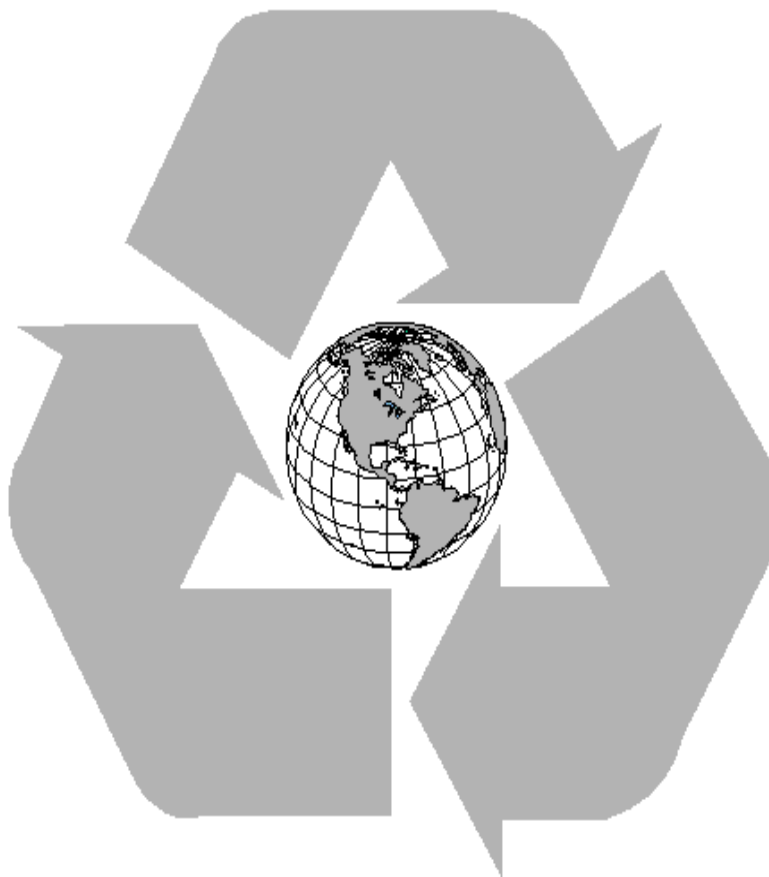


Transition Guidelines for Brownfields Cleanup Revolving Loan Fund Pilots



Solid Waste and
Emergency Response
(5105T)

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I. Introduction and Purpose

Brownfields Cleanup Revolving Loan Fund Guidelines for Transition under The “Small Business Liability Relief and Brownfields Revitalization Act”

Introduction and Purpose

The Environmental Protection Agency’s (EPA or The Agency) Brownfields Economic Redevelopment Program is designed to empower states, federally recognized Indian tribes, local governments, communities, and other stakeholders involved in redevelopment to work together in a timely manner to prevent, assess, and safely cleanup brownfields in order to facilitate their sustainable reuse. As part of this Program, EPA has awarded cooperative agreements to States, and political subdivisions (including cities, towns, counties) to capitalize Brownfields Cleanup Revolving Loan Fund (BCRLF) pilots to facilitate the cleanup and redevelopment of brownfields properties.¹

On January 11, 2002, the Small Business Liability and Brownfields Revitalization Act was signed into law (P.L. 107-118). (“Brownfields Law”) This law makes several significant changes to EPA’s Brownfields Program. Section 104(k)(3)(D) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, CERCLA (42 U.S.C. 9601) added by the new law provides that “[R]evolving loan funds that have been established before the date of enactment ...” may be used in accordance with the new law. A BCRLF² pilot, established prior to January 11, 2002, may continue to operate pursuant to the terms and conditions of its existing cooperative agreement, or it may choose to “transition” under the new law. The decision to transition is voluntary.

This document describes the process for requesting transition under the Brownfields Law and highlights some opportunities and requirements so that existing BCRLF pilots can determine whether transitioning is in their best interest. Subject to the availability of appropriations, EPA will begin implementing the new grant programs under the new law in Federal fiscal year 2003 (beginning October 1, 2002).

BCRLF pilots choosing to transition under the Brownfields Law will be required to comply with *all* requirements of the new law. BCRLF pilots that choose to transition will have their existing cooperative agreement closed out, and unspent funds will be transferred to a new replacement “transition” cooperative agreement, i.e. transition from original funding under §104(d) to §104(k) authority. Regulations applicable to the new replacement cooperative agreement as well as new cooperative agreements will include 40 C.F.R. Part 31 (Uniform Administration Requirements for Grants and Cooperative Agreements to State and Local Governments), and “relevant and appropriate” provisions of the National Oil and Hazardous Substances Contingency Plan (NCP), as determined by EPA. The Davis-Bacon Act, 40 U.S.C. § 276a *et seq.* applies. ***See page 12 “Matrix on BCRLF Pilot Transition Process.”***

¹ There are 143 BCRLF pilots that have been awarded since fiscal year 1997.

² Throughout this document, “Brownfields Cleanup Revolving Loan Fund” (BCRLF) will refer to existing pilots and “Revolving Loan Fund” (RLF) or RLF cooperative agreement recipients will refer to pilots AFTER they have transitioned.

BCRLF pilots that do NOT choose to transition will continue to operate pursuant to the terms and conditions of their existing cooperative agreement. The BCRLF demonstration pilot program was originally funded under §104(d)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA). Regulations applicable to that program included 40 C.F.R. Part 31 (Uniform Administration Requirements for Grants and Cooperative Agreements to State and Local Governments), 40 C.F.R. Part 35, Subpart O (Cooperative Agreements for Superfund Response Actions), and 40 C.F.R. Part 300 (The National Oil and Hazardous Substances Pollution Contingency Plan).

II. Brief Summary of Major Changes under the Brownfields Law

Brief Summary of Major Changes under the Brownfields Law

Major changes from the current EPA brownfields program include:

- I. *A new definition of a brownfield site (See Appendix 3.) The new definition of a brownfield site includes:*
 - a. *Sites contaminated by hazardous substances, pollutants or contaminants, petroleum or petroleum product, or controlled substances under §102 of the Controlled Substances Act (21U.S.C. 802) may be eligible for grant funding.*
 - b. *“Real property” including residential as well as commercial and industrial properties.*
 - c. *“Mine-scarred land.”*
- II. *Revolving Loan Fund (RLF) funding may be used for both loans and cleanup subgrants. Intragovernmental loans, i.e., the reimbursable transfer of loan funds within the same governmental entity may be made to the RLF recipient; cleanup subgrants may NOT be made by the RLF recipient to itself.*
- III. *RLF cooperative agreement recipients are prohibited from making loans or cleanup subgrants for the response costs at a site for which the recipient of the grant or loan is potentially liable under §107 of CERCLA.*
- IV. *RLF cooperative agreement recipients are required to provide a 20% cost share of funds awarded by EPA, unless EPA approves a hardship waiver.*
- V. *RLF cooperative agreement recipients are prohibited from using grant funding for administrative costs. See Appendix 5.*
- VI. *RLF cooperative agreement recipients are required to apply provisions of the National Oil and Hazardous Substances Contingency Plan (NCP) that EPA determines to be “relevant and appropriate to the program”.*

Each of these major changes is briefly described in *Appendix 1*.

III. Questions and Answers on Transition

General

Which BCRLF pilots are eligible for “transition”?

All BCRLF pilots “established before the date of enactment” of the Brownfields Law on January 11, 2002, may transition under the new law. This provision will allow all 143 BCRLF pilots to transition if they choose to do so. EPA’s regional offices will provide assistance if a BCRLF pilot chooses to transition.

Does a BCRLF pilot have to transition?

No. BCRLF pilots that do NOT choose to transition will continue to operate pursuant to the terms and conditions of their existing cooperative agreement.

Can BCRLF coalitions transition?

Yes. The cooperative agreement recipient (Lead Agency) for a BCRLF coalition must be able to demonstrate that **all** coalition members agree to the transition request. Members of coalitions are eligible entities and may apply independently for any grant under the new law.

Is there a deadline for transition?

No. There is no deadline date for pilots to transition because transitioning is not mandated. However, EPA is strongly encouraging pilots that choose to transition to do so as soon as possible, preferably before June 30, 2003 (within the first, second, or third quarter of fiscal year 2003). After June 30, 2003, requests for transition may be made only during a specified “open season” to be announced by EPA in fiscal year 2004.

What is the earliest that a BCRLF pilot could request transition?

BCRLF pilots may request transition under the new law upon publication and distribution of these transition guidelines. BCRLF pilots should contact the appropriate EPA Regional Office. Copies of the Transition Guidance will be available at all EPA regional offices, in EPA’s Office of Brownfields Cleanup and Redevelopment, and on the EPA’s web site www.epa.gov/brownfields.

Does a BCRLF pilot that transitions have to meet all of the new statutory requirements?

Yes. BCRLF pilots that transition will be required to comply with **all** of the statutory requirements specified in the new law. For example, the new law specifically prohibits the use of a grant, subgrant, or loan for response costs at a site for which the recipient of the grant or loan is potentially liable under §107 of CERCLA. The new law prohibits the RLF cooperative agreement recipient from using grant or loan funds for administrative costs. Other prohibitions on the use of funds are also applicable. Further, the new law requires the RLF cooperative agreement recipient to provide a 20% cost share of the total federal funds awarded.

What will be EPA’s role in determinations by an RLF grantee to make loans and cleanup subgrants?

EPA expects to be substantially involved in overseeing and monitoring the RLF program. EPA will approve the substantive terms of RLF loans and cleanup subgrants. Substantial involvement by EPA generally covers such administrative activities as: monitoring, review and approval of procedures for loan recipient selection; review of project phases; approval of the

substantive terms included in certain types of contracts, as well as loans and subgrants to help the cooperative agreement recipient verify that the costs incurred in these transactions are eligible expenses under CERCLA §104(k). Substantial involvement also includes reviewing and approving sites to determine eligibility; reviewing financial and environmental status reports; and monitoring the RLF grantee's fulfillment of all reporting, record keeping, and other program requirements. The exact terms of EPA's substantial involvement will be negotiated between the RLF grantee and the EPA Regional office.

Loans and Cleanup Subgrants

What funds will be affected by transition under the new law?

BCRLF pilot funds affected by transition are all funds not expended for loans or otherwise legally encumbered or expended at the time of the transition. The 20% cost share will apply to the funds transitioned as well as any subsequent supplemental funds provided to the RLF recipient.

If a BCRLF pilot transitions what happens to loans already made?

BCRLF loans are subject to terms and conditions existing at the time of their execution.

1. In cases in which a loan has been made under an existing BCRLF cooperative agreement, that cooperative agreement will remain in effect until the loan has been fully paid out to a borrower. This cooperative agreement will continue to operate pursuant to the terms and conditions of the existing agreement. It will not be closed out until all loan monies have been paid out to the borrower. Accordingly, administrative costs anticipated to manage these loans will also remain a part of the existing cooperative agreement. For example, funds to be used for anticipated administrative costs to be incurred by a Fund Manager to oversee the day-to-day management of an outstanding loan may remain under the existing cooperative agreement. An estimate of these costs and how the estimate was derived must be included in the materials submitted at the time of transition.

(Note: Any program income (i.e., principal repayments and interest received on a loan) received after the date of transition may become a part of the new replacement "transition" cooperative agreement.)

2. All other funds under the existing BCRLF will be part of the transition. A new replacement "transition" cooperative agreement will be in effect under the new law.

For example, if a BCRLF pilot was awarded \$1,000,000 and has made a \$400,000 loan that has been fully paid out to the Borrower, and expended \$15,000 for other eligible and allowable purposes, then the remaining sum of \$585,000 will be transitioned. ***See page 12 - "Matrix on BCRLF Pilot Transition Process"***

How will existing funding structures (70/20/10 or the earlier 85/15) be affected by transition?

BCRLF pilots awarded in 1997, 1999, and 2000, generally provide 85% of their funding to capitalize the loan fund and 15% for general administrative costs. BCRLF pilots awarded in 2001 and 2002 were required to use at least 70% of the cooperative agreement funds to capitalize the cleanup loan fund; and were allowed to use up to 20% of the cooperative agreement funds as direct financial assistance to carry out cleanup responsibilities as lead agency. The remaining 10% of the cooperative agreement funds were to be used for general administrative costs.

RLF grants under the new law will not have an analogous funding structure.

If a BCRLF pilot transitions what percentage of funds may be used for loans? For cleanup subgrants?

Consistent with the intent of the new law to promote the long-term availability of funds from the revolving loan fund, it is ***EPA policy that at least 60% of the funds transitioned by a BCRLF pilot must be used to capitalize the loan pool and eligible programmatic costs.*** No more than 40% of the funds awarded may be used for cleanup subgrants and eligible programmatic costs.

(Note: Accounting to differentiate loans and cleanup subgrants made will be necessary. All subgrants are subject to grant rules.)

Will loan discounts be available after transition?

No. EPA has determined that loan discounts will not promote the long-term availability of funds from the revolving loan fund under the new law.

Will intra-governmental loans be allowed after transition?

Yes. Intragovernmental loans, i.e., the ***reimbursable*** transfer of loan funds within the same governmental entity, may be made by the RLF recipient.

Will intra-governmental cleanup subgrants be allowed after transition?

No. Cleanup subgrants, unlike loans, may NOT be made by the RLF recipient within the same governmental entity that receives the RLF grant, (e.g. one department of a city government “subgrants” to another department of the same governmental entity). This would be consistent with either the new law or the “Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments, 40 C.F.R. Part 31. A BCRLF pilot that transitions may, however, award a subgrant to another eligible governmental entity (e.g. a state or county that has an RLF may make a subgrant to a township). Further, eligible governmental entities may apply separately for \$200,000 Cleanup Grants from EPA under Section 104(k)(3)(A)(ii).

Who can receive subgrants from the BCRLF pilot that transitions?

RLF subgrants for cleanup may be made to another eligible entity, or nonprofit organization based on several specific considerations for the cleanup of sites ***owned*** by the eligible entity or nonprofit organization that receives a cleanup subgrant.

Supplemental Funding and New Grants

Can a BCRLF pilot that transitions receive additional (supplemental) funding?

Yes. Upon transition a BCRLF pilot may apply for additional, non-competitive supplemental funding. Supplemental funding selection will be based on the availability of funds. Supplemental funding selection will be made by the Agency on a “rolling basis” to the extent funds are available. For many pilots the opportunity to receive supplemental funding may be a significant consideration to transition.

The Agency will consider supplemental funding based on the following statutory considerations including the number of sites and number of communities addressed; the demand for funding by eligible entities that have not previously received a grant under the new law; the demonstrated ability of the eligible entity to use the revolving loan fund to enhance remediation and provide funds on a continuing basis; and such other factors as the Agency considers appropriate to carry out the RLF. In the past EPA has required BCRLF pilots to demonstrate:

that loans have been made and ***significantly depleted existing available loan funds and that there will be a community benefit from supplemental funding.*** The Agency will continue to require a similar demonstration under the new law.

It is ***EPA policy that at least 60% of the supplemental funding received by an RLF must be used to capitalize the loan pool and eligible programmatic costs.*** No more than 40% of the funds awarded may be used for cleanup subgrants and eligible programmatic costs.

Can a BCRLF pilot that does NOT transition receive additional (supplemental) funding?

No. Under the new law, non-competitive supplemental funding is available only to cooperative agreement recipients who are awarded competitive RLF capitalization cooperative agreements, *or to a BCRLF pilot that transitions.*

Can a BCRLF pilot that does NOT transition compete for new grant funding?

Yes. For a list of entities eligible to apply for grant funding see ***Appendix 2.***

Administrative Costs and Cost Share

What are prohibited administrative costs?

The Brownfields Law prohibits the use of any “part of a grant or loan” for the payment of an administrative cost. Direct administrative costs are prohibited costs. The new law provides that the administrative cost prohibition does not apply to: investigation and identification of the extent of the contamination; design and performance of a response action; or monitoring of a natural resource. ***Under new law, BCRLF pilots that choose to transition will no longer be able to use their grant funds to pay for prohibited administrative costs. See Appendix 5.***

What are eligible programmatic costs?

Eligible programmatic costs are expenses incurred for activities that are integral to achieving the purpose of the grant, even if EPA considered the costs to be “administrative” under the prior Brownfields Program. ***See Appendix 5.***

How will the 20% cost share requirement be applied?

In the case of BCRLF pilots transitioning under the new law, the 20% cost share will apply to the EPA funds not previously loaned or otherwise legally expended or encumbered under the existing BCRLF and to any subsequent supplemental funds provided to the RLF recipient.

The cost share requirement may be in the form of a contribution of cash, labor, material, or services from non-Federal sources unless EPA determines that the cost share would place an undue hardship on the eligible entity. A BCRLF pilot requesting transition may petition EPA to waive the cost share based on a claim for undue hardship. To petition EPA, a BCRLF pilot must submit a letter to the EPA Brownfields Project Officer requesting a hardship waiver and the specific circumstances to support the request. EPA will consider a hardship waiver to the cost share requirement on a case-by-case basis. For factors EPA will consider in making a hardship waiver determination ***See Appendix 1.***

Eligible programmatic costs may be used to meet the RLF capitalization grant 20% cost share.

Can prohibited administrative costs or other ineligible costs be counted toward an RLF cooperative agreement recipient's cost share requirement?

No. Under 40 C.F.R. 31.24, grant recipients can only use eligible and allowable costs to meet their cost share requirements.

Can the 20% cost share come from eligible programmatic activities?

Yes. Eligible programmatic costs may be used to meet the RLF capitalization grant 20% cost share.

Can repayments of loans and fees charged to borrowers be used to meet the 20% cost share?

Yes. Under 40 C.F.R. 31.25(g), program income, including repayment of loans made after the date of transition or fees charged to borrowers, may be used to fund expenditures toward meeting the 20% cost share. However, if a BCRLF pilot plans to use anticipated program income to help meet the cost share, the request for transition must demonstrate how alternative sources for obtaining cash, labor, material or services can be used to meet the cost share if program income is less than anticipated during the performance period for the cooperative agreement.

Can contributions of labor, material, or services from borrowers be used to meet the 20% cost share?

Yes. EPA will allow contributions of labor, material, or services from borrowers to count toward the cost share if the RLF cooperative agreement recipient can demonstrate that the accounting system used is able to track and provide adequate documentation for such contributions.

Can the cost share be met by other entities contributing to the cleanup (i.e., borrowers, State contributions or other third-party non-Federal entities)?

Yes. States and other third-party non-Federal entities may contribute funds, labor, services, or materials to be counted towards the cost share requirement. The costs for 3rd party contributions must be allowable under 40 C.F.R. 31.24. Generally other sources of federal funds including other EPA grants and cooperative agreements cannot be used to meet the cost share requirement, some Federal grant programs have specific authority that allow grants to be used to meet cost share requirements. For example, the Department of Housing and Urban Development's Community Development Block Grant program funding (42 USC 5305(a)(9)) contains a specific authorization that allows these Federal grant funds to be used as a match for other Federal grants. Local governments that choose to transition their BCRLF pilots may use state grants to meet their cost share requirements to the extent allowed by state law.

How is the cost share calculated?

The 20% cost share will apply to the transitioned funds. For example, if a BCRLF pilot is transitioning \$500,000 in funds, the 20% cost share is calculated by multiplying \$500,000 by 20%. In this example, the cost share would be \$100,000. The workplan and budget for the new "transition" cooperative agreement would total \$600,000 (i.e., \$500,000 in transitioned funds plus the \$100,000 cost share).

Transition Process for BCRLF Pilots

What does a BCRLF pilot have to do to request a transition?

Your EPA Regional Office is available to provide assistance regarding the transition process. ***See page 14 for a list of Brownfields RLF Coordinators.*** A BCRLF pilot must notify both the EPA Regional Brownfields Project officer and the Regional Grants Management Office that the pilot will be requesting a transition. A BCRLF pilot will be asked to submit formal documentation to process the transition. This documentation should include a cover letter signed by the authorized representative of the BCRLF pilot and should include a statement that the pilot understands and agrees to comply with the provisions of the new law. In addition, the pilot must provide the following:

1. Application for Assistance/Amendment (Standard Forms 424, 424A, and 424B); including detailed information showing how the figures were derived for each object class category in which funds are shown in Standard Form 424A.
2. Revised work plan narrative specifying additional and modified tasks including those activities or services contributed as the cooperative agreement recipient's cost share.
3. Revised budget information, including:
 - ▶ A breakdown of funds expended or otherwise legally encumbered under the BCRLF to identify the amount remaining in the account for transition. Submittal of a Financial Status Report (Standard Form 269) can be used to certify transition amount.
 - For existing BCRLF cooperative agreements which will remain in effect until a loan has been fully paid out to the borrower, include an estimate of any administrative costs anticipated to manage the outstanding loan. The estimate and a description of how the estimate is derived must be included as part of the financial status report.
 - ▶ A clear identification of the 20% cost share (based on the funds transitioned)
 - ▶ Identification of the amount of the funding to be used to capitalize the loan program and the amount to be used for cleanup subgrants. (EPA requires that a minimum of 60% of the your awarded funds be utilized to capitalize the loan pool based on the funds transitioned.)
 - ▶ Amount to be used to purchase insurance for site cleanup, if applicable
 - ▶ *Local governments only:* Identification of the amount, if any, up to 10% of grant funds transitioned, to develop and implement a brownfields program.³
 - ▶ Identification of the amount anticipated for use to cleanup petroleum-contaminated brownfields.

What is the transition approval process?

³ The Small Business Liability Relief and Brownfields Revitalization Act §104(k) (4)(C) provides that local governments receiving a brownfields grant from EPA may use up to 10% of the grant funds to develop and implement a brownfields program that may include: monitoring the health of populations exposed to one or more hazardous substances from a brownfield; and monitoring and enforcement of any institutional control used to prevent human exposure to any hazardous substance from a brownfield site.

When a transition request has been received, the EPA's Regional office will review the application package to ensure that it includes all of the required documentation. EPA will advise the BCRLF pilot if revisions or additional information is needed. Upon final negotiation of the revised application and workplan, a new replacement "transition" cooperative agreement with revised terms and conditions will be sent to the grantee for review and signature. Upon signature of the new cooperative agreement, the RLF recipient will proceed under the new law and the terms and conditions of the new cooperative agreement. BCRLF pilots requesting transition may not begin operation under the new law until a new RLF cooperative agreement has been executed.

Note:

1. For pilots with outstanding loans, the EPA Region will prepare an amendment to the existing BCRLF cooperative agreement to deobligate unspent funds.

2. For BCRLF pilots that do not have outstanding loans, the EPA Region will prepare an amendment to the existing BCRLF cooperative agreement to deobligate unspent funds and close out the existing cooperative agreement.

In the interim period between the submission of a transition application and the award of the new cooperative agreement, BCRLF pilots should note that reimbursement of pre-award costs (*i.e., prior to award of the new RLF replacement "transition" cooperative agreement*) requires careful consideration on the part of the recipient. The Agency is not obligated to reimburse recipients for pre-award costs and recipients incurring pre-award costs do so at their own risk. Therefore, care should be given by the BCRLF pilot regarding costs expended in the interim period in anticipation of approval.

Are there new record keeping requirements upon transition?

Upon transition, costs incurred under the new law must be tracked separately from those incurred under the previous program. In addition, the following types of expenditures will need to be tracked separately: the matching share; any costs incurred for petroleum-related activities; and any costs related to program development and implementation (*Note: local governments will have to identify and track the amount, if any, up to 10% of grant funds transitioned, to develop and implement a brownfields program*).

The length of time that records must be retained has been reduced. The current BCRLF was awarded under 40 C.F.R. Part 35, Subpart O. This regulation governed Superfund cooperative agreements made under §104(d) of CERCLA and required that all records be retained for a minimum of 10 years. With the enactment of §104(k) of CERCLA, EPA has determined that the replacement transition cooperative agreement will be governed by 40 C.F.R. Part 31 which requires maintenance of all pertinent records for three years following submittal of the final Financial Status Report for the RLF cooperative agreement. EPA may require a longer record retention period for records pertaining to the earning of income (e.g., after the cooperative agreement has expired but where loan repayments continue to be made); where there is any pending litigation, claim or audit involving such records; or if such longer period is deemed appropriate. At the end of the three year period written approval must be received from EPA prior to destruction of any records.

Will a BCRLF Pilot that transitions be required to meet new performance measures?

Yes. New performance measures will be required.

Information About the Brownfields Law

BCRLF pilot recipients are encouraged to review the new law and guidelines for grant proposals to obtain a better understanding of these requirements for themselves. Information and summaries of the new law may be found on EPA's web site at www.epa.gov/brownfields. Additional information may also be found through the legislative reference system called "Thomas" on either the U.S. Congress House of Representatives site or the Senate site: www.house.gov or www.senate.gov.

Matrix on BCRLF Pilot Transition Process

BCRLF PILOT Status Process To Transition to RLF Under New Law

<p>NO BCRLF FUNDS SPENT</p>	<p>■ Close out existing cooperative agreement. EPA deobligates, recertifies, and reobligates simultaneously unspent funds to new replacement “transition” cooperative agreement</p> <ul style="list-style-type: none"> ▶ Requires transition application related to the amount unspent, showing matching share and including new budget/workplan to incorporate new statutory requirements <p>■ Replacement “transition” cooperative agreement grant is under §104(k) authority</p>
<p>BCRLF FUNDS SPENT FOR ADMINISTRATIVE COSTS ONLY</p>	<p>■ Close out existing cooperative agreement. EPA deobligates, recertifies, and reobligates simultaneously unspent funds to new replacement “transition” cooperative agreement</p> <ul style="list-style-type: none"> ▶ Requires transition application related to the amount unspent, showing matching share and including new budget/workplan to incorporate new statutory requirements <p>■ Replacement “transition” cooperative agreement grant is under §104(k) authority.</p>
<p>BCRLF WITH LOANS MADE</p>	<p>■ Close out existing cooperative agreement. EPA deobligates, recertifies, and reobligates simultaneously unspent funds to new replacement “transition” cooperative agreement</p> <ul style="list-style-type: none"> ▶ Requires transition application related to the amount unspent, showing matching share and including new budget/workplan to incorporate new statutory requirements <p>■ Closeout of the existing cooperative agreement will be possible in those cases in which all loans previously made have been fully paid out.</p> <p>■ If loans have been made under the existing cooperative agreement but have NOT been fully paid out:</p> <ul style="list-style-type: none"> ▶ The funds associated with the loans (including administrative expenses) will remain in the existing cooperative agreement ▶ The existing cooperative agreement will remain open until the loans have been fully paid out. ▶ Funds other than the loan funds (described above) will be transferred to the new “transition” cooperative agreement. ▶ Program income associated with these loans but received after the date of transition will be counted as part of the transitioned funds and can be used to satisfy the 20% match requirement of the new “transition” cooperative agreement (<i>See 40 C.F.R. 31.25(g)(3)</i>) ▶ An existing cooperative agreement and the new replacement “transition” cooperative agreement may be in existence at the same time. <p>■ Replacement “transition” cooperative agreement grant is under §104(k) authority.</p>

Note: (1) “Replacement” means the deobligation of BCRLF funds under §104(d) and the reobligation of the same funds as an RLF under the authority of §104 (k). (2)Note: BCRLF refers to pilots existing under the original Brownfields program; RLF refers to cooperative agreements under the new law.

IV. Transition Request Submission and Mailing Instructions

BCRLF pilots choosing to transition under the new law must send a 2 copies of the Transition application to:

U.S. EPA Regional Office:

Original

Signed Copy ATTN: Grants Management Officer

Copy ATTN: Brownfields Project Officer

* See page 14 for a listing of EPA Regional Offices and Revolving Loan Fund Coordinators.

V. U.S. EPA Regional Office RLF Coordinators

Regions and States		Address and Phone Number
EPA Region 1 James Chow	CT, ME, MA, NH, RI, VT	One Congress Street, Suite 1100 (Mailcode HIO) Boston, MA 02114-2023 Phone (617) 918-1394 Fax (617) 918-1291
EPA Region 2 Larry D'Andrea	NJ, NY, PR, VI	290 Broadway, 18th Floor New York, NY 10007 Phone (212) 637-4314 Fax (212) 637-4360
EPA Region 3 Sherry Gallagher	DE, DC, MD, PA, VA, WV	1650 Arch Street (3HS34) Philadelphia, PA 19103-2029 Phone (215) 814-3211 Fax (215) 814-5518
EPA Region 4 Wanda Jennings	AL, FL, GA, KY, MS, NC, SC, TN	Atlanta Federal Center (SNFC-EPA Mail Room) 61 Forsyth Street Atlanta, GA 30303 Phone (404) 562-8682 Fax (404) 562-8628
EPA Region 5 Alan Baumann	IL, IN, MI, MN, OH, WI	77 West Jackson Boulevard (SE-4J) Chicago, IL 60604-3507 Phone (312) 886-3058 Fax (312) 886- 6741
EPA Region 6 Roger Hancock	AR, LA, NM, OK, TX	1445 Ross Avenue, Suite 1200 (6SF-PB) Dallas, TX 75202-2733 Phone (214) 665-6688 Fax (214) 665-6660
EPA Region 7 Debi Morey	IA, KS, MO, NE	901 N. 5th Street (SUPR/STAR) Kansas City, KS 66101 Phone (913) 551-7593 Fax (913) 551-8688
EPA Region 8 Tom Pike	CO, MT, ND, SD, UT, WY	999 18th Street, Suite 300 (EPR-SA) Denver, CO 80202- 2466 Phone (303) 312-6982 Fax (303) 312-6067
EPA Region 9 Susanne Perkins	AZ, CA, HI, NV, AS, GU	75 Hawthorne Street, SFD 1-1 San Francisco, CA 94105 Phone (415) 972-3208 Fax (415) 947-3526
EPA Region 10 Timothy Brincefield	AK, ID, OR, WA	1200 Sixth Avenue (ECL-112) Seattle, WA 98101 Phone (206) 553-2100 Fax (206) 553-0124

Appendix 1. Summary of Major Changes under the Brownfields Law

Major changes from the current EPA brownfields program include:

- I. *A new definition of a brownfield site (**See Appendix 3.**) The new definition of a brownfield site includes:
 - a. *Sites contaminated by hazardous substances, pollutants or contaminants, petroleum or petroleum product, or controlled substances under §102 of the Controlled Substances Act (21U.S.C. 802) may be eligible for grant funding.*
 - b. *“Real property” including residential as well as commercial and industrial properties.*
 - c. *“Mine-scarred land.”**
- II. *Revolving Loan Fund (RLF) funding may be used for both loans and cleanup subgrants. Intragovernmental loans, i.e., the reimbursable transfer of loan funds within the same governmental entity may be made to the RLF recipient; cleanup subgrants may NOT be made by the RLF recipient to itself.*
- III. *RLF cooperative agreement recipients are prohibited from making loans or cleanup subgrants for the response costs at a site for which the recipient of the grant or loan is potentially liable under §107 of CERCLA.*
- IV. *RLF cooperative agreement recipients are required to provide a 20% cost share of funds awarded by EPA, unless EPA approves a hardship waiver.*
- V. *RLF cooperative agreement recipients are prohibited from using grant funding for administrative costs. **See Appendix 5.***
- VI. *RLF cooperative agreement recipients are required to apply provisions of the National Oil and Hazardous Substances Contingency Plan (NCP) that EPA determines to be “relevant and appropriate to the program”.*

Each of these major changes is briefly described. BCRLF pilots are encouraged to review the new law to obtain a better understanding of these requirements for themselves.

I. Definition of Brownfield Site

EPA may provide funding to plan, identify, investigate, assess, and clean up brownfields properties. A “brownfield site” is defined to mean 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.” (§101(39)(A)). Certain facilities are excluded from the definition of a brownfield site. **See Appendix 3.**

However, certain sites that are excluded from funding eligibility because the sites fall within the scope of the statutory exclusions from the definition of “brownfield site” may qualify for brownfields funding, if a property-specific determination is made that the site meets the goals and criteria of the brownfields program and the criteria set forth in the statute. EPA may award financial assistance to an eligible entity for assessment and cleanup activities at an excluded site, if it is found that such financial assistance will protect human health and the environment, **and** either promote economic development or enable the creation of, preservation of, or addition to parks, greenways, undeveloped property, other recreational property, or other property, used for

nonprofit purposes. Sites not eligible for a property-specific funding determination are those sites or facilities: that are listed, or proposed for listing on the National Priorities List; subject to a unilateral administrative order, a court order, an administrative order on consent or judicial consent decree issued or entered into by parties under CERCLA; and that are subject to the jurisdiction, custody, or control of the United States government, except for land held in trust by the United States for an Indian tribe.

Eligible brownfields sites may include sites that are

- contaminated by petroleum or a petroleum product
- contaminated by controlled substances (meaning a drug or other substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)).
- mine-scarred lands.

Generally, petroleum sites are included in the definition of a brownfield site and may receive financial assistance from EPA for assessments and cleanup. The Brownfields Law restricts eligibility for brownfields funding to petroleum contaminated sites that EPA or the state determines are (1) of “relatively low risk” compared with other “petroleum-only” sites in the state; and (2) for which there is no viable responsible party and will be assessed, investigated, or cleaned up by a person that is not potentially liable for cleaning up the site. In addition, petroleum contaminated sites must not be subject to a corrective action order under the RCRA 9003(h). Petroleum sites that have received specific cleanup assistance under Subtitle I of RCRA from the Leaking Underground Storage Tank trust fund are excluded from receiving financial assistance, unless a property-specific funding determination from EPA is obtained.

EPA’s preliminary 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. 40 C.F.R. 261.4(b)(7). *See Appendix 3 for additional information.*

Brownfields sites also include all “real property.” Residential properties, as well as commercial and industrial properties, are included under the new definition. In particular, sites eligible for funding include residential property that is contaminated by controlled substance(s) (e.g. former drug labs). (21 USC 812)

II. RLF funding may be used for both loans and cleanup subgrants

Under the new law, a Revolving Loan Fund (RLF) may make both loans (including loan guarantees) and cleanup subgrants to eligible entities. Consistent with the intent of the new law to promote the long-term availability of funds from the revolving loan fund, it is ***EPA policy that at least 60% of the funds transitioned by a BCRLF pilot must be used to capitalize the loan pool and eligible programmatic costs.*** No more than 40% of the funds awarded may be used for cleanup subgrants and eligible programmatic costs.

EPA expects to be substantially involved in overseeing and monitoring the RLF program. EPA will approve the substantive terms of RLF loans and cleanup subgrants. Substantial involvement by EPA generally covers such administrative activities as: monitoring, review and approval of procedures for loan recipient selection; review of project phases; approval of the substantive terms included in certain types of contracts, as well as loans and subgrants to help the cooperative agreement recipient verify that the costs incurred in these transactions are

eligible expenses under CERCLA §104(k). Substantial involvement also includes reviewing and approving sites to determine eligibility; reviewing financial and environmental status reports; and monitoring the RLF grantee's fulfillment of all reporting, record keeping, and other program requirements. The exact terms of EPA's substantial involvement will be negotiated between the RLF grantee and the EPA Regional office.

A. Loans under the RLF

Like the current program, new RLF grant recipients or BCRLF pilots transitioning under the new law will be able to make one or more loans (or loan guarantees) to an eligible entity, a site owner, a site developer, or another person. *In addition, new RLF grant recipients or BCRLF pilots transitioning under the new law may continue to make intragovernmental loans, i.e., the reimbursable transfer of loan funds within the same governmental entity.* The law does not limit the amount of funding an RLF recipient may lend a borrower for any one site, however, the ability to enhance cleanup and provide funds on a continuous basis is a factor that will be considered if a RLF grantee or transitioned BCRLF pilot applies for supplemental funding.

B. Cleanup Subgrants under the RLF

While loans are generally preferred because repayment of the loans will extend the life and expand the utility of federal expenditures under this program, the new law allows new RLF grant recipients or transitioned BCRLF pilots to make one or more cleanup subgrants. ***The cleanup subgrants, unlike the loans, may NOT be made within the same governmental entity that receives the RLF grant.***⁴

RLF subgrants for cleanup may be made to another eligible entity, or nonprofit organization based on several specific considerations for the clean up of sites *owned by* the eligible entity or the nonprofit organization that receives the cleanup subgrant.⁵

The RLF cooperative agreement recipient must take into consideration (§104(k)(3)(C)):

- the extent to which the *cleanup subgrant* will facilitate the creation of, preservation of, or addition to a park, a greenway, undeveloped property, recreational property, or other property used for nonprofit purposes;
- the extent to which the *cleanup subgrant* will meet the needs of a community that has 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;

⁴ Under CERCLA §104(k)(3)(B)(ii), the eligible governmental entity "providing assistance" may make subgrants to a *different* eligible entity or to a nonprofit organization. In addition, under the "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments, 40 C.F.R. Part 31, Section 31.3 defines a grantee as "the entire legal entity even if only a particular component of the entity is designated in the grant award document" and further defines a subgrantee as "...the government or other legal entity ...which is accountable to the grantee for the use of the funds provided."

⁵ The cleanup subgrants made under an RLF cooperative agreement are not the same as "direct cleanup grants" which may also be awarded by EPA under the new law. Direct cleanup grant funding is limited to \$200,000 and is awarded by EPA to eligible entities AND NON-PROFIT ORGANIZATIONS described in section 104(k)(3)(A)(ii).

- the extent to which the *cleanup subgrant* will facilitate use or reuse of existing infrastructure;
- the benefit of promoting the long-term availability of funds from a revolving loan fund for brownfield remediation; and
- other similar factors EPA considers appropriate.

Non-profit subgrantees must expend subgrant funds in accordance with 40 C.F.R. Part 30 and OMB Circular A-122 (nonprofit organizations). Subgrants made to eligible entities that are governmental organizations are subject to 40 C.F.R. Part 31 and OMB Circular A-87 (state, tribal and local governments). All costs incurred by subgrantees must be eligible costs. In other words, subgrantees cannot use cleanup funds for prohibited administrative costs, or for other costs prohibited by the new law. *See Appendix 5.*

III. RLF cooperative agreement recipients are prohibited from making loans or cleanup subgrants for the response costs at a site for which the recipient of the grant or loan is potentially liable under §107 of CERCLA.

The new law states that no part of a grant or loan may be used for the payment of “a response cost at a brownfield site for which the recipient of the grant or loan is potentially liable under section 107.” (§104(k)(4)(B)(I)(IV))

IV. RLF cooperative agreement recipients are required to provide a 20% cost share of funds awarded from EPA, unless EPA approves a hardship waiver.

The new law requires that RLF recipients pay a 20% cost share of the total federal award. In the case of BCRLF pilots transitioning under the new law, the 20% cost share will apply to the EPA funds not previously loaned or otherwise legally expended or encumbered under the existing BCRLF and to any subsequent supplemental funds provided to the RLF recipient.

The cost share requirement may be in the form of a contribution of cash, labor, material, or services from non-Federal sources unless EPA determines that the cost share would place an undue hardship on the eligible entity. A BCRLF pilot requesting transition may petition EPA to waive the cost share based on a claim for undue hardship.

To petition EPA, a BCRLF pilot must submit a letter to the EPA Brownfields Project Officer requesting a hardship waiver and the specific circumstances to support the request. EPA will consider a hardship waiver to the cost share requirement on a case-by-case basis. Factors that EPA will consider include:

- (A) bankruptcy, receivership, or similar indicators of financial distress, OR
- (B) evidence that the eligible entity is unable to commit its own funding or in-kind contribution to the project due to:
 - (1) a loss or diminution of sources of revenue,
 - (2) low per capita income,
 - (3) an unemployment rate above the national average,
 - (4) unemployment or economic adjustment problems resulting from severe short-term or long-term changes in economic conditions, or
 - (5) a reduced tax base due to unforeseen economic conditions.
- (C) evidence of the presence of factors that the applicant for the hardship waiver believes are relevant to a decision by EPA to waive the cost share requirement.

RLF cooperative agreement recipients (including BCRLF pilots that transition) cannot meet the cost share requirement with prohibited administrative costs, or other unallowable costs. Under 40 C.F.R. 31.24, cooperative agreement recipients can only use eligible and allowable costs to meet their cost share requirements. To be allowable, the costs must be reasonable and allocable to an activity described by the scope of work and not otherwise prohibited. If the cost share is in the form of a contribution of labor, material or other services, it must be an eligible and allowable expense under the grant and not an ineligible expense such as administrative or indirect costs. States and other third-party non-Federal entities may contribute funds, labor, services, or materials to be counted towards the cost share requirement. The costs for 3rd party contributions must be allowable under 40 C.F.R. 31.24. Generally, other sources of federal funds including other EPA grants and cooperative agreements cannot be used to meet the cost share requirement unless the grant making authority contains a specific provision that allows the Federal grant to be used as a cost share. For example, the Department of Housing and Urban Development's Community Development Block Grant program funding (42 USC 5305(a)(9)) contains a specific authorization that allows these Federal grant funds to be used as a cost share for other Federal grants. Local governments that transition their BCRLF pilots may use state grants to meet their cost share requirements to the extent allowed by state law.

Under 40 C.F.R. 31.25(g), program income, including repayment of loans made after the date of transition or fees charged to borrowers, may be used to fund expenditures toward meeting the 20% cost share. EPA will not allow contributions of labor, material, or services *from borrowers* to count toward the RLF cooperative agreement recipient's cost share unless the recipient can demonstrate that the accounting system used is able to track and provide adequate documentation for such contributions. However, if a BCRLF pilot plans to use anticipated program income to help meet the cost share, the request for transition must demonstrate how alternative sources for obtaining cash, labor, material or services can be used to meet the cost share if program income is less than anticipated during the performance period for the cooperative agreement.

Finally, the cost share requirement must be included in the approved budget and tracked and reported to EPA by the grant recipient.

Eligible programmatic costs may be used to help meet the RLF cooperative agreement recipient's 20% cost share requirement. *See Appendix 5 for discussion of eligible programmatic costs.*

V. RLF cooperative agreement recipients are prohibited from using grant funding for administrative costs.

The Brownfields Law prohibits the use of any "part of a grant or loan" for the payment of an administrative cost. Direct administrative costs are prohibited costs. The new law provides that the administrative cost prohibition does not apply to: investigation and identification of the extent of the contamination; design and performance of a response action; or monitoring of a natural resource. EPA has determined that the administrative cost prohibition does not apply to "programmatic" costs, i.e., costs for activities that are integral to achieving the purpose of the grant, even if the Agency considered costs to be "administrative" under the prior Brownfields Program. *Under new law, BCRLF pilots that choose to transition will no longer be able to use their grant funds to pay for prohibited administrative costs. See Appendix 5 for a discussion of the administrative cost prohibition and the eligibility of programmatic costs. Please note*

particularly that prohibited administrative costs include all indirect costs under OMB Circular A-87.

VI. RLF cooperative agreement recipients are required to apply provisions of the National Oil and Hazardous Substances Contingency Plan (NCP) that EPA has determined are “relevant and appropriate to the program.”

EPA may require a BCRLF pilot that transitions, or new RLF cooperative agreement recipients, to apply parts of the NCP to the extent the provisions are “*relevant and appropriate to the program.*” Relevant and appropriate provisions will be addressed through terms and conditions in the new replacement transition cooperative agreement. For those pilots choosing to transition, new terms and conditions will be negotiated with the Region. These terms and conditions are expected to provide the cooperative agreement recipient with program flexibility. For example, an existing BCRLF pilot is now required to have a site manager who is a government employee. Upon transition, a new term and condition may allow oversight of a cleanup to be conducted by an independent, qualified environmental professional.

EPA preliminary view is that NCP requirements for public information and community relations as well as the analysis of alternatives may be relevant and appropriate. Similarly, preparation of a community relations plan that includes reasonable notice of the proposed cleanup plan, opportunity for community involvement, and response to community comments on the plan may be relevant and appropriate. Consideration of cleanup alternatives⁶ (which may include “no action”) implemented through a simple, concise evaluation may be considered relevant and appropriate. The RLF cooperative agreement recipient may be required to include information about the site and contamination issues; cleanup objectives; cleanup alternatives to address effectiveness, implementability, and cost; and the proposed cleanup plan.

⁶ For cleanup of contamination caused by petroleum releases from underground storage tanks, a party to a cooperative agreement with EPA typically considers a range of proven cleanup methods to address such contamination. This consideration includes identification of contaminant sources, exposure pathways and an evaluation of corrective measures; and for UST petroleum cleanup projects conducted in this manner, the cleanup constitutes, the required analysis of cleanup alternatives.

Appendix 2. Matrix of Major Changes

<i>Major Changes Affecting Transitioning BCRLF Pilots” AND FY 2003 New Revolving Loan Fund (RLF) Guidelines</i>		
	Old BCRLF PILOTS	New RLF
<i>Requirements for old BCRLF pilots and new RLF cooperative agreement recipients or transitioning pilots</i>	<p>Pre Legislation BROWNFIELDS PROGRAM - through FY2002 “OLD FUNDING”</p> <p>The BCRLF demonstration pilot program was originally funded under §104(d)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA). Regulations applicable to that program included 40 C.F.R. Part 31 (Uniform Administration Requirements for Grants and Cooperative Agreements to State and Local Governments), 40 C.F.R. Part 35, Subpart O (Cooperative Agreements for Superfund Response Actions), and 40 C.F.R. Part 300 (The National Oil and Hazardous Substances Pollution Contingency Plan).</p>	<p>New Law (P.L. 107-118) - Beginning 2003 “NEW FUNDING”</p> <p>The BCRLF pilots choosing to transition under the new law (§104(k)) will be required to follow the new law. Regulations applicable to the transition as well as new cooperative agreements will include 40 C.F.R. Part 31 (Uniform Administration Requirements for Grants and Cooperative Agreements to State and Local Governments), and “relevant and appropriate” provisions of the NCP as determined by EPA.</p>
<i>Funding for BCRLF and RLF Cooperative Agreements</i>	<p>BCRLF cooperative agreement awards of up to \$1,000,000 per eligible entity. Proposals from coalitions were permitted</p>	<p>Initial Revolving Loan Funds (RLF) awards may be up to \$1,000,000 per eligible entity. Proposals from coalitions are permitted. EPA may provide supplemental funding.</p>

**Major Changes Affecting Transitioning BCRLF Pilots”
AND FY 2003 New Revolving Loan Fund (RLF) Guidelines**

	Old BCRLF PILOTS	New RLF
List of Eligible Governmental Entities for RLF Awards is Expanded	Eligibility for cooperative agreements was limited to states, political subdivisions, and Indian Tribes.	<p>Eligibility has been expanded to include:</p> <ul style="list-style-type: none"> ▶ A general purpose unit of local government ▶ A land clearance authority or other quasi-governmental entity that operates under the supervision and control of or as an agent of a general purpose unit of local government ▶ A governmental entity created by the State legislature; ▶ A regional council or group of general purpose units of local government ▶ A redevelopment agency that is chartered or otherwise sanctioned by a State ▶ A State ▶ An Indian Tribe other than in Alaska ▶ An Alaska Native Regional Corporation and an Alaska Native Village Corporation as those terms are defined in the Alaska Native Claims Settlement Act (43 U.S.C. 1601 and following) and the Metlakatla Indian community <p>▶ AND, existing BCRLF pilots choosing to transition under new law or apply for new cooperative agreements under the new law</p>
Flexibility to Make BOTH RLF Loans and RLF Cleanup Subgrants	Must use at least 70% of capitalization to make BCRLF Loans; 20% may be used as direct financial assistance to carry out lead agency responsibilities; and, 10% may be used for general administrative costs	It is EPA policy that at least 60% funds to capitalize RLF loan pool and eligible programmatic costs. No more than 40% for cleanup subgrants and eligible programmatic costs.

**Major Changes Affecting Transitioning BCRLF Pilots”
AND FY 2003 New Revolving Loan Fund (RLF) Guidelines**

	Old BCRLF PILOTS	New RLF
<i>Eligibility for RLF Loans</i>	<p>Loans may be made to any public or private entity if:</p> <p>A. is authorized to enter into a loan agreement</p> <p>B. is an owner/operator of a site AND falls under a statutory CERCLA liability exemption OR EPA would not pursue the party under CERCLA</p> <p>C. is an owner/operator who acquired property after the time of disposal and did not cause or contribute to the contamination</p> <p>D. is NOT a generator or transporter of contamination at the site</p> <p>E. is NOT a party suspended or debarred</p>	<p>Loans may be made to any eligible entity, a site owner, a site developer, or other person who among other things:</p> <p>A. is authorized to enter into a loan agreement</p> <p>B. on or before the date of acquiring property, carried out all appropriate inquiries to meet the definition of “innocent landowner.”</p> <p>C. is NOT using the funds to pay for response costs at a site for which they are potentially liable under §107 of CERCLA.</p> <p>D. is NOT a party suspended or debarred</p>
<i>Eligibility for RLF CLEANUP Subgrants</i>	<p>The BCRLF may NOT provide subgrants for cleanup.</p>	<p>Subgrants for cleanup may be provided to:</p> <p>A. any eligible entity (other than the recipient of the grant)</p> <p>B. a nonprofit organization</p> <p>The property must be OWNED by the entity or nonprofit receiving the grant and the decision to make the subgrant must take into account the following considerations:</p> <ul style="list-style-type: none"> ▶ extent grant facilitates creation, preservation or addition to a park or greenspace, undeveloped property, or other property used for nonprofit purposes; ▶ extent grant meets needs of community that has inability to draw on other resources for cleanup and subsequent redevelopment because of the small population or low income of the community; ▶ extent grant will facilitate reuse of existing infrastructure; ▶ the benefit of promoting the long-term availability of funds from a brownfields revolving loan fund. ▶ other similar factors EPA considers appropriate.

**Major Changes Affecting Transitioning BCRLF Pilots”
AND FY 2003 New Revolving Loan Fund (RLF) Guidelines**

	Old BCRLF PILOTS	New RLF
Definition of Brownfields Site is expanded to reach petroleum sites, mine scarred land and drug lab sites.	Abandoned, idled or underused industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination. CERCLA EXCLUDES petroleum from the definition of hazardous substances.	<ul style="list-style-type: none"> • “Real property” the expansion, redevelopment, or reuse of which is complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant. Expressly includes ‘relatively low risk’ petroleum sites, mine scarred lands, and sites contaminated by a controlled substance (i.e., drug labs). The definition excludes certain types of sites including facilities listed (or proposed for listing) on the National Priorities List. <i>Appendix 3: Guidance on Sites Eligible for Brownfields Funding Under CERCLA §104(k).</i>
Use of EPA funding for Administrative Costs	10% - 15% of cooperative agreement award to RLF recipient may be used to cover the recipient’s general administrative costs depending on financial structure of the pilot.	Administrative costs are prohibited under the RLF cooperative agreement. Certain programmatic expenses including direct costs for managing the RLF will be eligible. Appendix 5: Prohibition on Use of Funds.
Cost Sharing Fund Requirements	No cost share funds required by cooperative agreement recipient.	New 20% cost share requirement. Cost share may be in the form of case, labor, material, or services. A cost share may not be required if EPA determines that the cost share would place an undue hardship on the eligible entity.
Meeting NCP Requirements	All environmental response requirements must be conducted in accordance with CERCLA and consistent with the NCP.	NCP requirements apply ONLY to extent they are relevant and appropriate to the program as determined by EPA.
Regulations Regarding Administration of BCRLF Cooperative Agreements	The requirements of 40 C.F.R. Part 31 and 40 C.F.R. Part 35 Subpart O must be met.	40 C.F.R. Part 35 Subpart O requirements not imposed under new law. Grants are subject to 40 C.F.R. Part 31.
Recordkeeping Requirements	Cooperative agreement recipients and borrowers must maintain documentation for a minimum of 10 years after completion of the cleanup activity supported by each loan and must obtain written approval from the U.S. EPA prior to destroying records (40 C.F.R. 35.6705).	<ul style="list-style-type: none"> ▶ Records must be kept for at least 3 years from the grantee’s submission of its final expenditure report in accordance with 40 CFR 31.42. ▶ BCRLF pilots that transition must keep separate records for activities and expenditures prior to transition and activities and expenditures following transition. Records following transition must be able to differentiate petroleum and non-petroleum grants, cost-share requirements, etc.

Appendix 3. Guidance on Sites Eligible for Brownfields Funding Under CERCLA §104(k)

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Appendix 3: Guidance on Sites Eligible for Brownfields Funding Under CERCLA Section 104(k)

3.1 Introduction

The information provided in this appendix should be used by applicants as a guide in determining the eligibility of any property for brownfields funding. The following guidance provides the EPA's preliminary views on the types of sites that may be appropriate for funding. EPA is providing this information as guidance to applicants to assist you in developing your proposals for funding under CERCLA §104(k). This guidance provides preliminary interpretations and policy guidance that EPA intends to use as a guide when we exercise our authority to award funds under §104(k). However, we believe that further development may impact our view of these provisions, and we will reevaluate our preliminary views in light of the factual information we receive with each proposal, as well as over the course of implementing the §104(k) grant program.

This guidance does not impose legally-binding requirements. Applicants are free to raise questions about the appropriateness of these preliminary views, and EPA will consider whether these preliminary views are appropriate at that time. Any decision by EPA to apply this preliminary guidance will be made based on the applicable statutory provisions.

3.2 General Definition of Brownfield Site

The new Brownfields Law defines a “Brownfield Site” to mean:

“...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 all “real property,” including residential, as well as commercial and industrial properties.

3.3 Additional Areas Specifically Eligible for Funding

The Brownfields Law identifies three types of properties that are specifically eligible for funding:

- ▶ Sites contaminated by ***controlled substances***.
- ▶ Sites contaminated by ***petroleum or a petroleum product***.
- ▶ ***Mine-scarred lands***.

See below for guidance on determining the scope of each of these three types of sites. Applicants should identify properties included within their funding proposals that fall within the scope of any of the following three areas.

3.3.1 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 Section 812). The term does not include distilled spirits, wine, malt beverages, or tobacco...”

For example, sites eligible for brownfields 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).

3.3.2 Contamination by Petroleum or Petroleum Product

Petroleum-contaminated sites (except those sites receiving LUST trust fund monies) are eligible for brownfields funding. Petroleum-contaminated sites (or portions of properties contaminated with petroleum) that are eligible for brownfields funding include certain sites that are not underground storage tank (UST) sites, as described below. 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.”

Applicants should note that the Brownfields Law restricts eligibility for brownfields funding to petroleum contaminated sites that EPA or the state determines:

1. Are of “relatively low risk” compared with other “petroleum-only” sites in the state; and
2. For which there is no viable responsible party and will be assessed, investigated, or cleaned up by a person that is not potentially liable for cleaning up the site.

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

In the case of proposals that include requests for an assessment or direct clean up grant, or a grant for a revolving loan fund, to address petroleum-contaminated sites, applicants are encouraged to indicate whether the site meets each of the criteria listed above. An explanation of each of these three criteria is provided below.

Relatively Low Risk:

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

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

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

“No Viable Responsible Party” and “Cleaned Up by a Person Not Potentially Liable”:

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

Please note that eligibility for a brownfields grant ***DOES NOT*** waive liability under RCRA Subtitle I, OPA, or any applicable state underground storage tank regulations.

“Not Subject to any Order Issued under RCRA 9003(h)”:

Any site that is under a RCRA Subtitle I corrective action order (RCRA §9003(h)) is not eligible for a grant.

Applicants should note that any determination that a site is of “relatively low risk” has meaning solely for the purposes of determining eligibility for a brownfields grant and has no effect on potential liability under RCRA §9003(h) (for the costs of corrective action and enforcement) or liability under other federal statutes such as under §311(c) of the Clean Water Act (CWA) and §1002 of OPA (for removal costs and damages that result from the discharge of oil into navigable waters).

3.3.3 *Mine-scarred Lands*

Under the new Brownfields Law, mine-scarred lands are eligible for brownfields funding. Applicants for brownfields funding that include properties within their proposal that they believe fall within the following definition of mine-scarred lands are encouraged to provide in the site description section of their proposals information identifying and describing such properties.

EPA’s preliminary 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.

3.4 *Particular Classes of Sites Not Eligible for Funding or Eligible Only Under Property-specific Determinations*

EPA excludes the following types of facilities from funding eligibility unless the applicant fulfills the requirements for demonstrating that the site meets the criteria for a property-specific determination for funding (see *Appendix 4 Guidance for Requests for Property-Specific Determinations for Funding*). Applicants are encouraged to indicate within the site description section of their proposal if any site or property included within the scope of their funding proposal falls within the scope of any of the categories of sites listed below. When requesting a property-specific determination for funding, applicants should follow the instructions provided in *Appendix 4* for indicating that brownfields funding at such sites will ensure protection of human health and the environment and promote economic development or the creation or preservation of greenspace or recreational areas. (Note: The following discusses limitations on funding particular classes of sites. Many of these limitations reflect policy decisions. Where the limitations are based on statutory provisions, we have noted that.)

Also, please note that in providing funding for brownfield sites, and given that a limited amount of funding is available for brownfields grants, EPA's goal is to not provide funding to sites to 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 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 identify

ongoing or anticipated environmental enforcement actions related to the brownfield site for which funding is sought.

The Brownfields Law also excludes three types of properties from funding eligibility and does not allow EPA the opportunity to provide funding for these properties after making a property-specific determination. These three types of properties include: 1) sites listed on the NPL, 2) facilities subject to unilateral administrative orders, court orders, administrative orders on consent or judicial consent decree issued to or entered into by parties under CERCLA, and 3) facilities that are subject to the jurisdiction, custody or control of the United States government.

Sites Not Eligible for Funding Without a Property-Specific Determination

1. Facilities subject to planned or ongoing CERCLA removal actions.
2. Facilities that are subject to unilateral administrative orders, court orders, 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 the Solid Waste Disposal Act (as amended by the Resource Conservation and Recovery Act (RCRA)), the Federal Water Pollution Control Act (FWPCA), the Toxic Substances Control Act (TSCA), or the Safe Drinking Water Act (SDWA).
3. Facilities subject to corrective action orders under RCRA (§ 3004(u) or §3008(h)) and to which a corrective action permit or order has been issued or modified to require the implementation of corrective measures.
4. Facilities that are 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.
5. Facilities where there has been a release of polychlorinated biphenyls (PCBs) and are subject to remediation under TSCA.
6. Portions of facilities for which funding for remediation has been obtained from the Leaking Underground Storage Tank (LUST) Trust Fund.

Guidance regarding the scope of each of the funding restrictions listed above is provided below.

**Sites NOT Eligible for Brownfields Fund and NOT Eligible for a
Property-Specific Determination**

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 decree issued to or entered into by parties under CERCLA.
3. Facilities that are subject to the jurisdiction, custody or control of the United States government. (*Note: Land held in trust by the United States government for an Indian tribe is eligible for brownfield funding.*)

3.4.1 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 preliminary 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 EE/CA approval memo; EPA mobilizes onsite; or EPA issues a notice of federal interest to one or more potentially responsible parties (PRP(s)), which in emergencies may be made verbally.

Our preliminary view is that, for the purposes of eligibility to receive brownfields funding, and for no other reason, a removal is complete, *i.e.*, 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.). Once a removal action is complete, a property is eligible for brownfields funding without having to obtain a property-specific funding determination. Applicants applying for brownfields funding for 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 funding and may be eligible for brownfields 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 removals and clean up 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 grantee may continue to expend assessment grant funds on additional assessment activities. However, any additional expenditure of federal brownfield funds and any

additional site assessment activities should be conducted in coordination with the OSC for the site.

Any property or site where there are removal actions may be eligible for brownfields funding if a grant or loan applicant can demonstrate that brownfields funding will ensure protection of human health and the environment and promote economic development, or the preservation of greenspace. EPA will consider providing funding to an eligible entity for assessment or clean up activities at the site, on a property-specific basis (see guidance on documenting eligibility for property-specific funding determinations provided below).

3.4.2 Facilities Subject to Unilateral Administrative Orders, Court Orders, Administrative Orders on Consent or Judicial Consent Decree Issued to or Entered into by Parties Under CERCLA

Sites subject to administrative orders, court orders, and consent or judicial consent decrees issued or entered into by parties under the provisions of CERCLA are not eligible for funding, even on a property-specific basis. Therefore, applicants should not include such sites within the scope of their brownfields funding proposals.

3.4.3 Facilities listed (or proposed for listing) on the National Priorities List

CERCLA sites listed on the NPL and sites proposed to be listed on the NPL are not eligible for brownfields funding. In addition, these sites are not eligible for funding on a property-specific basis. Therefore, applicants should not include proposed or listed NPL sites within the scope of brownfields funding proposals.

3.4.4 Facilities to which a permit has been issued by the United States or an authorized state under the Solid Waste Disposal 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, §1321 of the Clean Water Act, 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 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 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.*, §1321 of FWPCA).

In cases where one or more portions of a property are not eligible for funding, the applicant should identify the specific permit and situation that causes the property to be excluded. In addition, the applicant must include, within the proposal, documentation that federal brownfields funding for the assessment or clean up of the property will further the goals established for property-specific funding determinations (see attached guidance on property-specific funding determinations).

Any property or site that has been issued a permit under the federal environmental statutes listed above (and in accordance with any additional guidelines provided below) may be eligible for brownfields funding if a grant or loan applicant can demonstrate that brownfields funding will ensure protection of human health and the environment and promote economic development, or the preservation of greenspace. EPA will consider providing funding to an eligible entity for assessment or cleanup activities at the site, on a property-specific basis (see guidance on documenting eligibility for property-specific funding determinations provided below).

In some cases, a facility may not have a permit or order because they are not in compliance with federal or state environmental laws requiring that they obtain a permit or the facility has failed to notify EPA of their regulatory status. Such facilities are not eligible for brownfields 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 their existence. Therefore, it is EPA's preliminary 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 below.

3.4.5 RCRA Sites

Excluded RCRA Facilities

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

- RCRA-permitted facilities.
- 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.
- 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.
- 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.

However, if a grant or loan applicant is requesting a grant for property that is excluded, the applicant may still be eligible for a brownfields grant, if the applicant can demonstrate that funding will ensure protection of human health and the environment and promote economic development, or the preservation of greenspace. EPA will consider providing funding to an applicant for assessment or cleanup activities at such a site on a property-specific basis (see guidance on documenting eligibility for property-specific funding determinations below).

RCRA Facilities that are Eligible for Funding

EPA's preliminary view is that the following types of RCRA facilities would not fall within the scope of the exclusion and would be eligible for funding:

- RCRA interim status facilities that are not subject to any administrative or judicial order or consent decree;
- 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
- Parcels of RCRA facilities that are not under the scope of a RCRA permit or administrative or judicial order.

In addition, any property or site that has been issued a permit under RCRA may be eligible for brownfields funding if a grant or loan applicant can demonstrate that brownfields funding will ensure protection of human health and the environment and promote economic development, or the preservation of greenspace. EPA will consider providing funding to an eligible entity for assessment or clean up activities at the site, on a property-specific basis (see guidance on documenting eligibility for property-specific funding determinations provided below).

3.4.6 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 funding if a grant or loan applicant can demonstrate that brownfields funding will ensure protection of human health and the environment and promote economic development, or the preservation of greenspace. EPA will consider providing funding to an eligible entity for assessment or cleanup activities at the site, on a property-specific basis (see guidance on documenting eligibility for property-specific funding determinations provided below).

3.4.7 Facilities that are subject to the jurisdiction, custody or control of the United States government.

Facilities owned by, or under the custody or control of the federal government are *not* eligible for brownfields funding, even on a property-specific basis. EPA's preliminary view is that this exclusion may not extend to:

- Privately-owned, Formerly Used Defense Sites (FUDS)

- Privately-owned, Formerly Utilized Sites Remedial Action Program (FUSRAP) properties
- Other former Federal properties that have been disposed of by the U.S. government

Also note that land held in trust by the United States government for an Indian tribe is not excluded from funding eligibility.

Also note that eligibility for brownfields 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.

3.4.8 Sites Contaminated with PCBs

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

EPA's preliminary view is that all portions of properties *are eligible* for brownfields site assessment grants, except where EPA has initiated an involuntary action with any person to address PCB contamination. Also, it is our preliminary view that all portions of properties *are eligible* for cleanup and RLF grants, except where EPA has an ongoing action against a disposer to address PCB contamination.

Therefore, portions of properties that are excluded from funding eligibility include those portions of properties where:

- 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 an 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:

- Section 761.50(b)(3), the directed characterization, remediation or disposal action.
- Section 761.61(a), the self-implementing provision.
- An approval issued under Section 761.61(c), the risk-based provision.
- Section 761.61(b) to the level of PCB quantification (*i.e.*, 1 ppm in soil).
- An approval issued under Section 761.77, the coordinated approval provision.
- Section 761.79, the decontamination provision.
- An existing EPA PCB Spill Clean-Up Policy.
- Any future policy or guidance addressing PCB spill cleanup or remediation specifically addressing the remediation of PCBs at brownfield sites.

Note that 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 may be eligible for brownfields funding if a grant or loan applicant can demonstrate that brownfields funding will ensure protection of human health and the environment and promote economic development, or the preservation of greenspace. EPA will consider providing funding to an eligible entity for assessment or cleanup activities at the site, on a property-specific basis (see guidance on documenting eligibility for property-specific funding determinations provided below).

3.4.9 Exclusion of LUST Trust Fund Sites

The Brownfields Law excludes from eligibility for funding (unless EPA makes a property-specific determination for funding) 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 preliminary 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 an UST site is located in a state where the state agency has used LUST trust fund money for state program oversight activities but has not expended LUST trust funds for specific assessment and/or cleanup activities at the site, the site would not necessarily be excluded from eligibility for brownfields funding.

Such sites may receive brownfields funding on a property-specific basis, if it is determined that brownfields 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 below).

Examples of “excluded” sites (i.e., sites receiving LUST trust fund monies) we would consider to be good candidates to receive brownfields grants or loans

- All UST fields pilots (50 pilots)
- 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 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.
- Sites (or portions of properties) where LUST 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.

Appendix 4. Guidance for Requests for Property-Specific Determinations for Funding

Guidance for Requests for Property-Specific Determinations for Funding

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APPENDIX 4

Guidance for Requests for Site-by-Site Determinations for Funding

4.1 *Overview*

Grant applicants must determine if any of the properties, or facilities, included in their proposal require a property-specific determination. A list of the categories of facilities that only are eligible for funding via a site-by-site determination is provided below.

If an applicant includes within the scope of a grant proposal a facility that requires a property-specific funding determination, the proposal must include, on a separate page, the following information (to the extent this information replicates information requested elsewhere in the proposal, the applicant may directly copy the text to this page):

1. Basic site identification information and eligible entity identification information.
2. The specific circumstance that requires the grantee to request a property-specific determination (from the list in Section 3.4 of *Appendix 3*).
3. A short explanation of why the site falls within the identified circumstance requiring the property-specific funding determination.
4. An explanation of how providing brownfields funding for the site will meet the criteria necessary for making a property-specific funding determination (see below).
5. The degree to which other funding is or is not available for the assessment or cleanup of the site.
6. A explanation of whether or not the applicant is responsible for the contamination at a site.

The information provided will be used in making a property-specific determination for funding purposes, which will take place during the proposal evaluation process.

4.2 *Funding Limitations*

Although the statutory definition of “brownfield site” is broad, Congress limited the extent to which brownfields **funding** may be provided to eligible entities to assess and clean up sites that are being addressed under other federal programs. In addition, the Brownfields Law prohibits the use of grant and loan funds for the payment of response costs at sites for which the funding recipient of the grant or loan is potentially liable under §107 of CERCLA.⁷ (See *Appendix 5* for additional prohibitions on the use of brownfields funding.)

The types of facilities that Congress **excluded from** funding eligibility are listed below. However, certain facilities listed below as excluded from funding eligibility, may still qualify for brownfields funding. The types of facilities marked with an **asterisk (*)** below are eligible for brownfields funding, if a property-specific determination is made that funding for assessment or

⁷ Applicants also should note that the Brownfields Law contains other prohibitions on the use of grant and loan monies, including the use of grant and loan monies for paying penalties, administrative costs, federal cost-share requirements, and the cost of complying with any federal law (see §101(k)(4)(B)).

cleanup activities will meet the criteria set forth in the statute and meet the goals and criteria of the brownfields program.

- Facilities subject to planned or ongoing removal actions under CERCLA.*
- Facilities currently listed, or proposed to be listed, on NPL.
- Facilities subject to a unilateral administrative order, a court order, an administrative order on consent or a judicial consent decree under CERCLA.
- 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 have been issued by the U.S. or an authorized state under RCRA, FWPCA, TSCA, or SDWA.*
- 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.*
- Land disposal units that have submitted a RCRA closure notification or that are subject to closure requirements specified in a closure plan or permit.*
- Facilities subject to the jurisdiction, custody, or control of a department, agency, or instrumentality of the U.S., except for land held in trust for an Indian tribe.
- Portions of facilities where there has been a release of PCBs and is subject to TSCA remediation.*
- Facilities receiving monies for cleanup from the LUST trust fFund.*

* *Sites eligible for property-specific funding determinations.*

The types of facilities marked with an asterisk above may qualify for brownfields funding if EPA makes a property-specific determination that brownfields funding will protect human health and the environment **and** will either promote economic development or the creation, preservation, or addition to parks, greenways, undeveloped property, other recreational property, or other property used for nonprofit purposes. A determination of eligibility for funding will be made by EPA at the time of proposal evaluation.

Grant applicants must determine whether the property or properties that are the subject of their proposal fall within the scope of one or more of the funding exclusions listed above. Actual determinations of eligibility or exclusion will be made by EPA. However, if one or more sites that are the subject of a grant proposal fall within the scope of any of the facility types listed above, the grant proposal should specifically identify the site or sites, identify the applicable funding exclusion from the list above, and describe why each site falls within the exclusion. Descriptions summarizing the scope of each of the funding exclusions listed above are provided in *Appendix 3* of these guidelines.

4.3 *Criteria for Determining Eligibility for Funding on Property-Specific Basis*

Certain sites that are excluded from funding eligibility because the sites fall within the scope of the statutory exclusions from the definition of “brownfield site” may qualify for brownfields funding, if a property-specific determination is made that the sites meet the goals and criteria of the brownfields program and the criteria set forth in the statute. The following types of facilities, although excluded from the definition of brownfield site above, are *eligible for property-specific determinations for brownfields funding*:

1. Facilities subject to planned or ongoing removal action under CERCLA.
2. Facilities to which a permit has been issued by U.S. or authorized state under RCRA, FWPCA, TSCA, SDWA.
3. Facilities subject to RCRA orders requiring corrective action (§3004(u) or §3008(h)).
4. Land disposal units that have submitted a RCRA closure notification or that are subject to closure requirements specified in a closure plan or permit.
5. Portions of facilities where there has been a release of PCBs and is subject to TSCA remediation.
6. Facilities receiving monies for cleanup from the LUST trust fund.

In the case of each type of facility listed above, the new legislation allows EPA to award financial assistance *to an eligible entity* for assessment or cleanup activities at the site, if it is found that financial assistance will:

1. Protect human health and the environment, *and*
2. Either:
 - promote economic development, or
 - enable the creation of, preservation of, or addition to parks, greenways, undeveloped property, other recreational property, or other property used for nonprofit purposes.

Grant proposals for brownfields funding that include, within the scope of planned assessment or cleanup activities, sites, properties or facilities that potentially fall within any of the funding exclusions listed above, should specifically identify such sites and explain, in as much detail as possible, why the availability of brownfields funding will protect human health and the environment and promote economic development or the creation or preservation of greenspace (or other listed objectives). Information provided by the applicant in addressing these criteria will be used in documenting the EPA’s decision in making property-specific determinations for funding eligibility.

4.3.1 *Protection of Human Health and the Environment*

Grant applicants must provide a detailed discussion of how financial assistance for brownfields assessment or clean up activities at each site for which a property-specific determination for funding eligibility must be made will result in the allocation of funding in accordance with legislative intent. Each proposal for financial assistance, including a recipient of a revolving loan fund grant seeking EPA approval of loans, whose proposal includes one or more sites for which a property-specific determination must be made must include a discussion of how brownfields funding will ensure protection of human health and the environment.

Documentation supporting a determination that brownfields funding will ensure protection of human health and the environment should include documentation of one or more of the following:

- Specific examples of human health risks that will be mitigated by activities funded under a brownfields grant.
- Specific environmental improvements that can reasonably be expected to result from activities funded under a brownfields grant.
- Specific examples of contamination that will be addressed, including the specific hazardous substances, pollutants, or contaminants of concern and the environmental media that will be addressed.
- Description of how the proposed cleanup and redevelopment of the property will ensure that the property will be protective of human health and the environment and that the remedy will be both protective and consistent with the planned reuse of the property.

4.3.2 *Promote Economic Development*

Applicants also must provide detail on how financial assistance will promote economic development or the creation of, preservation of, or addition to parks, greenways, undeveloped property, other recreational property, or other property used for nonprofit purposes.

Documentation of economic development activities should include information such as the following:

- A description of economic development activities that can reasonably be expected to occur as a result of brownfields funding (*e.g.*, number of jobs created, estimated increase in the property and/or profits/sales tax base to community, additional business expansion or new business relocation that may occur within the community).
- A description of how the redevelopment of the brownfields property will contribute to community-wide redevelopment and revitalization plans with a specific emphasis on how funding for the brownfields redevelopment is integral to the success of the community-wide plan.
- A description of new businesses or business expansions that are planned for the brownfields property.

4.3.3 *Creation of, Preservation of, or Addition to Parks, Greenways, Undeveloped Property, other Recreational Property, or Other Property Used for Nonprofit Purposes*

If brownfields funding will be used by the applicant to preserve or create greenspace, recreational areas, undeveloped property, or property to be used for nonprofit purposes, the

applicant should provide specific documentation of these activities in the proposal. Grant proposals should provide specific information documenting how brownfields funding will result in the creation of, preservation of, or addition to parks, greenways, undeveloped property, other recreational property, or other property used for nonprofit purposes should include information such as:

- A description of the proposed park, recreational property, greenspace, undeveloped space, or other type of property to be used for nonprofit purposes, including size, use, and surrounding environment that will be preserved or created as a result of brownfields funding.
- An assessment of how the property will be used and by whom.
- A description of how the property will be integrated with surrounding properties or environments.
- A description of how the property will be maintained or preserved for its continued use as a greenspace, recreational area, etc.

When documenting compliance with these criteria, applicants may copy information provided elsewhere in their proposal, if such information directly addresses the criteria. However, all documentation must be comprehensive and specific to actual events that will be mitigated or can reasonably be expected to occur as a result of federal brownfields funding, should the applicant receive brownfields funding.

4.3.4 Other Documentation

Property-specific brownfields funding determinations will be made based upon the availability of funding and the extent to which applicants can provide documentation that funding for particular sites offers opportunities to protect human health and the environment and enhance economic development or create or preserve greenspace (as the criteria is described above). However, at the same time, Congress explicitly prohibited the use of federal brownfields funding to reimburse liable parties for response costs. The statute prohibits grant and loan monies from being used for the payment of response costs at brownfield sites for which the recipient of a grant or loan is potentially liable (§101(k)(4)(B)(i)(IV)). Applicants are encouraged to address, in the body of the proposal, why federal funding is appropriate for brownfields assessment and/or cleanup at the site, given that brownfields funding cannot be used to reimburse liable property owners for response activity costs.

4.4 Properties Not Eligible for Brownfields Funding

Grant applicants must keep in mind that the legislation *excludes certain types of facilities from qualifying for the property-specific* funding determinations and therefore from federal brownfields financial assistance. Sites or facilities that *may not* be included within the scope of a grant proposal and for which brownfields grants and loans cannot be made available *regardless of property-specific circumstances* include the following types of sites or facilities:

- Facilities listed or proposed for listing on the NPL.

- Facilities subject to a unilateral administrative order, an administrative order, a court order, an administrative order on consent, or judicial consent decree issued or entered into by parties under CERCLA.
- Facilities that are subject to the jurisdiction, custody, or control of the United States government, except for land held in trust by the U.S. for an Indian Tribe.

Applicants should note that the discussion of property-specific determinations for funding sites that are otherwise excluded from funding eligibility that is provided here only applies to funding determinations. This discussion does not apply to, or have bearing on, any other property-specific determinations or other aspects of the brownfields program. For example, a property-specific determination for funding purposes in no way affects a facility's or an entity's status with regard to EPA's enforcement and cost recovery authorities.

4.5 *Additional Information on Potential for Continual Funding at Sites Subject to Removal Actions*

Some brownfield sites that receive federal brownfields assessment grants may, as a result of the federally-funded site assessment require a CERCLA removal action. Under the Brownfields Law (§101(39)(B)(i)), sites that are subject to planned or on-going removal actions under CERCLA are excluded from funding eligibility. However, such sites may receive federal brownfields funding, if a property-specific determination is made that such funding will meet the property-specific determination criteria. Applicants should follow the procedures listed in the previous section to request a property-specific determination. (Note: If a removal action is required at a site where an assessment grant exists, the grantee does not need to obtain the property-specific determination noted above. However, grant recipients must obtain approval from the EPA removal OSC prior to any onsite work commencing).

Grant applicants requesting federal brownfields funding and recipients of revolving loan fund grants seeking EPA approval of loans for sites at which a CERCLA removal action is planned or on-going must document in their proposals (or loan approval requests) that the requested funding will be used in accordance with legislative intent. Therefore, proposals must include a discussion of how brownfields grant or loan funds will ensure protection of human health and the environment and provide detail on how financial assistance will promote economic development or the creation of, preservation of, or addition to parks, greenways, undeveloped property, other recreational property, or other property used for nonprofit purposes. Requests for property-specific determinations for funding for the assessment or clean up of properties where there is a planned or ongoing removal action will be considered in the following circumstances: 1) when it is clear a follow-on response action will be required to address long-term threats at a site; and 2) in cases where portions of a site are not under the current scope of a planned or ongoing removal action.

In addition to the specific criteria listed above, applicants also should explain in their proposal the extent to which other funding sources are not available for the assessment and/or clean up of the site or property. Federal brownfields funding cannot be used to reimburse liable parties for response costs. In addition, federal brownfields funding may not be used for an ensuing removal action. Applicants should specifically address, in the body of the proposal, why federal funding is appropriate for brownfields assessment and/or cleanup at the site, given the Congressional intent not to reimburse liable property owners for response activity costs.

4.6 *Additional Information on Potential Funding for Petroleum-contaminated Sites*

As noted above, portions of facilities receiving assistance for response activities from the LUST trust fund are excluded from eligibility for brownfields funding. However, these facilities are eligible for funding on a property-specific basis. To assist applicants in determining whether their sites are good candidates for property-specific funding determinations, below are examples of “ineligible” sites (*i.e.*, sites receiving LUST trust fund monies) EPA considers to be potentially good candidates to receive brownfields grants or loans under the property-specific determination provisions of the Brownfields Law (*i.e.*, CERCLA §101(39)(C)).

- All UST fields pilots.
- Sites (or portions of properties) where an assessment was completed using LUST trust fund monies and the state has not determined the site to be a “high risk” site and, although an assessment was completed using LUST trust fund monies, the site needs further assistance to conduct a cleanup. Although the site is otherwise a good candidate for economic revitalization, additional LUST money cannot be provided for the cleanup of petroleum contamination.
- Sites (or portions of properties) where LUST money was spent for emergency activities, and are otherwise determined to be ineligible for further LUST trust funds, yet the site needs additional funding for continued assessment and/or cleanup that will contribute to economic revitalization of the site.

4.7 Eligible Response Sites / Enforcement Limits

The Brownfields Law 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. Section 101(40) defines an “eligible response site” by referencing the general definition of a “brownfield site” in §101(39)(A) and incorporating the exclusions at §101(39)(B). The law places further limitations on the types of sites 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 facilities that are otherwise excluded from the definition. Such property-specific determinations must be based upon a finding that limits on 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.

Appendix 5. Prohibitions on Use of Funds

Grant funds may not be used for the payment of:

- A penalty or fine.
- A federal cost-share requirement (for example, a cost share required by other federal funds).
- An administrative cost (see below).
- A response cost at a brownfield site for which the recipient of the grant or loan is potentially liable under CERCLA §107.
- A cost of compliance with any federal law, excluding the cost of compliance with laws applicable to the cleanup.
- Unallowable costs (e.g. lobbying and fund raising) under OMB Circulars A-21 (universities), A-87 (state, tribal, and local governments), or A-122 (nonprofit organizations), and Subpart 31.2 of the Federal Acquisition Regulation (commercial organizations), as applicable.

The following discussion of the administrative cost prohibition is provided to you for illustrative purposes only. If you receive a grant as a result of this competition, your agreement will include a more detailed term and condition specifying requirements for complying with the administrative cost prohibition.

Administrative Cost Prohibition

The Brownfields Law prohibits the use of any “part of a grant or loan” for the payment of an administrative cost. In implementing this prohibition, EPA has made a distinction between prohibited administrative costs and eligible programmatic costs.

- A. *Administrative Costs.* Direct administrative costs are prohibited costs, including those in the form of salaries, benefits, contractual costs, supplies, and data processing charges, incurred to comply with most provisions of the *Uniform Administrative Requirements for Grants* contained in 40 CFR Part 30 or 40 CFR Part 31. Direct costs for grant administration are ineligible even if the grantee or subgrantee is required to carry out the activity under the grant agreement. Prohibited administrative costs also are all indirect costs under OMB Circulars A-21, A-87, and A-122, and Subpart 31.2 of the *Federal Acquisition Regulation*.
- B. *Statutory Exclusions.* The Brownfields Law provides that the administrative cost prohibition does not apply to:
1. Investigation and identification of the extent of contamination;
 2. Design and performance of a response action; or
 3. Monitoring of a natural resource.

Using these statutory exclusions as a guide, EPA has developed the following guidelines on eligible “programmatic” costs.

C. *Eligible Programmatic Costs.* Eligible programmatic costs are expenses incurred for activities that are integral to achieving the purpose of the grant, even if EPA considered the costs to be “administrative” under the prior brownfields program. For example, programmatic costs are eligible under a revolving loan fund grant if incurred in making loans (such as the costs of loan processing, legal fees, and professional services) or overseeing the borrower’s activities to ensure compliance with relevant and appropriate requirements of the *National Contingency Plan* (see 40 CFR §300.700 *et seq.*). These costs are programmatic, not administrative. Direct costs, as defined in the applicable OMB Cost Principle Circular, are eligible for the following programmatic activities and, therefore, are not subject to the administrative cost prohibition:

1. In the case of grants for site characterization and assessment, expenses for inventorying, characterizing, assessing, and conducting planning related to brownfield sites.
2. In the case of grants for capitalization of revolving loan funds:
 - (a) expenses for making and managing loans,
 - (b) expenses, including financial management expenses, for operating the revolving fund, and
 - (c) expenses for making and managing subgrants under CERCLA §104(k)(3)(B)(ii).
3. In the case of grants for direct use by eligible entities and nonprofit organizations in remediation of brownfield sites under CERCLA §104(k)(3)(A)(ii), expenses for site remediation activities.
4. In the case of grants for implementation of brownfields programs under CERCLA §104(k)(6), expenses for providing training, research, and technical assistance.
5. Costs incurred for complying with procurement provisions of 40 CFR Part 30 and 31 are considered eligible programmatic costs only if the procurement contract is for services or products that are direct costs for performing activities specified above in Section B, “Statutory Exclusions,” or Section C, “Programmatic Costs.”
6. Costs for performance and financial reporting required under 40 CFR 30.51 and 30.52, and 40 CFR 31.40 and 31.41 are eligible programmatic costs. Performance and financial reporting are essential programmatic tools for both the recipient and EPA to ensure that grants are carried out in accordance with statutory and regulatory requirements.

Eligible programmatic costs can include expenses for travel, training, equipment, supplies, reference materials, and contractual support if those costs are reasonable and allocable to tasks specified in a grantee’s approved scope of work for carrying out the activities described in Section B, “Statutory Exclusions,” or Section C, “Programmatic Costs.”

Eligible programmatic costs may be used to help meet the RLF capitalization grant and direct cleanup grant recipients' 20 percent cost share. Prohibited administrative costs may not be used to meet recipients' cost share.

For further information on these prohibitions, contact your Regional Brownfields Contact listed on page 14.