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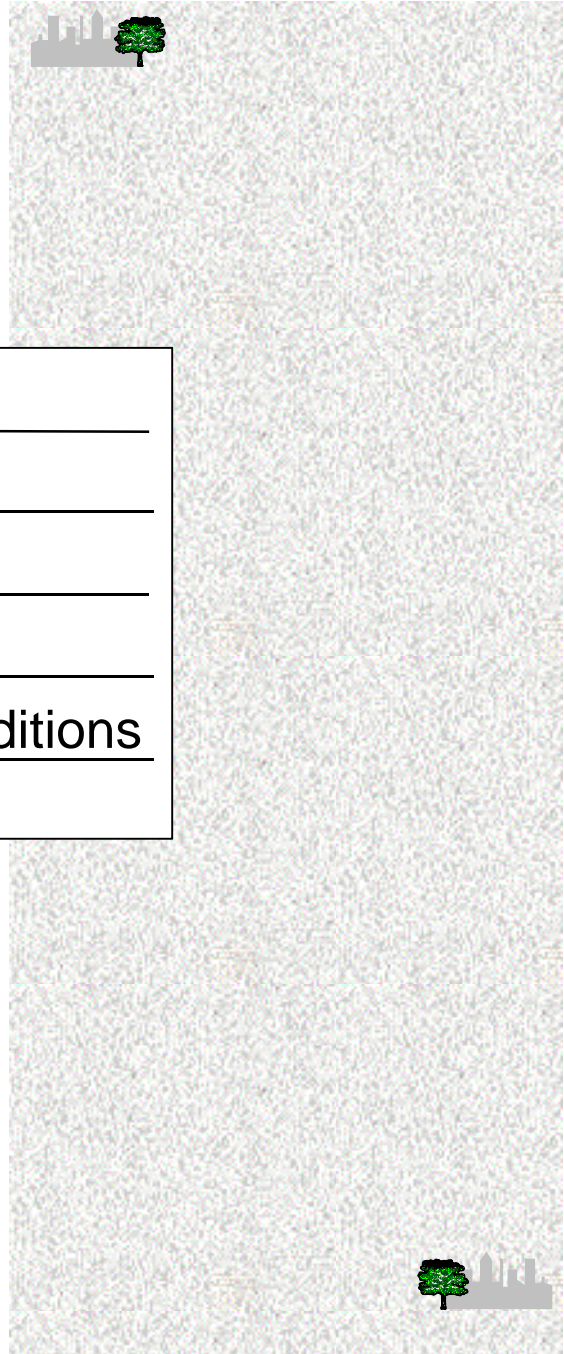
The Brownfields Economic Redevelopment Initiative

Brownfields Cleanup

Revolving Loan Fund

Administrative Manual:

Model Terms and Conditions



Model BCRLF Terms and Conditions

Note to Regional Brownfields Coordinators: These model terms and conditions have been developed as guidance to capture requirements specific to the Brownfields Cleanup Revolving Loan Fund (BCRLF) demonstration pilot program which would not be included in a standard Superfund cooperative agreement and which may not otherwise be required by statute or regulation. These terms and conditions should be incorporated into your BCRLF cooperative agreements and may be modified as appropriate. Regions may add other terms and conditions, if such terms and conditions meet the requirements of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and any applicable Federal statutory and regulatory requirements, are consistent with the overall goals of the BCRLF program, and meet environmental and/or financial objectives.

I. GENERAL FEDERAL REQUIREMENTS

A. Federal Policy and Guidance

“In implementing the demonstration pilot, the cooperative agreement recipient shall consider EPA guidance for the BCRLF program as written in the BCRLF Administrative Manual, dated May 1998, including any updates made to the Administrative Manual and all other Federal brownfields policy and guidance. Applicable statutes and regulations take precedence over any descriptions contained in the manual. Applicable statutes and regulations include, but are not limited to, CERCLA, 42 USCA §§ 96001 to 9675; 40 C.F.R. Part 31 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments); 40 C.F.R. Part 35, Subpart O (Cooperative Agreements for Superfund Response Action); and 40 C.F.R. Part 300 (the NCP).”□

B. Cross-Cutting Federal Requirements

Note to Regional Brownfields Coordinators: Cross-cutting requirements are those which, in addition to CERCLA and associated and administrative authorities, are applicable to the BCRLF by operation of statutes, executive orders, and regulations other than CERCLA and associated administrative authorities.

Environmental

Note to Regional Brownfields Coordinators: Federal environmental requirements will be identified and applied on a site-by-site basis as part of the BCRLF response selection process. Therefore, environmental statutes, executive orders, and regulations have not been included in the list of applicable cross-cutting requirements (see the BCRLF Administrative Manual Section IX.B.,

Applicable Cross-Cutters) except as they relate to specific social or economic issues. See the BCRLF Administrative Manual Section V.B.2.(c) Requirements of other environmental laws (i.e., ARARs) for a discussion on the application of environmental laws to BCRLF response actions.

Social and Economic

“The cooperative agreement recipient is responsible for complying with all applicable cross-cutting requirements. EPA has developed a list of cross-cutting requirements that may apply to the BCRLF (see the BCRLF Administrative Manual Section IX.B.2., Social and Economic Cross-cutters for a list of cross-cutting requirements). Additionally, other cross-cutting requirements are referenced in Standard Form 424B, entitled “Assurances Non-Construction Programs.” The cross-cutting list and Standard Form 424B may not, however, identify all cross-cutting requirements, and the cooperative agreement recipient is not relieved from responsibility for complying with a cross-cutting requirement because it is not included on the cross-cutting list or Standard Form 424B. The EPA will provide additional guidance on the applicability of specific cross-cutting requirements if requested to do so by the cooperative agreement recipient.”□

“Cooperative agreement recipients also are responsible for ensuring that borrowers, including borrowers receiving non-BCRLF loans guaranteed with BCRLF cooperative agreement funds, comply with all applicable cross-cutting requirements. A term, condition or other legally binding provision relating to cross-cutting requirements shall be included in all loan or financial assistance agreements entered into with funds provided under a BCRLF cooperative agreement. The cross-cutting list and Standard Form 424B identify cross-cutting requirements that may be applicable to borrowers. The cross-cutting list and Standard Form 424B may not, however, identify all cross-cutting requirements, and the cooperative agreement recipient is not relieved from responsibility for ensuring that borrowers comply with a cross-cutting requirement because it is not included on the cross-cutting list or Standard Form 424B.”□

“Cross-cutting requirements apply to loans that are funded under this cooperative agreement in combination with non-Federal sources of funds, and to loans awarded as a result of BCRLF loan guarantees, to the extent of the Federal participation in the loan. Cross-cutters apply not only to the initial loans made with Federal funds but also to subsequent loans made with program income derived from Federal participation in the fund. Within 90 days of the date of award (i.e., the cooperative agreement start date), the cooperative agreement recipient shall advise the U.S. EPA Project Officer of the approach for ensuring compliance with cross-cutting requirements applicable to this cooperative agreement.”□

Note to Regional Brownfields Coordinators: Cooperative agreement recipients may take one of the approaches listed below to ensure that cross-cutting requirements are met:

- a. Include a term or condition in the loan agreement which will require the borrower to maintain records which segregate expenditures from Federal and non-Federal sources. The cross-cutting requirements apply to the Federal expenditures.*

b. Use an “equivalency” approach which reflects the amount of Federal funding included in the cooperative agreement recipient's loan pool. The cooperative agreement recipient has the discretion to choose which loans are subject to the cross-cutting requirements as long as the cross-cutters are applied in proportion to the amount of Federal funds in the cooperative agreement recipient's loan pool. An appropriate term and condition shall be included in all loans subject to cross-cutting requirements.

c. Apply the cross-cutting requirements to all loans funded under this cooperative agreement. An appropriate term and condition shall be included in all loans subject to cross-cutting requirements.

“The cooperative agreement recipient shall comply with the Davis Bacon Act of 1931. Pursuant to CERCLA 104(g)(1), the Davis Bacon Act applies to construction, repair, or alteration work funded in whole or in part with BCRLF loans, or guaranteed with BCRLF funds. A term and condition ensuring that borrowers comply with the Davis Bacon Act shall be included in all loan agreements made with BCRLF funds provided under this cooperative agreement.”

C. State Agreements

Note to Regional Brownfields Coordinators: In accordance with 40 C.F.R. 335.6205(c), BCRLF cooperative agreement recipients must obtain and forward to the U.S. EPA written agreement from the state that the cooperative agreement recipient may assume the lead responsibility for removal activity at a particular site. The state may agree to cooperative agreement recipient lead removals on a site-by-site or programmatic basis. This requirement is in addition to, and distinct from, the intergovernmental review under 40 C.F.R. Part 29 required to initiate the cooperative agreement (see, Model BCRLF Terms and Conditions, Section I.D. Intergovernmental Review). If such an agreement cannot be obtained prior to cooperative agreement signature, then the following paragraph must be included in the cooperative agreement.

“Prior to incurring any costs under this cooperative agreement associated with a given site, the recipient shall obtain, and shall forward to the EPA Project officer, written agreement from the State that the recipient may assume the lead responsibility for removal activities at that site.”

D. Intergovernmental Review (Under Federal Grants Regulations)

Note to Regional Brownfields Coordinators: EPA Headquarters Grants Office approved this approach. The intergovernmental review should be completed as part of the application package before the award is signed unless unusual circumstances prevent the completion of the process. If it is not, please include the following condition in the cooperative agreement:

“Proposers are responsible for contacting their State Intergovernmental Review Office (single point of contact) to initiate applicable review processes as soon as possible after receiving

notification of intent to award (see 40 C.F.R. Part 29). If no State Intergovernmental Review Office exists for a given state, or if the state has not selected the BCRLF program for review, proposers are responsible for distributing information about their prospective application to each relevant reviewing agency. BCRLF applications are subject to §204 of the Demonstration Cities and Metropolitan Development Act of 1966 (see 40 C.F.R. §29.8(c)).”

“The start of work shall be delayed until the intergovernmental review process is completed. The process is deemed complete if the reviewing agency has had a 60 day review period, or provides comments prior to the expiration of this period. If comments requiring a response by EPA are provided, then the process is deemed complete when the comments are resolved.

EPA reserves the right to rescind an award and de-obligate funding based on comments received during the intergovernmental review.”

II. GENERAL COOPERATIVE AGREEMENT ADMINISTRATIVE REQUIREMENTS

A. Substantial EPA Involvement

Note to Regional Brownfields Coordinators: It is expected that EPA's degree of involvement will vary based on the level of experience and expertise of the cooperative agreement recipient to implement cleanup and fund management requirements. The following language may need to be modified to account for regional and pilot differences:

“The U.S. EPA anticipates being substantially involved in overseeing and monitoring the BCRLF program. Substantial involvement by the U.S. EPA generally covers such activities as: monitoring; review and approval of procedures for site and loan recipient selection; review or approval of project phases; approval of substantive terms included in contracts; and overseeing operational matters. Substantial involvement by the U.S. EPA includes reviewing financial and environmental status reports, approving site-specific Community Relations Plans and quality assurance project plans/sampling plans and ensuring that all environmental cleanup actions initiated under the BCRLF program are conducted in accordance with CERCLA and consistent with the NCP.”

“The U.S. EPA is responsible for monitoring BCRLF pilots' fulfillment of all reporting, recordkeeping, and other program requirements.”

B. Approved Deviation Request

Note to Brownfields Regional Coordinators: An approved deviation request may be attached to cooperative agreements or described here (see the BCRLF Administrative Manual Appendix H, Approved Deviation Request).

C. Insurance Coverage for the Cleanup

“The cooperative agreement recipient may purchase insurance, including environmental insurance, if the expense is incidental to costs it incurs as a lead agency associated with a specific loan agreement or site cleanup. Purchase of environmental insurance by a cooperative agreement recipient is subject to the 15 percent administrative cost limit.”□

“The cooperative agreement recipient may allow borrowers to purchase insurance, including environmental insurance, if the expense is incidental to, and associated with BCRLF costs it incurs for site-specific cleanup activities (e.g. workers compensation). Incidental insurance purchased by a borrower is not counted against the borrowers’s ten percent limit on administrative costs.”□

“With U.S. EPA approval, BCRLF funds may be used by a borrower for the sole purpose of purchasing environmental insurance if the purchase of such insurance is necessary to carry out other removal activities. Removal activities associated with BCRLF funded insurance must be carried out in accordance with the terms and conditions of the cooperative agreement, CERCLA, and the NCP.”□

Note to Regional Brownfields Coordinators: U.S. EPA Regions must receive EPA headquarters approval in order to authorize the use of BCRLF funds for the sole purpose of purchasing environmental insurance.

D. Cooperative Agreement Recipient Roles and Responsibilities

“The cooperative agreement recipient is the “lead agency” as defined in the NCP. The lead agency is responsible for ensuring that BCRLF response actions are conducted in conformance with CERCLA, the NCP, and the terms and conditions of this cooperative agreement. As the lead agency, the cooperative agreement recipient is also responsible for designating a qualified government employee as a “brownfields site manager” to coordinate, direct, and oversee BCRLF response actions at a particular site. The brownfields site manager is an on-scene coordinator (OSC) and is responsible for carrying out the OSC duties described in the NCP. The cooperative agreement recipient may acquire or otherwise engage the services of other entities that have experience with overseeing and carrying out environmental response actions to assist it in its capacity as lead agency; however, the role of “lead agency” cannot be assigned or delegated to any entity other than the cooperative agreement recipient.”□

“The cooperative agreement recipient shall act as or enlist the services of a “fund manager.”□ Fund management responsibilities include those related to financial management of the cooperative agreement recipient’s loan program. The cooperative agreement recipient may acquire or otherwise engage the services of other entities that have experience with fund management activities to assist the cooperative agreement recipient with fulfilling its fund management responsibilities; however, the cooperative agreement recipient remains accountable to EPA for the proper expenditure of cooperative agreement funds.”□

“The cooperative agreement recipient shall ensure that BCRLF borrowers comply with all federal and state requirements as well as the intent of the BCRLF program. The cooperative agreement recipient shall ensure that the lead agency, the brownfields site manager, and the fund manager consult with each other prior to any final loan decisions and as loan agreements are developed to ensure that all BCRLF environmental response requirements will be met and that BCRLF funds are used only for authorized activities.”□

“The cooperative agreement recipient shall enter into legally authorized written commitments (see Section II.G. Written Comments) to obtain the services of other qualified agencies, organizations, or individuals. Notwithstanding any such written commitment, the Cooperative Agreement recipient, remains legally responsible for carrying out all the terms and conditions of the cooperative agreement and complying with CERCLA and the NCP.”□

E. Written Commitments for Fulfillment of Cooperative Agreement Terms

Note to Regional Brownfields Coordinators: Any transaction involving the transfer of cooperative agreement funds (with the exception of loans) to acquire goods and services must comply with 40 C.F.R. §35.6550 through §35.6610. Cooperative agreement recipients may use contracts or, when appropriate, intergovernmental agreements as defined by 40 C.F.R. §35.6015 (a) to obtain necessary goods and services. See also 40 C.F.R. 35, 6550 (a)(11). Please note also that BCRLF recipients cannot make “subgrants” to nonprofit organizations. However, cooperative agreement recipients may enter into Memoranda of Understanding or other agreements which do not transfer funds to any appropriate entity.

“The start of work shall be delayed until EPA approves the substantive terms of any agreements (including non-financial Memoranda of Understanding) between the cooperative agreement recipient and entity selected as fund manager and any entity which provides services that the recipient will rely on as the lead agency.”□

III. FINANCIAL ADMINISTRATION REQUIREMENTS

A. Eligible Fund Uses

“BCRLF funds shall be used for non-time critical removal activities only (as defined in CERCLA §101(23) and described in 40 C.F.R. §300.415).”□

“The cooperative agreement recipient that elects to use program income to cover all or part of a BCRLF's administrative costs shall maintain adequate accounting records and source documentation to substantiate the amount and percent of program income expended for eligible BCRLF administrative costs, and comply with applicable OMB cost principles when charging costs against program income. For any costs determined by the EPA to have been

an ineligible use of program income, the recipient shall reimburse the BCRLF or the EPA. EPA will notify the recipient of the time period allowed for reimbursement.”□

“The cooperative agreement recipient shall use no more than 15 percent of the total initial award to cover a cooperative agreement recipient’s (lead agency and fund manager) administrative and legal costs (e.g., insurance, loan processing, professional services, audit, legal fees, and state program fees), as negotiated between the U.S. EPA and the cooperative agreement recipient during the cooperative agreement application and award process.”□

“Allowable administrative costs may include loan processing, professional services, administering the BCRLF, audit, legal fees, and state program fees. In addition, allowable administrative costs shall include the costs incurred by the cooperative agreement recipient in ensuring that the borrower complies with Federal requirements related to the agreement, such as public participation, worker health and safety, and interagency coordination.”□

“The cooperative agreement recipient shall use no more than ten percent of the borrower’s principal repayments to the fund, and may use up to 100 percent of the borrower’s interest payments and any program fees for eligible administrative costs. This is allowable for each loan made and repaid to the fund.”□

“The cooperative agreement recipient shall allow borrowers to use no more than ten percent of borrowed funds for administrative costs. The cooperative agreement recipient (fund manager) shall negotiate with the borrower a limit of up to ten percent of the total loan to cover both administrative and cleanup response planning costs.”□

G. Method of Payment

Note to Regional Brownfields Coordinators: The method of payment from the U.S. Environmental Protection Agency to the cooperative agreement recipient will vary. The U.S. EPA Region and the cooperative agreement recipient should work out the method of payment at the Region’s discretion. In addition, see, fund payment and closeout term in Model BCRLF Terms and Conditions, Section VII, Disbursement, Payment, and Closeout. If the Automated Clearing House (ACH) Vendor Payment System is used, please include the following model condition in the cooperative agreement:

“To comply with the Debt Collection Improvement Act of 1996, the cooperative agreement recipient shall complete and return the “Payment Information Form ACH Vendor Payment System” (U.S. Treasury Form 3881) with the signed assistance agreement.”□

“The cooperative agreement recipient shall make positive assertions regarding its fund management capabilities and provide necessary certifications prior to any receipt of cooperative agreement funds. In particular, the cooperative agreement recipient shall certify that its accounting system is adequate to identify, safeguard, and account for all BCRLF funds, including BCRLF program income. The cooperative agreement recipient also shall certify that BCRLF loan documents necessary for lending are in place and that these

documents have been reviewed by the recipient's legal counsel for compliance with applicable state and local law and compliance with all other terms and conditions of the award."□

Note to Regional Brownfields Coordinators: Accounting system certification is normally completed through an independent accountant.

H. Future Funding

"Neither EPA, nor any other federal agency has an obligation to provide any additional funding in connection with this award. Any renewal of this award to increase funding is at the sole discretion of the EPA."□

I. Interest-Bearing Accounts

Note to Regional Brownfields Coordinators: With respect to interest earned on advances, cooperative agreement recipients are subject to the provisions of 40 C.F.R. §31.21(h)(2)(I) and §35.6280(a)(2).

IV. BCRLF ENVIRONMENTAL RESPONSE REQUIREMENTS

A. Applicable Authority

"All environmental response activities carried out using BCRLF funds shall be conducted in accordance with CERCLA and consistent with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), [40 C.F.R. 300.1 *et seq.*]. The cooperative agreement recipient shall ensure that borrowers of BCRLF funds conduct all activities in accordance with CERCLA and consistent with the NCP, and in accordance with all terms and conditions of this cooperative agreement."□

B. Authorized BCRLF Response Actions

"BCRLF funds shall only be used to carry out non-time critical removal activities authorized by CERCLA and the NCP (for the purposes of this document the term "BCRLF response" is equivalent to "non-time critical removal action."). The cooperative agreement recipient shall also consider guidance described in the most current version of the BCRLF Administrative Manual."□

"BCRLF funds may only be used to conduct response actions at brownfields sites, and the cooperative agreement recipient shall consider whether cleanup of a particular site will significantly contribute to local community revitalization."□

"The cooperative agreement recipient's findings and decisions with respect to whether a BCRLF response action is authorized at a particular site and what response action is

appropriate shall be documented in writing, as described in the most current version of the BCRLF Administrative Manual.

“The cooperative agreement recipient shall ensure that loan decisions and/or agreements do not preclude the ability of the cooperative agreement recipient to change a BCRLF response, or any portion of response, based on comments from the public or on any new information acquired.”□

C. Sampling and Analysis

“The cooperative agreement recipient shall develop sampling and analysis plans that provide a process for obtaining data of sufficient quality and quantity to satisfy data needs, if environmental samples are to be collected. Any data (including data generated by anyone other than the cooperative agreement recipient) used as the basis for any findings or decisions by the cooperative agreement recipient shall conform to 40 C.F.R. §300.415(b)(4)(ii).”□

Note to Regional Brownfields Coordinators: In accordance with 40 C.F.R. Part 35, Subpart O, field work may not begin until EPA has approved the cooperative agreement recipient's quality assurance project plan and sampling plan.

D. Community Relations and Public Involvement in BCRLF Response Actions

“All BCRLF activities shall be conducted consistent with the community relations and public involvement requirements in the NCP.”□

E. Administrative Record

“The cooperative agreement recipient shall establish an administrative record, consistent with the requirements in the NCP, which contains the information forming the basis for the selection of any BCRLF response action.

F. Implementation of BCRLF Response Actions

“The cooperative agreement recipient shall ensure the adequacy of each BCRLF response as it is implemented. Each loan agreement shall contain terms and conditions which allow the cooperative agreement recipient to change response activities as necessary.”□

“If the selected response action will not fully address threats posed by a release at a site, or a borrower is unable or unwilling to complete the BCRLF response, the Cooperative Agreement recipient shall ensure that the site is secure and poses no immediate threat to human health or the environment. The Cooperative Agreement recipient shall notify the appropriate state agency and the U.S. EPA to ensure an orderly transition to other appropriate response activities.”□

G. Completion of BCRLF Response

“The cooperative agreement recipient shall ensure that the completion of a BCRLF response is documented in a report as described in the most current version of the *BCRLF Administrative Manual*.”□

H. State Voluntary Cleanup Programs

“The cooperative agreement recipient shall ensure that any BCRLF response actions conducted under a State Voluntary Cleanup program are carried out in accordance with the substantive and procedural requirements of CERCLA and the NCP, and all terms and conditions of this cooperative agreement.”□

V. REVOLVING LOAN FUND REQUIREMENTS

Note to Regional Brownfields Coordinators: Cooperative agreement recipients may not make loans until they have submitted to the U.S. EPA, and EPA has approved, their BCRLF pilot work plan which specifies the recipient's financial plan, their procedures for selecting sites/loan recipients that meet the requirements of CERCLA and the NCP, and their approach for handling the day-to-day operation of the BCRLF. Cooperative agreement recipients may incur administrative costs before submitting a BCRLF Pilot financial plan.

A. Prudent Lending Practices

“The cooperative agreement recipient shall not incur costs under this cooperative agreement related to loans until a BCRLF pilot work plan has been submitted to the U.S. EPA and EPA has approved it. The cooperative agreement recipient shall ensure that the overall objectives of the fund are met through its or the fund manager's selection and structuring of individual loans and lending practices. These activities shall include, but not be limited to the following:

- Establishing appropriate project selection criteria consistent with Federal and state requirements, the intent of the BCRLF program, and the cooperative agreement entered into with EPA.
- Establishing threshold eligibility requirements whereby only potential borrowers are eligible to receive BCRLF financing.
- Developing a formal protocol for potential borrowers to demonstrate eligibility, based on the procedures described in the initial BCRLF

application proposal and cooperative agreement application. Such a protocol shall include descriptions of projects that will be funded, how loan monies will be used, and qualifications of the borrower to make legitimate use of the funds. Additionally, cooperative agreement recipients shall ask borrowers for an explanation of how a project, if selected, would be consistent with BCRLF program objectives.

- Requiring that borrowers submit information describing the borrower's environmental compliance history. The cooperative agreement recipient shall strongly consider this history in an analysis of the borrower as a cleanup and business risk.
- Establishing procedures for handling the day-to-day management and processing of loans and repayments.
- Establishing standardized procedures for the disbursement of funds to borrowers."□

B. Inclusion of Special Terms and Conditions in BCRLF Loan Documents

"The cooperative agreement recipient shall ensure that the borrower meets the cleanup and other program requirements of the BCRLF pilots by including the following special terms and conditions in BCRLF loan agreements:

- Borrowers shall use funds only for eligible activities.
- ! Borrowers shall document all funds use.
- Borrowers shall maintain documentation for a minimum of 10 years after the completion of the cleanup activity supported by the loan or for the length of the loan, whichever is longer. Borrowers shall obtain written approval from the lead agency prior to disposing of records.
- Borrowers shall use no more than 10 percent of the loan for allowable non-cleanup activities.
- Borrowers shall certify that they are not currently, nor have they been, subject to any penalties resulting from environmental non-compliance at the site subject to the loan.
- Borrowers shall conduct BCRLF response activities in accordance with the cooperative agreement and CERCLA and consistent with the NCP."□

- Borrowers shall modify response activities as required by the lead Agency (see, the Model BCRLF Terms and Conditions, Section IV., B and G).

C. Default

Note to Regional Brownfields Coordinators: This section “Default” applies to both loan and loan guarantee programs.

“In the event of a loan default, the cooperative agreement recipient shall make reasonable efforts to enforce the terms of the loan agreement including proceeding against the assets pledged as collateral to cover losses to the loan. If the cleanup is not complete at the time of default, the cooperative agreement recipient is responsible for: (1) documenting the nexus between the amount paid to the bank or other financial institution and the cleanup that took place prior to the default; and (2) securing the site (e.g., ensuring Officer and the State.”□

D. Conflict of Interest

“The cooperative agreement recipient shall establish and enforce conflict of interest provisions governing the roles and responsibilities of the lead agency, fund manager, brownfields site manager and borrower. These provisions must address the situations described at 40 C.F.R. 31.36(b)(3) and 35.6550(b).”□

E. Loan Guarantees

Note to Regional Brownfields Coordinators: If the cooperative agreement recipient chooses to use the BCRLF funds to support a loan guarantee approach, please include the following condition:

“The cooperative agreement recipient shall: (1) document the relationship between the expenditure of CERCLA 104 (d) funds and response actions; (2) maintain an escrow account expressly for the purpose if guaranteeing loans, by following the payment requirement described under the Escrow Requirements term and condition; and (3) ensure that response actions guaranteed by BCRLF funds are carried out in accordance with CERCLA and consistent with the NCP.”□

Escrow Requirements

“Payment of funds to a cooperative agreement recipient shall not be made until a guaranteed loan has been issued by a participating financial institution. Loans guaranteed with BCRLF funds shall be made available as needed for specified cleanup activities on a “actual expense”□ or “schedule” basis to the borrower. (See, Model Terms and Conditions, Section VII. A, Methods of Disbursement). The cooperative agreement recipient’s escrow arrangement shall be structured to ensure that the CERCLA 104 (d) funds are properly “disbursed” by the recipient for the purposes of the assistance agreement as required by 40 C.F.R. §31.20 (b) (7)

and §31.21 (c). If the funds are not properly disbursed, the CERCLA §104 (d) funds that the recipient places in an escrow account will be subject to the interest recovery provisions of 40 C.F.R. §31.21(I).”□

“To ensure that funds transferred to the cooperative agreement recipient are disbursements of assisted funds, the escrow account shall be structured to ensure that: (1) the recipient cannot retain the funds; (2) the recipient must not have access to the escrow funds on demand; (3) the funds remain in escrow unless there is a default of a guaranteed loan; (4) the organization holding the escrow, i.e., the escrow agency, shall be a bank or similar financial institution that is independent of the recipient; and (5) there must be an agreement with financial institutions participating in the guaranteed loan program which documents that the financial institution has made a guaranteed loan to clean up a brownfields site in exchange for access to funds held in escrow in the event of a default by the borrower.”□

Federal Obligation to the Loan Guarantee Program

“Any obligations that the cooperative agreement recipient incurs for loan guarantees in excess of the amount awarded under the cooperative agreement are the cooperative agreement recipient’s responsibility. This limitation on the extent of the Federal Government’s financial commitment to the cooperative agreement recipient’s loan guarantee program shall be communicated to all participating banks and borrowers.”□

Repayment of Guaranteed Loans

Note to Regional Brownfields Coordinators: This term and condition is designed to cover situations in which the recipient’s loan guarantee program ceases to operate. The agency has the discretion to wind up the program in a manner similar to that for loan programs (e.g. negotiate a final disposition of funds). Please note that if the recipient chooses to guarantee another loan, the commitments must be in place within 30 days of the time the escrow amount for the initial loan is released, otherwise, funds must be returned to the U.S. EPA. A possible scenario for the close out of guaranteed loans would provide that at the end of 5 years, the EPA and the cooperative agreement recipient will negotiate a close out agreement. Any EPA funds which have not been paid to the cooperative agreement recipient to enable it to guarantee loans will be deobligated under this scenario. The cooperative agreement recipient and the EPA will need an agreement on the disposition of funds subsequently released from escrow upon repayment of the guaranteed loans. The disposition may be recovery by EPA of the paid cooperative agreement funds with interest, EPA approval of a plan by the recipient to guarantee additional loans, or an amendment to the cooperative agreement to redirect the funds for other eligible brownfields activities (any additional eligible brownfields activities must be conducted in accordance with CERCLA and the NCP).

“Upon repayment of a guaranteed loan and release of the escrow amount by the participating financial institution, the cooperative agreement recipient shall return the cooperative agreement funds placed in escrow to the U.S. Environmental Protection Agency. Alternatively, the cooperative agreement recipient may, with EPA approval, (1) guarantee additional loans under the terms and conditions of the agreement (2) or, amend the terms and

conditions of the agreement to provide for another disposition of funds that will redirect the funds for other brownfields related activities.”□

VI. AUDITS

“The cooperative agreement recipient shall ensure that periodic program audits are conducted by an outside auditor in accordance with General Accounting Office (GAO) accounting standards or generally accepted government auditing standards. Furthermore, the cooperative agreement recipient shall comply with all applicable requirements of the Single Audit Act of 1984, as amended and implemented by OMB Circular A-133, *Audits of States, Local Governments, and Non-Profit Organizations*. In addition, the cooperative agreement recipient shall, as a condition of making a loan, require borrowers to maintain project accounts in accordance with generally accepted accounting principles.”□

VII. DISBURSEMENT, PAYMENT, AND CLOSEOUT

Note to Regional Brownfields Coordinators: For the purposes of these terms and conditions, the following definitions apply: “payment” is the U.S. EPA’s transfer of funds to the cooperative agreement recipient; the cooperative agreement recipient incurs an “obligation” when it enters into a loan agreement with the borrower; “disbursement” is the transfer of funds from the cooperative agreement recipient to the borrower. “Close out” refers to the process that the U.S. EPA follows to ensure that all administrative actions and work required under the cooperative agreement have been completed, and to de-obligate funds that the recipient has been unable to use.

A. Methods of Disbursement

“The cooperative agreement recipient may choose to disburse funds to the borrower by means of ‘actual expense’ or ‘schedule’.”□

“An ‘actual expense’ disbursement approach requires the cooperative agreement recipient to submit documentation of the borrower’s expenditures (e.g., invoices) to EPA to request payment.”□

“A ‘schedule’ disbursement is one in which all, or an agreed upon portion, of the obligated funds are disbursed to the borrower on the basis of an agreed upon schedule (e.g., progress payments) or upon execution of the loan. The cooperative agreement recipient shall submit documentation of disbursement schedules to EPA.”□

“If the disbursement schedule of the loan agreement calls for disbursement of the entire amount of the loan upon execution, the cooperative agreement recipient shall demonstrate to U.S. EPA’s Project Officer that this method of disbursement is necessary for purposes of cleaning up the site covered by the loan. Further, the

cooperative agreement recipient shall include an appropriate provision in the loan agreement which ensures that the borrower uses loan funds promptly for costs incurred in connection with the cleanup and that interest accumulated on schedule disbursements is applied to the cleanup.”□

B. Payment Schedule

“The cooperative agreement recipient may request payment from EPA pursuant to 40 C.F.R. 35.6280 after it incurs an obligation or has an administrative expense. EPA will make payments to the cooperative agreement recipient on a schedule which minimizes the time elapsing between transfer of funds from EPA and disbursement by the recipient. The recipient may request payments when it receives a disbursement request from a borrower based on the borrower’s incurred costs under the “actual expense” method or the schedule for disbursement under the “schedule” disbursement method. The cooperative agreement recipient shall disburse accrued program income to meet all or part of this obligation or administrative expenses prior to requesting payment from EPA.”□

C. Schedule for Closeout

“There are two fundamental criteria for closeout: (1) final payment of funds from EPA to the cooperative agreement recipient; and (2) completion of all cleanups funded by the amount of the award.”□

“To close out the cooperative agreement all payments to the cooperative agreement recipient must be complete. The first criterion of cooperative agreement closeout is met when the cooperative agreement recipient receives all payments from EPA.”□

“The second closeout criterion is met when all cleanups funded by the initial amount of the award are complete (all cleanups must be completed within 12 months from the date that on-site cleanup activity is initiated, unless EPA determines, consistent with CERCLA §104(c)(1) and the NCP at 40 C.F.R. §300.415(b)(5), that the response may continue.)”□

“The cooperative agreement recipient shall have three years from the cooperative agreement start date to obligate all the funds awarded (i.e., the BCRLF principal). Final payment and disbursement of award funds shall be complete within five years from the agreement start date. Any accrued program income (i.e., fees, repayments of interest, repayments of principal, and other income) must be disbursed before requesting final payment from EPA (per 40 C.F.R. §31.21(f)). The schedule of obligation shall be no less than 50 percent of the amount awarded within 18 months; 80 percent within two years; and 100 percent within three years.”□

Note to Regional Brownfields Coordinators: During the period of the agreement, the cooperative agreement recipient shall submit financial and performance reports which include but are not limited to financial information quarterly (such as status of payment, obligation, and disbursement) and cleanup information (such as the cleanup completion dates). As part of closeout, the

cooperative agreement recipient shall submit a final status report which includes but is not limited to financial information (such as status of payment, obligation, and disbursement) and cleanup information (such as the cleanup completion dates). If both the payment and cleanup closeout criterion are met before the five year period ends, the cooperative agreement recipient may request early closeout.

D. Compliance with Closeout Schedule

“If a cooperative agreement recipient fails to comply with the closeout schedule, any cooperative agreement funds not obligated under loan agreement to a borrower may be subject to federal recovery, and the cooperative agreement award amended to reflect the reduced amount of the cooperative agreement.”□

E. Capital Utilization Standard

Note to Regional Brownfields Coordinators: The cooperative agreement recipient's financial plan shall propose a minimum level of the BCRLF's capital to be in use at all times (to be negotiated with EPA). In negotiating the appropriate capital utilization standard with cooperative agreement recipients, EPA Regions may make considerations for BCRLFs that propose to make loans that are large relative to the size of the capital base unless other arrangements are agreed to use the following standard:

“Subsequent to full payment of award funds, the cooperative agreement recipient shall manage its repayment and lending activities to maintain 50 percent or more of the BCRLF capital loaned out or committed at all times.”□

F. Recovery of BCRLF Assets

“In case of termination for cause or convenience, the cooperative agreement recipient shall return to EPA its fair share of the value of the BCRLF assets consisting of cash, receivables, personal and real property, and notes or other financial instruments developed through use of the funds. EPA's fair share is the amount computed by applying the percentage of EPA participation in the total capitalization of the BCRLF to the current fair market value of the assets thereof. EPA also has remedies under 40 C.F.R. 31.43 when the Agency determines that the value of such assets has been reduced by improper/illegal use of cooperative agreement funding. In such instances, the cooperative agreement recipient may be required to compensate EPA over and above the Agency's share of the current fair market value of the assets.”□

G. Post Cooperative Agreement Program Income

“After the end of the award period, the cooperative agreement recipient shall use program income in a manner consistent with the terms and conditions of the cooperative agreement affecting disposal of program income, eligible administrative costs, and environmental compliance in accordance with CERCLA and consistent with the NCP, as provided in [Model BCRLF Terms and Conditions, Section III.C. Use of Program Income] and [Model BCRLF Terms and Conditions, Section IV. BCRLF Environmental Response Requirements] of this agreement. In accordance with 40 C.F.R. 31.42 (c)(3), the cooperative agreement recipient shall maintain appropriate records to document compliance with these requirements (i.e., records relating to the use of post-award program income. EPA may request access to these records or may negotiate post closeout reporting requirements to verify that post-award program income has been used in accordance with the terms and conditions of the original agreement.”□

“When the cooperative agreement has been closed out (i.e., the cooperative agreement recipient has met all funds use and cleanup requirements), remaining funds not obligated by the cooperative agreement recipient via a loan agreement shall be returned to the Superfund Trust Fund, or the Region may choose to modify the award to allow the recipient to use funds for other activities consistent with brownfields cleanup.”□

VIII. HIGH-RISK GRANTEE

Note to Regional Brownfields Coordinators: A cooperative agreement recipient that has demonstrated difficulty in meeting the terms and conditions of past awards may be treated as a “high risk” cooperative agreement recipient. BCRLF awards to high risk cooperative agreement recipients may be subject to special terms and conditions or other provisions, as detailed below. The following criteria are listed in 40 C.F.R. §31.12 as defining a “high risk” grantee:

- *Has a history of unsatisfactory performance;*
- *Is not financially stable;*
- *Has a management system which does not meet the management standards set forth in this 40 C.F.R. Part 31;*
- *Has not conformed to terms and conditions or previous awards, or*
- *Is otherwise not responsible.*

If the prospective cooperative agreement recipient meets any of the above criteria, special conditions and/or restrictions that correspond to the relevant high risk condition shall be included in the award. These may include:

- *Payment limited to a reimbursement basis;*
- *Withholding authority to proceed to the next phase until receipt of evidence of acceptable performance within a given funding period;*
- *Requiring additional, more detailed financial reports;*
- *Additional project monitoring;*
- *Requiring the cooperative agreement recipient to obtain technical or management assistance; or*

- *Establishing additional prior approvals.*

The prospective cooperative agreement recipient should be notified by the EPA Award Official as soon as possible, in writing, of the nature of the special conditions/restrictions, the reason(s) for imposing them, the corrective actions which must be taken before they will be removed and the time allowed for completing the corrective actions, and the method that the cooperative agreement recipient should use to request reconsideration of the conditions/restrictions imposed.