manufacture and/or distribution of methamphetamines or other illegal drugs where there is a presence or potential presence of controlled substances or pollutants, contaminants, or hazardous substances (e.g., red phosphorous, kerosene, acids).

1.3.2. Contamination by Petroleum or Petroleum Product

Petroleum-contaminated sites must meet certain requirements to be eligible for brownfields grant funding. 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 that otherwise meets the definition of a brownfield site to be eligible for funding, EPA or the state must determine:

1. There is no viable responsible party.
2. The site will not be assessed, investigated, or cleaned up by a person that is potentially liable for cleaning up the site.
3. The site must not be subject to a corrective action order under the Resource Conservation and Recovery Act (RCRA) § 9003(h).

¹ CERCLA as amended by the Small Business Liability Relief and Brownfields Revitalization Act enacted in 2002 and the Brownfields Utilization, Investment, and Local Development (BUILD) Act enacted in 2018.

Applicants applying for a Site-specific Assessment Grant or Cleanup Grant to address petroleum-contaminated sites must provide information in their proposal indicating whether the site meets each of the criteria listed above and respond to the threshold criteria outlined in the Guidelines.

For current recipients managing a Community-wide Assessment Grant, RLF Grant, or Multipurpose Grant, the state or EPA must make the same determinations for site(s) that will be addressed. These criteria are explained below.

Please note that states may, but are not required to, use this guidance to determine whether sites contaminated by petroleum or petroleum products are eligible for brownfields grant funding. States may apply their own laws and regulations, if applicable, to eligibility determinations under this section.

Note: A petroleum eligibility determination by EPA or a state under CERCLA § 101(39)(D) for the purpose of brownfields grant funding does not release any party from obligations under any federal or state law or regulation, or under common law, and does not impact or limit EPA or state enforcement authorities against any party.

“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. If EPA, or the state, identifies a party that is responsible for the activities proposed in the grant proposal/submitted for a site eligibility determination, and that party is financially viable, then the site is not eligible for funding and EPA cannot award the grant/approve the site for funding. This analysis is twofold - EPA or the state must first determine whether a responsible party exists and, if a responsible party is identified, then determine whether that party is viable for the activities identified in the grant proposal/submitted as part of a site eligibility determination. Applicants/recipients are responsible for providing information that demonstrates that the activities for which they seek funding have no viable responsible party.

A petroleum-contaminated site may be determined to have no responsible party if the site was last acquired (regardless of whether the site is owned by the applicant/recipient) through tax foreclosure, abandonment, or equivalent government proceedings, and that the site meets the criteria in (1) below. Any petroleum-contaminated site not acquired by a method listed above will be determined to have a responsible party if the site fails to meet the criteria in both (1) and (2) below.

1. No responsible party has been identified for the site through:
 - a. an unresolved judgment rendered in a court of law or an administrative order that would require any party (including the applicant/recipient) to conduct the activities (including assessment, investigation or cleanup) proposed in the grant proposal/submitted as part of a site eligibility determination;
 - b. an unresolved enforcement action by federal or state authorities that would require any party (including the applicant/recipient) to conduct the activities (including assessment, investigation, or cleanup) proposed in the grant proposal/submitted as part of a site eligibility determination; or

- c. an unresolved citizen suit, contribution action, or other third-party claim brought against the current or immediate past owner for the site that would, if successful, require the activities (including assessment, investigation, or cleanup) proposed in the grant proposal to be conducted/submitted as part of a site eligibility determination.

2. The current and immediate past owner did not dispense or dispose of, or own the subject property during the dispensing or disposal of, any contamination at the site, did not exacerbate the contamination at the site, and took reasonable steps with regard to the contamination at the site.² For purposes of the Brownfields Program, the current owner is the entity that will own the property at the time of proposal submission/submission of the site eligibility determination. (For Cleanup Grants, the current owner must be the applicant/recipient.)

If no responsible party is identified above, then the petroleum-contaminated site may be eligible for funding. If a responsible party is identified above, EPA or the state must next determine whether that party is viable. If any such party is determined to be viable, then the petroleum-contaminated site is not eligible for funding.

If there is a responsible party for the site, the applicant/recipients should explain what steps it took to determine a responsible party's financial status, and why the information presented indicates that the responsible party is not viable. A state making the "viable responsible party" determination for the applicant/recipient may use the standards contained in this document or its own standard. If a state is not making the determination or a tribe is the applicant/recipient, EPA will follow the standard set forth in this document. Note that any viability determination made by EPA is for purposes of the CERCLA § 104(k) grant program only.

EPA will consider a party to be viable if the party is financially capable of conducting the activity (i.e., assessment, investigation, or cleanup) identified in the grant proposal.

Generally, EPA will consider ongoing businesses or companies (corporations, LLCs, partnerships, etc.) and government entities to be viable. EPA will generally deem a defunct or insolvent company and an individual responsible party to be not viable. EPA will apply these assumptions to its petroleum grant viability determinations, unless there is information suggesting that the assumption is not appropriate in a particular case (e.g., if there is information that an individual has adequate financial resources to address contamination at a site, or if there is information indicating an ongoing business is not, in fact, viable). An applicant/recipient should indicate if one of the above assumptions applies and provide support for the assertion. In circumstances not covered by one of the above assumptions, the applicant/recipient should explain why the responsible party is not viable.

An applicant/recipient seeking to determine the financial status (i.e., the viability) of a responsible party should consider consulting the following resources and any other resources it may deem to be useful to make this determination:

² For purposes of determining petroleum brownfield grant eligibility, "reasonable steps with regard to contamination at the site" includes, as appropriate: stopping continuing releases, preventing threatened future releases, and preventing or limiting human, environmental, or natural resource exposure to earlier petroleum or petroleum product releases. Reasonable steps are discussed in more detail on pages 9-12 of EPA's March 6, 2003, "[*Common Elements*](#)" guidance.

1. **Responsible Party:** Ask the responsible party for its financial information (tax returns, bank statements, financial statements, insurance policies designed to address environmental liabilities, etc.), especially if the responsible party is still associated with the site or is the applicant/recipient, and, therefore, will receive the benefit of the grant. An applicant/recipient that is a responsible party and claiming it is not viable should provide conclusive information, such as an INDIPAY or MUNIPAY analysis, on its inability to pay for the assessment or cleanup.
2. **Federal, State, and Local Records:** Federal, state, and local (i.e., county and city) records often provide information on the status of a business. An applicant/recipient that is a state or local government should at the very least search its own records for information on a responsible party. Examples of such resources include regulatory records (e.g., state hazardous waste records), Secretary of State databases, and property/land records.
3. **Public and Commercial Financial Databases:** Applicants/recipients also may obtain financial data from publicly available and commercial sources. Listed below are examples of sources for financial data. Please note that some commercial sources may charge fees. EPA does not endorse the use of any specific sources, and EPA will accept reliable data from other sources as part of a proposal for funding.

Examples of sources: Lexis/Nexus, Dun & Bradstreet reports, Hoover's Business Information, Edgar Database of Corporate Information, Thomas Register of American Manufacturers, The Public Register, Corporate Annual Reports, Internet search engines (e.g. Google, Ask).

"Cleaned Up by a Person Not Potentially Liable"

Brownfields grant funding may be awarded for the assessment and cleanup of petroleum-contaminated sites provided they meet the requests below.

1. The applicant/recipient has not dispensed or disposed of or owned the property during the dispensing or disposal of petroleum or petroleum product at the site; and
2. The applicant/recipient did not exacerbate the contamination at the site and took reasonable steps with regard to the contamination at the site.

"Is not subject to any order issued under Resource Conservation and Recovery Act (RCRA) § 9003(h)"

Proposals from applicants that include requests for an Assessment Grant or Cleanup Grant to address petroleum-contaminated sites must not be subject to a corrective action order under RCRA § 9003(h).

For current recipients managing a Community-wide Assessment Grant, Revolving Loan Fund Grant, or Multipurpose Grant, the state or EPA must make the same determination for site(s) that will be addressed.

1.3.3. Mine-Scarred Lands

Mine-scarred lands are eligible for brownfields grants funding. EPA's view is that "mine-scarred lands" are those lands, associated waters, and surrounding watersheds where extraction, beneficiation, or processing of ores and minerals (including coal) has occurred. For the purposes

of this section, the definition of extraction, beneficiation, and processing is the definition found at 40 CFR § 261.4(b)(7).

Mine-scarred lands include abandoned coal mines and lands scarred by strip mining.

Examples of coal mine-scarred lands may include, but are not limited to:

- abandoned surface coal mine areas;
- abandoned deep coal mines;
- abandoned coal processing areas;
- abandoned coal refuse areas;
- acid or alkaline mine drainage; and
- associated waters affected by abandoned coal mine (or acid mine) drainage or runoff, including stream beds and adjacent watersheds.

Examples of non-coal hard rock mine-scarred lands may include, but are not limited to:

- abandoned surface and deep mines;
- abandoned waste rock or spent ore piles;
- abandoned roads constructed wholly or partially of waste rock or spent ore;
- abandoned tailings, disposal ponds, or piles;
- abandoned ore concentration mills;
- abandoned smelters;
- abandoned cyanide heap leach piles;
- abandoned dams constructed wholly or partially of waste rock, tailings, or spent ore;
- abandoned dumps or dump areas used for the disposal of waste rock or spent ore;
- acid or alkaline rock drainage; and
- waters affected by abandoned metal mine drainage or runoff, including stream beds and adjacent watersheds.

1.4. Sites Not Eligible for Brownfields Grant Funding

The following three types of properties are not eligible for brownfields grant funding under CERCLA, even on a property-specific basis. Applicants/recipients should not propose these types of sites for funding.

- 1) Facilities listed or proposed for listing on the National Priorities List (NPL).
- 2) Facilities subject to unilateral administrative orders, court orders, administrative orders on consent, or judicial consent decrees issued to or entered into by parties under CERCLA.
- 3) Facilities that are subject to the jurisdiction, custody, or control of the U.S. government. Facilities owned by, or under the custody or control of, the federal government are not eligible for brownfields grant funding. EPA's view is that this exclusion may not extend to:
 - a. privately-owned, Formerly Used Defense Sites (FUDS);
 - b. privately-owned, Formerly Utilized Sites Remedial Action Program (FUSRAP) properties; and
 - c. other former federal properties that have been disposed of by the U.S. government.

Note that land held in trust by the U.S. government for an Indian tribe is not excluded from funding eligibility. In addition, eligibility for brownfields grant funding does not alter a private owner's ability to cost recover from the federal government in cases where the previous federal government owner remains liable for environmental damages.

1.5. Particular Classes of Sites Eligible for Brownfields Grant Funding Only with Property-Specific Determinations

The following special classes of property are generally ineligible brownfield sites unless EPA makes a "Property-Specific Determination" and determines they are eligible for funding. These include:

- properties subject to planned or ongoing removal actions under CERCLA;
- properties with facilities that have been issued or entered into a unilateral administrative order, a court order, an administrative order on consent, or judicial consent decree or to which a permit has been issued by the United States or an authorized state under RCRA, FWPCA, TSCA, or SDWA;
- properties with facilities subject to RCRA corrective action (§ 3004(u) or § 3008(h)) to which a corrective action permit or order has been issued or modified to require the implementation of corrective measures;
- properties that are land disposal units that have submitted a RCRA closure notification or that are subject to closure requirements specified in a closure plan or permit.
- properties where there has been a release of PCBs and all or part of the property is subject to TSCA remediation; and
- properties that include facilities receiving monies for cleanup from the LUST Trust Fund.

EPA's approval of Property-Specific Determinations will be based on whether or not awarding/approving the proposed activities will protect human health and the environment and either promote economic development or enable the property to be used for parks, greenways, and similar recreational or nonprofit purposes. See the [FAQs](#) for more information on how to prepare and submit a Property-Specific Determination.

1.5.1. Facilities Subject to CERCLA Removal Actions

Properties (including parcels of properties) where there are removal actions may not receive funding, unless EPA makes a property-specific determination of funding eligibility.

EPA's view is that a removal may be identified by the occurrence of one of the following events, whichever occurs first in time: EPA issues an action memo; EPA issues an Engineering Evaluation/Cost Analysis approval memo; EPA mobilizes onsite; EPA issues a notice of federal interest to one or more potentially responsible parties (PRPs), which in emergencies may be made verbally; or EPA takes other actions that are consistent with a removal.

Once a removal action is complete, a property is eligible for brownfields grant funding without having to obtain a property-specific funding determination. EPA's view is that, solely for the purposes of eligibility to receive brownfields grant funding, a removal is complete when the actions specified in the action memorandum are met, or when the contractor has demobilized and left the site (as documented in the "pollution report" or POLREP). Applicants/recipients

proposing sites at which removal actions are complete must include documentation of the action being complete with their funding proposal.

Parcels of facilities not affected by removal action at the same property may apply for brownfields grant funding and may be eligible for funding on a property-specific basis. Property-specific funding decisions will be made in coordination with the on-scene coordinator (OSC) to ensure that all removal and cleanup activities at the property are conducted in safe and protective manners and to ensure that the OSC retains the ability to address all risks and contamination.

Please note that if a federal brownfields-funded site assessment results in identifying the need for a new removal action, the recipient may continue to expend brownfields funds on additional grant-related activities. However, any additional expenditure of federal brownfields funds and any additional site assessment activities should be conducted in coordination with the OSC for the site.

1.5.2. Facilities to which a permit has been issued by the United States or an authorized state under the Resource Conservation and Recovery Act (RCRA), the Federal Water Pollution Control Act, the Toxic Substances Control Act, or the Safe Drinking Water Act

Generally, in cases where a property or a portion of a property is permitted under the Resource Conservation and Recovery Act, Clean Water Act § 1321, the Safe Drinking Water Act, and/or the Toxic Substances and Control Act, the property, or portion of the property, may not receive funding without a property-specific determination. Therefore, applicants/recipients should review the following guidance regarding which types of permitted facilities may not receive funding unless EPA makes a property-specific determination to provide funding.

Applicants/recipients should note that the exclusion for permitted facilities does not extend to facilities with National Pollutant Discharge Elimination System (NPDES) permits issued under the authorities of the Federal Water Pollution Control Act, but is limited to facilities issued permits under the authorities of the Oil Pollution Act (i.e., FWPCA § 1321).

In cases where one or more portions of a property are not eligible for funding, the applicant/recipient should identify the specific permit and situation that causes the property to be excluded. In addition, the applicant/recipient must include documentation that federal brownfields grants funding for the assessment or cleanup of the property will further the goals established for property-specific funding determinations as described in the [FAQs](#).

In some cases, a facility may not have a permit or order because it is not in compliance with federal or state environmental laws requiring that it obtain a permit or the facility has failed to notify EPA of its regulatory status. Such facilities are not eligible for brownfields grant funding. For example, a RCRA treatment unit operator is required to obtain a permit and/or notify EPA of its operation. An operator that fails to fulfill those obligations will likely not have a permit or order as EPA will be unaware of its existence. Therefore, it is EPA's view that such facilities are ineligible to receive brownfields funds as a result of their failure to comply with a basic regulatory requirement. Additional guidance on the eligibility of RCRA-permitted facilities, including facilities under administrative or court orders, including corrective action orders, is provided in the [FAQs](#).

1.5.3. RCRA Sites

RCRA Facilities that are Eligible for Funding

EPA's view is that the following types of RCRA facilities are eligible for brownfields grants funding and do not require Property-Specific Determinations:

- a. RCRA interim status facilities that are not subject to any administrative or judicial order or consent decree;
- b. RCRA interim status facilities that are subject to administrative or judicial orders that do **not** include corrective action requirements or any other cleanup provisions (e.g., RCRA § 3008(a) orders without provisions requiring the owner/operator to address contamination); and
- c. parcels of RCRA facilities that are not under the scope of a RCRA permit or administrative or judicial order.

RCRA Facilities that Require Property-Specific Determinations

EPA's view is that the following types of RCRA facilities **may not receive funding without a property-specific determination**:

- a. RCRA-permitted facilities;
- b. RCRA interim status facilities with administrative orders requiring the facility to conduct corrective action or otherwise address contamination, including facilities with orders issued under the authorities of RCRA § 3008(a), § 3008(h), § 3013, and § 7003;
- c. facilities under court order or under an administrative order on consent or judicial consent decree under RCRA or CERCLA that require the facility to conduct corrective action or otherwise address contamination at the facility; and
- d. land disposal units that have notified EPA or an authorized state of their intent to close and have closure requirements specified in closure plans or permits.

1.5.4. Land disposal units that have filed a closure notification under Subtitle C of RCRA and to which closure requirements have been specified in a closure plan or permit

RCRA hazardous waste landfills that have submitted closure notifications, as required under 40 CFR § 264.112(d) or § 265.112(d), generally will not be funded. This may include permitted facilities that have filed notification of closure and for which EPA and/or an authorized state is proceeding with final closure requirements for the facility. For interim status facilities, this is done through approval of a closure plan submitted with closure notification. For permitted facilities, this is routinely done as a modification to the permit, requested by the facility at the time of closure notification.

Please note that RCRA hazardous waste landfills that have submitted closure notifications may be eligible for brownfields grant funding with a Property-Specific Determination.

1.5.5. Sites Contaminated with PCBs

CERCLA excludes from funding eligibility portions of facilities where there has been a release of PCBs that are subject to remediation under TSCA.

EPA's view is that all portions of properties **are eligible** for brownfield site assessment funding, except where EPA has initiated an involuntary action with any person to address PCB contamination. Also, it is EPA's view that all portions of properties **are eligible** for cleanup/remediation funding, except where EPA has an ongoing action against a disposer to address PCB contamination. However, any portion of a property where EPA has initiated an involuntary action with any person to address PCB contamination and portions of properties

where EPA has an ongoing action against a disposer to address PCB contamination will require a Property-Specific Determination to be eligible for brownfields grant funding, including:

- there is a release (or disposal) of any waste meeting the definition of “PCB remediation waste” at 40 CFR § 761.3; **and**
- at which EPA has initiated an involuntary action with any person to address the PCB contamination. Such involuntary actions could include:
 - enforcement action for illegal disposal;
 - Regional Administrator’s order to characterize or remediate a spill or old disposal (40 CFR § 761.50(b)(3));
 - penalty for violation of TSCA remediation requirements;
 - superfund removal action; or
 - remediation required under RCRA § 3004(u) or § 3004(v).

PCBs may be remediated under any one of the following provisions under TSCA:

- a. § 761.50(b)(3), the directed characterization, remediation, or disposal action;
- b. § 761.61(a), the self-implementing provision;
- c. an approval issued under § 761.61(c), the risk-based provision;
- d. § 761.61(b) to the level of PCB quantification (i.e., 1 ppm in soil);
- e. an approval issued under § 761.77, the coordinated approval provision;
- f. § 761.79, the decontamination provision;
- g. an existing EPA PCB Spill Cleanup Policy; or
- h. any future policy or guidance addressing PCB spill cleanup or remediation specifically addressing the remediation of PCBs at brownfield sites.

1.5.6. LUST Trust Fund Sites

CERCLA requires a Property-Specific Determination for funding at those sites (or portions of properties) for which assistance for response activity has been obtained under Subtitle I of RCRA from the LUST Trust Fund. EPA’s view is that this provision may exclude UST sites where money is being spent on actual assessment and/or cleanup of UST/petroleum contamination.

However, in cases where the state agency has used LUST Trust Fund money for state program oversight activities on an UST site, but has not expended LUST Trust Funds for specific assessment and/or cleanup activities at the site, the site would be eligible for brownfields grant funding and does not need a Property-Specific Determination. Such sites may receive funding on a property-specific basis, if it is determined that funding will protect human health and the environment and the funding will promote economic development or enable the creation of, preservation of, or addition to greenspace (see guidance on documenting eligibility for property-specific funding determinations provided in the [FAQs](#)).

Examples of sites receiving LUST Trust Fund monies that EPA would consider to be good candidates to receive Brownfield Grants or loans include:

- a. all UST fields pilots (50 pilots);
- b. sites (or portions of properties) where an assessment was completed using LUST Trust Fund monies and the state has determined that the site is a low-priority UST site, and therefore, additional LUST Trust Fund money cannot be provided for the cleanup of petroleum

contamination, but the site still needs some cleanup and otherwise is a good candidate for economic revitalization; and

- c. sites (or portions of properties) where LUST Trust Fund money was spent for emergency activities, but then the site was determined to be ineligible for further expenditures of LUST Trust Funds, yet the site needs additional funding for continued assessment and/or cleanup that will contribute to economic revitalization of the site.

1.6. Eligible Response Sites/Enforcement Issues

CERCLA limits EPA's enforcement and cost recovery authorities at "eligible response sites" where a response action is conducted in compliance with a state response program. CERCLA § 101(40) defines an "eligible response site" by referencing the general definition of a "brownfield site" in § 101(39)(A) and incorporating the exclusions in § 101(39)(B). CERCLA places further limitations on the types of properties included within the definition of an eligible response site, but grants EPA the authority to include within the definition of eligible response site, and on a property-specific basis, some properties that are otherwise excluded from the definition. Such property-specific determinations must be based upon a finding that limits an enforcement will be appropriate, after consultation with state authorities, and will protect human health and the environment and promote economic development or facilitate the creation of, preservation, or addition to a park, a greenway, undeveloped property, recreational property, or other property used for nonprofit purposes. While the criteria appear similar to those for determining eligibility for funding on a property-specific basis, the determinations are distinct, will be made through a separate process, and may not be based on the same information requested in this document for property-specific funding determinations.

Also, please note that in providing funding for brownfield sites, and given that a limited amount of funding is available for Brownfield Grants, EPA's goal is to not provide brownfields grant funding to sites where EPA has a planned or ongoing enforcement action. While EPA does not intend that the existence of a planned or ongoing enforcement action will necessarily disqualify a site from receipt of brownfields grant funding, EPA does believe it is necessary that EPA be aware of the existence of any such action in making funding decisions. As a result, EPA will conduct an investigation to evaluate whether a site is, or will be, subject to an enforcement action under CERCLA or other federal environmental statutes. EPA is requesting that applicants/recipients identify ongoing or anticipated environmental enforcement actions related to the brownfield site for which funding is sought.