

September 5, 2000

MEMORANDUM

SUBJECT: Clarification of Borrower Eligibility Under the Brownfields Cleanup Revolving Loan Fund Program

**FROM: Timothy Fields, Jr. /s/
Assistant Administrator, Office of Solid Waste and Emergency Response**

TO: [Regional National Superfund Policy Manager, Regions 1-10]

The Agency has determined that the scope of eligible borrowers at brownfields sites should be clarified. Under the current guidelines, a party who knowingly acquires property contaminated with hazardous substances would be ineligible for BCRLF loans unless the party meets a statutory exemption from liability; or, the U.S. EPA could use its enforcement discretion (as described in certain EPA guidance documents) and not pursue the party under CERCLA. The Brownfields Cleanup Revolving Loan Fund Administrative Manual, EPA 500-B-98-001, May 1998) states:

The cooperative agreement recipient's lead agency may initially find that an owner/operator of a brownfields site(s) is an eligible borrower for a BCRLF pilot loan for that same site only if: the lead agency can determine that an owner/operator would fall under a statutory exemption from liability; or that the U.S. EPA could use its enforcement discretion and not pursue the party in question under CERCLA, as described by the U.S. EPA guidance. However, initial findings of the lead agency by no means limit the enforcement discretion or authority of the Federal or state government. The lead agency must maintain documentation demonstrating the eligibility of the owner/operator.@

As a result, brownfields property owners who did not cause or contribute to contamination (e.g., a developer who acquired a property to restore and reuse it) may be precluded from obtaining a BCRLF loan by virtue of the ownership interest in the property, not because the party caused or contributed to the contamination. EPA believes this result unnecessarily restricts the scope of eligible BCRLF borrowers and the facilitation of sustainable reuse of brownfields. Thus, the Agency has decided to expand the scope of eligible borrowers to include owner/operators of contaminated brownfields property who acquired the property after the time of disposal or placement of hazardous substances if the lead agency determines that the owner/operator has not caused, contributed to, permitted, or exacerbated the release of a hazardous substance on, or emanating from that property.

As with other borrower eligibility determinations, the decisions of the lead agency as to whether a owner has caused, contributed to, permitted, or exacerbated a release of a hazardous substance is not a CERCLA liability determination and does not limit the enforcement authority of the Federal or state government. The lead agency must maintain documentation demonstrating the eligibility of the owner/operator. And, in addition, the lead agency must ensure that BCRLF pilot funds are not used for activities at any sites:1) listed (or proposed for listing) on the National Priorities List; 2) at which a removal action must be taken within six months; or 3) where a federal or state agency is planning or conducting a response or enforcement action (including sites that are the subject of a unilateral administrative order, a court order, and administrative order on consent or judicial consent decree).