



# BROWNFIELDS 101

SMALL BUSINESS LIABILITY RELIEF & BROWNFIELDS  
REVITALIZATION ACT

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Presenter

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# Blighted Properties



# What is a Brownfields Site?

- ▶ The term Brownfields 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 or a controlled substance, petroleum or petroleum products, or is mine-scarred land.”*



# Benefits of Brownfields Revitalization

- ▶ Increases local tax base
- ▶ Promote Jobs
- ▶ Utilize existing infrastructure
- ▶ Bring real estate back into productive use
- ▶ Prevent sprawl
- ▶ Support cleaner air
- ▶ Reduce environmental and health risks
- ▶ Improve quality of life and preserve cultural values



# Funding

- ▶ 1993 – Pilots were funded with Superfund dollars.
- ▶ 1995 – The success of the pilots lead to more Superfund dollars being used to fund more projects.
- ▶ 2002 – The Brownfields Revitalization Law was passed and signed by President George Bush.
- ▶ Congress gave the program its own appropriation.



# Small Business Liability Relief and Brownfields Revitalization Act

- ▶ Title I – Small Business Liability
- ▶ Title II – Brownfields Revitalization
  - Grants Program
  - Liability Clarifications
  - State Response Program



# Brownfields Grants and Technical Assistance

- ▶ Assessment
- ▶ Revolving Loan Fund
- ▶ Clean Up
- ▶ Job Training
- ▶ Targeted Brownfields Assessments
- ▶ Technical Assistance to Brownfields

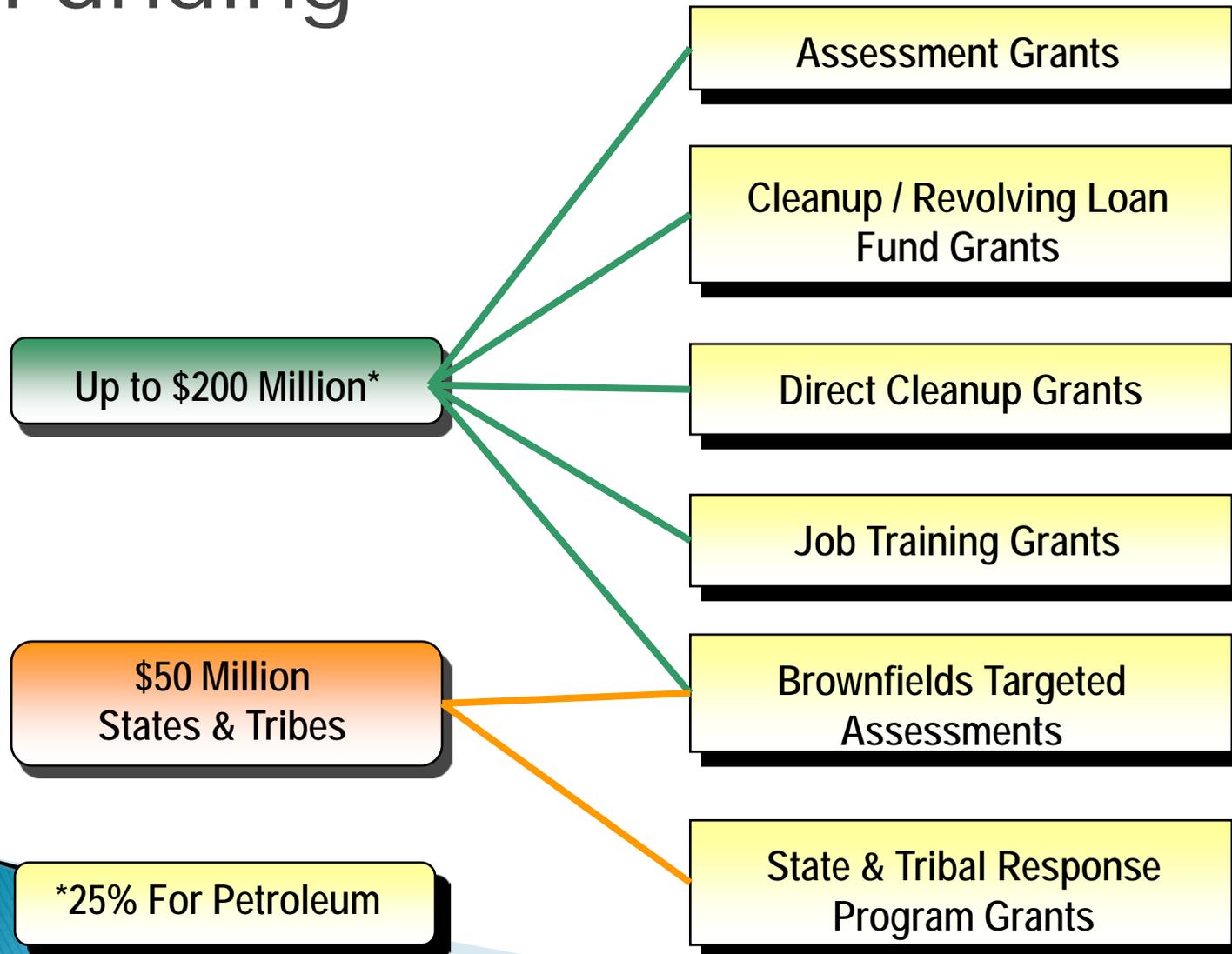


# EPA's Investment in Brownfields Grants

- ▶ Since 1995, EPA has awarded 2,619 Brownfields grants totaling more than \$787.1M
- ▶ The benefits to local communities are:
  - Projects leveraged \$18.68 per EPA dollars spent
  - Leverage 61,023 jobs nationwide.
  - Storm water runoff from Brownfields redevelopment is 47 to 62 percent lower than alternative greenfield scenarios
  - Can increase residential property values 2 to 3 percent when nearby Brownfields are addressed
  - Promotes area-wide planning



# Brownfields Funding



# Liability Clarifications and Protections



# Brownfields Amendment to CERCLA

- ▶ The 2002 Brownfields Amendments to CERCLA required EPA to develop regulations establishing standards and practices for conducting all appropriate inquiry (AAI).
- ▶ AAI is the process of evaluating a property for potential environmental contamination.
- ▶ The goal is to identify conditions that indicate a release or threatened release of hazardous substances, etc.



# All Appropriate Inquiry

- ▶ EPA's final rule for the AAI was published November 1, 2005 and became effective one year later. Parties must follow the provisions of the final rule or use the ASTM E1527-05 standard.
- ▶ An Environmental Professional is **required** to approve/certify the report.



# Applicability of the Rule

- ▶ The final rule is applicable to:
  - Parties who may potentially claim protection from CERCLA liability as:
    - An innocent landowner,
    - A bona fide prospective purchaser, or
    - A contiguous property owner; *and*
  - Parties who receive grants under the EPA's Brownfields Grant program to assess, characterize, and cleanup properties



# The Innocent Landowner (IL) Defense

- ▶ This is a defense to liability rather than an exemption, if IL conducts all appropriate inquiries and meets the statutory requirements.



# Avoid Liability and Qualify as an IL (cont)

- ▶ IL must show the following:
  - 1. Exercised due care with respect to the hazardous substance concerned.
  - 2. Took precautions against foreseeable acts or omissions of the third party and the consequences that could result from those acts or omissions;



# Avoid Liability and Qualify as an (IL) (cont)

- ▶ Must establish (by a preponderance) at the time the facility is acquired:
  - 1. Did not know and did not have reason to know of the release or threatened release of a hazardous substance; or
  - 2. Person acquired the property by bequest or inheritance; and
  - 3. Fully cooperate with the appropriate authorities, allow them access, be in the compliance with applicable land use restrictions and cannot impede response action.



# Avoid Liability and Qualify as an IL (cont)

- ▶ To meet the lack of knowledge requirement, the IL must show:
  - 1. Carried out AAls into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices; and
  - 2. Took reasonable steps to
    - Stop any continuing release;
    - Prevent threatened future release;
    - Prevent or limit any human environmental or natural resource exposure to any previously released hazardous substance.



# Bona Fide Prospective Purchasers –

CERCLA 101(40), 107(r)

- ▶ Acquire ownership after January 11, 2002
- ▶ Not a PRP or affiliated with the PRP
- ▶ Disposal occurred before acquisition
- ▶ Provide all legally required notices
- ▶ In compliance with Land Use Restrictions / Institutional Controls



# Avoid Liability and Qualify as a BFPP

- ▶ Prior to acquisition, all hazardous substances at the facility must already be disposed;
- ▶ Must make all appropriate inquiry into previous ownership and uses of the facility;
- ▶ For residential property, a facility inspection and title search that reveals no basis for further investigation will suffice;



# Avoid Liability and Qualify as a BFPP (cont)

- ▶ Provides all legally required notices;
- ▶ Exercised *appropriate care by taking reasonable steps to stop continuing release, prevent any threatened future release and prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance;*



# Avoid Liability and Qualify as a BFPP (cont)

- ▶ Fully cooperate and assist authorized personnel to conduct response actions or natural resource restoration;
- ▶ Be in compliance with land use restrictions and cannot impede on the effectiveness or integrity of institutional controls employed in connection with a response action;



# Avoid Liability and Qualify as a BFPP (cont)

- ▶ Comply with request for information or administrative subpoena issued by the President;
- ▶ Cannot be liable or potentially liable or affiliated with another person that is potentially liable for response costs;



# Avoid Liability and Qualify as a BFPP (cont)

- ▶ Will not be liable as long as they do not impede response or restoration actions; **however**, the U.S. shall still be able to place a lien on the property for any uncovered response costs. The lien can only be placed if the response action increases the fair market value of the facility absent the response action.



# Contiguous Property Owners –

CERCLA 107(q)

- ▶ Property may or may not be contaminated
- ▶ Contamination comes from property that is contiguous to or “similarly situated with respect to”
- ▶ Owner is not a PRP or affiliated with the PRP
- ▶ Full cooperation
- ▶ Appropriate inquiry: did not know or have reason to know of contamination
- ▶ Take reasonable steps to stop / prevent release or exposure



# Contiguous Property Owners (cont)

- ▶ Defense to liability
- ▶ For migration of contaminated groundwater, no remediation necessary (except as required by the Contaminated Aquifer Policy)
- ▶ EPA may issue:
  - No action assurance letter
  - Contribution protection



# Avoid Liability and Qualify as a CPO

- ▶ Cannot cause, contribute or consent to release or threatened release;
- ▶ Cannot be liable or potentially liable and cannot have a direct or indirect familial relationship with any other person that is potentially liable for response costs at a facility;
- ▶ Take reasonable steps to stop any continuing releases, prevent any threatened future release and prevent or limit any hazardous substances exposure to human, environmental or natural resources;



# Avoid Liability and Qualify as a CPO (cont)

- ▶ Fully cooperate and assist with any response actions or resource restoration by letting the authorities access the property;
- ▶ Be in compliance with any land use restrictions and cannot impede on the effectiveness or integrity of any institutional control employed in connection with a response action.



# Avoid Liability and Qualify as a CPO (cont)

- ▶ Comply with any request for information or administrative subpoena issued by the President;
- ▶ Provide all legally required notices with respect to the discovery or release of any hazardous substances at the facility;



# Avoid Liability and Qualify as a CPO (cont)

- ▶ Have conducted AAI and did not know or have reasons to know that the property was or could be contaminated from other real property not owned or operated by the person; and
- ▶ Each element must be established by a preponderance of the evidence, and the CPO has the burden of proof.



# EPA Liability Guidances

- ▶ BFPPs – May 31, 2002
- ▶ De Micromis Waste – Nov 6, 2002
- ▶ Common Elements -- March 6, 2003
- ▶ Windfall Liens – July 16, 2003
- ▶ CPOs – January 14, 2004
- ▶ AAI Rule – Nov 1, 2005; effective year later



# Eligibility

- ▶ Applicants must be eligible to apply for grants
- ▶ No private parties
- ▶ Sites must be eligible to receive Brownfields funding
- ▶ No federal enforcement sites without a property specific determination



# State Response Program

- ▶ CERCLA 128(a) – non-competitive grant
- ▶ Funds are used to develop a response program to address environmental sites
- ▶ State has the ability to develop their own program which does not have to mirror the federal CERCLA program
- ▶ Funds are allocated annually based on proposal and effective use of prior years funds.
- ▶ EPA asks for success stories



# Additional Information

- ▶ [www.epa.gov/brownfields](http://www.epa.gov/brownfields)
- ▶ Joshua Wirtschafter, Office of Regional Counsel, USEPA Region 9, [wirtschafter.joshua@epa.gov](mailto:wirtschafter.joshua@epa.gov)
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