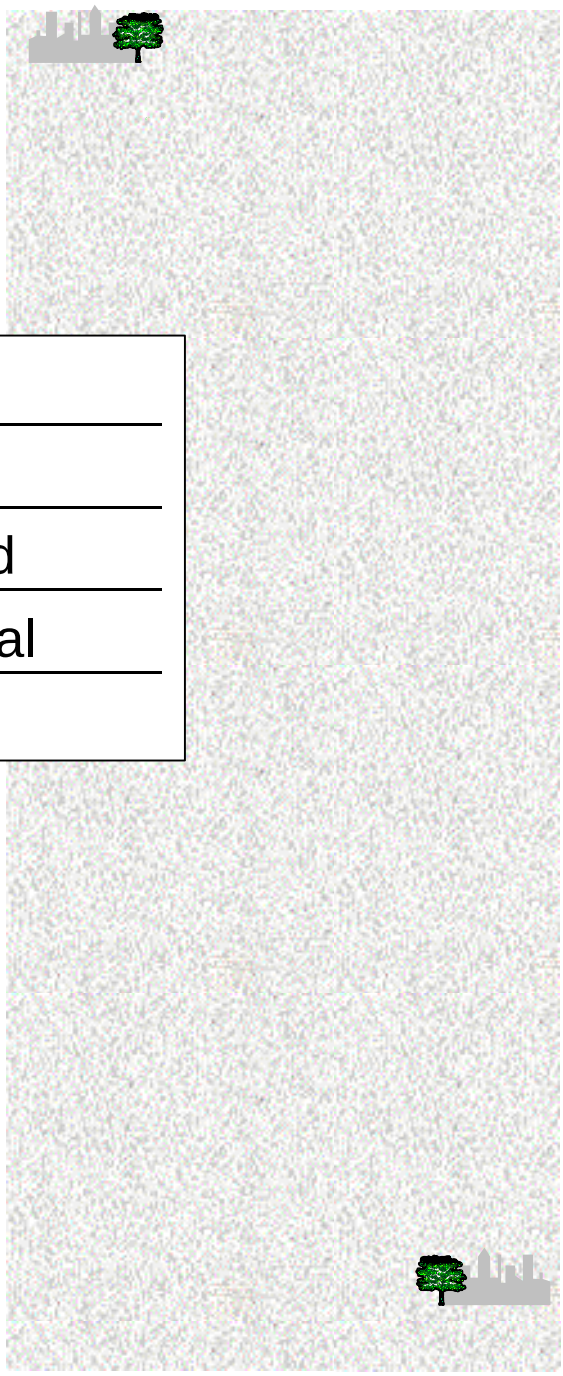
United States
Environmental Protection
Agency
Washington, DC 20460

Solid Waste and
Emergency Response
(5101)

EPA 500-B-98-001
May 1998
www.epa.gov/brownfields/

The Brownfields Economic Redevelopment Initiative



Brownfields Cleanup Revolving Loan Fund Administrative Manual

BCRLF Administrative Manual Contents

Contents and Intent of Manual

This manual describes the administrative requirements and procedures for the Brownfields Cleanup Revolving Loan Fund (BCRLF) demonstration pilots. The manual is intended to assist the U.S. Environmental Protection Agency (U.S. EPA) Regions in developing cooperative agreements and overseeing BCRLF pilots, as well as to provide program participants with initial guidance on various requirements. Examples of these requirements include environmental and financial program management standards, recordkeeping and reporting requirements, and the U.S. EPA oversight and audit requirements.

The cooperative agreement entered into by the cooperative agreement recipient and the U.S. EPA, which is composed of the approved application and the assistance agreement document which incorporates the Standard Terms and Conditions and any Special Terms and Conditions, document the approved scope of work as well as the legal requirements applicable to each BCRLF pilot funding recipient. Since the cooperative agreements were awarded under the regulatory authority of 40 C.F.R. Part 35, Subpart O, all of the requirements of those regulations, as well as applicable portions of 40 C.F.R. Part 31, apply to these agreements, with the sole exception of the portion of the regulations for which a deviation has been granted (see Appendix H, *Approved Deviation Request*). This manual is designed to support and implement those established requirements. (Note: Congressional appropriations committee's report language for FY 1998 limited the use of available brownfields funds to assessments, training, and personnel costs. The report language stated that "the law preempts the expenditure of funds for 'revolving loan funds' for cleanups." EPA is not using FY 1998 funding for BCRLFs.)

I. Program Description Contents

I. PROGRAM DESCRIPTION

A. INTRODUCTION

One element of the U.S. Environmental Protection Agency's (U.S. EPA) Brownfields Economic Redevelopment Initiative is the Agency's award of financial assistance to eligible entities so they may capitalize Brownfields Cleanup Revolving Loan Fund (BCRLF) demonstration pilots to test loan fund models and facilitate coordinated public and private cleanup efforts. In no way is the BCRLF designed to undermine or replace the fundamental concept of "polluter pays," upon which all U.S. EPA cleanup initiatives are based. Those who create or contribute to environmental problems should and will continue, whenever possible, to bear the funding burden for cleanup (i.e., the "polluter pays").

As part of each award, the U.S. EPA will fund (i.e., provide seed funding to) Brownfields Cleanup Revolving Loan Fund pilots in amounts up to $350,000. These funds will be provided without a matching or cost share requirement. However, participants are encouraged to contribute additional monies and/or in-kind services to maximize the lending capacity of the BCRLF to support brownfields cleanup.

States, political subdivisions of states (e.g., counties, cities, towns), territories, and Indian tribes are eligible cooperative agreement recipients. For the fiscal year 1997 award cycle, only the 29 entities that were awarded National or Regional brownfields site assessment pilots prior to October 1995 were eligible recipients of BCRLF pilot funds. Of those 29, twenty four were awarded funds (see Appendix E, *Entities Selected for FY 1997 BCRLF Program*).

The U.S. EPA expects to be substantially involved in overseeing and monitoring the BCRLF program. The U.S. EPA is responsible for general program oversight and review, as well as ensuring that all applicable financial and environmental management and cleanup requirements are met (see Section IV.B., *U.S. EPA Responsibilities*). The U.S. EPA expects that its involvement will vary based on each cooperative agreement recipient's level of experience and expertise to implement cleanup and fund management requirements. Under no circumstance, however, will the U.S. EPA be directly involved in a recipient's prioritization of loan recipients or the day-to-day management of the loan program.

Each cooperative agreement recipient is legally responsible for managing BCRLF funds, ensuring proper environmental cleanups, and complying with all applicable Federal and state laws and regulations (see Section IV.C., *Cooperative Agreement Responsibilities*; Section V, *BCRLF Environmental Response Requirements -- Applicable Authority*; and Section VI, *BCRLF Environmental Response Requirements -- Fund Manager Functions and Responsibilities*). Furthermore, cooperative agreement recipients are responsible for ensuring compliance with all applicable statutory and executive order based "cross-cutting" Federal requirements to the extent of Federal participation (i.e., the Federal monetary contribution) in the revolving loan fund (see

Section IX, *Cross-cutters*).

As with cooperative agreement recipients, BCRLF borrowers also are responsible for complying with all applicable Federal and state laws and regulations, including ensuring proper environmental cleanups and prudent financial management. While cooperative agreement recipients retain legal responsibility for BCRLF response activities, it is expected that borrowers will actively participate in developing and conducting BCRLF response actions (see Section IV.D., *Borrower Responsibilities*).

B. PURPOSE

The overall purpose of the BCRLF pilot program is rooted in the mission of the U.S. EPA's Brownfields Economic Redevelopment Initiative: to empower states, local governments, communities, and other stakeholders to work together in a timely manner to prevent, assess, and safely clean up brownfields in order to facilitate their sustainable reuse. As part of this broader initiative, the specific purpose of the BCRLF pilot program is to foster development and implementation of financial and administrative approaches that can support self-sustaining efforts by states, local governments, and Indian tribes to facilitate brownfields cleanup efforts.

The pilot program will accomplish this objective in two ways. First, it will facilitate the implementation of loan programs to carry out cleanups in pilot locations. Second, the experience gained from these pilots will provide important information and lessons for all brownfields stakeholders -- about how to structure, establish, and operate revolving loan funds to effectively support brownfields cleanup.

Similar revolving loan funds, such as those supporting investments in wastewater treatment, drinking water, and general economic development, typically are capitalized with a combination of Federal, state, and/or local funds. Through the provision of loans, often at below-market interest rates, such revolving loan funds are able to become self-sufficient sources of capital funds for targeted purposes (i.e., in the case of the BCRLF pilot program, brownfields cleanups). The fund "revolves," by using loan repayments (principal and interest) and other program income to provide new loans and for other for authorized purposes.

C. PROGRAM OVERVIEW

The U.S. EPA will make awards to selected BCRLF pilots through cooperative agreements negotiated between the U.S. EPA and the entities selected to receive pilot funding. For the demonstration pilot the U.S. EPA will be responsible for ensuring that all cooperative agreement financial and environmental management requirements are met including ensuring that all environmental response actions are conducted in accordance with the cooperative agreement and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and consistent with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) (see Section V, *BCRLF Environmental Response Requirements -- Applicable Authority*). To this end, the U.S. EPA will be substantially involved in the general

administration of the BCRLF program, including such activities as collaborating with cooperative agreement recipients on operational matters and providing necessary monitoring and oversight of the cooperative agreement. However, day-to-day operations and all activities related to prioritizing loan applications will be the responsibility of the cooperative agreement recipient.

Cooperative agreement recipients are expected to work with the U.S. EPA to ensure that BCRLF pilot funds are used appropriately and that the individual BCRLF programs established by the cooperative agreement recipients meet the intent and legal requirements of the pilot program. The specific responsibilities of cooperative agreement recipients include both environmental cleanup and financial management components of operating the loan fund. The cooperative agreement recipient will serve as the "lead agency" for clean up. The cooperative agreement recipient may enter into a written agreement with a qualified government organization or private entity to support its lead agency functions. As the lead agency, the cooperative agreement recipient will designate a qualified government environmental specialist as "brownfields site manager" (responsible for on-scene coordinator responsibilities described in 40 C.F.R. Part 300) for each and every site toward which BCRLF funding is directed. One brownfields site manager must be responsible for each site, but a single brownfields site manager may be responsible for more than one site. In addition to cleanup-related responsibilities, the cooperative agreement recipient also will serve as, or enlist the services of, a "fund manager" to provide all financial management functions required to operate the BCRLF (see Section IV, *Roles and Responsibilities Overview and* Section V, *BCRLF Environmental Response Requirements -- Applicable Authority*).

Among its other responsibilities, each cooperative agreement recipient must ensure that its borrowers comply with all relevant requirements of the BCRLF program, as well as other applicable Federal and state requirements. Such requirements will be outlined in the loan agreement between the cooperative agreement recipient and individual borrowers (see Section III, *Eligible BCRLF Cooperative Agreement Fund Uses and Program Activities*).

D. AUTHORITY

Section 104(d)(1) of CERCLA, as amended, permits funding of the BCRLF program to carry out cleanup activities. Regulations applicable to the program include 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 Action), and 40 C.F.R. Part 300 (the NCP).

E. APPLICABILITY

This manual describes general legal and administrative requirements applicable to all cooperative agreement recipients selected for the BCRLF demonstration pilot program. Applicable statutes and regulations take precedence over any descriptions contained in the manual. Cooperative Agreement Recipients are bound by the

signed cooperative agreement and its terms and conditions.

To supplement this guidance, the U.S. EPA Regions may incorporate other terms and conditions into a cooperative agreement if such terms and conditions meet the requirements of 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.

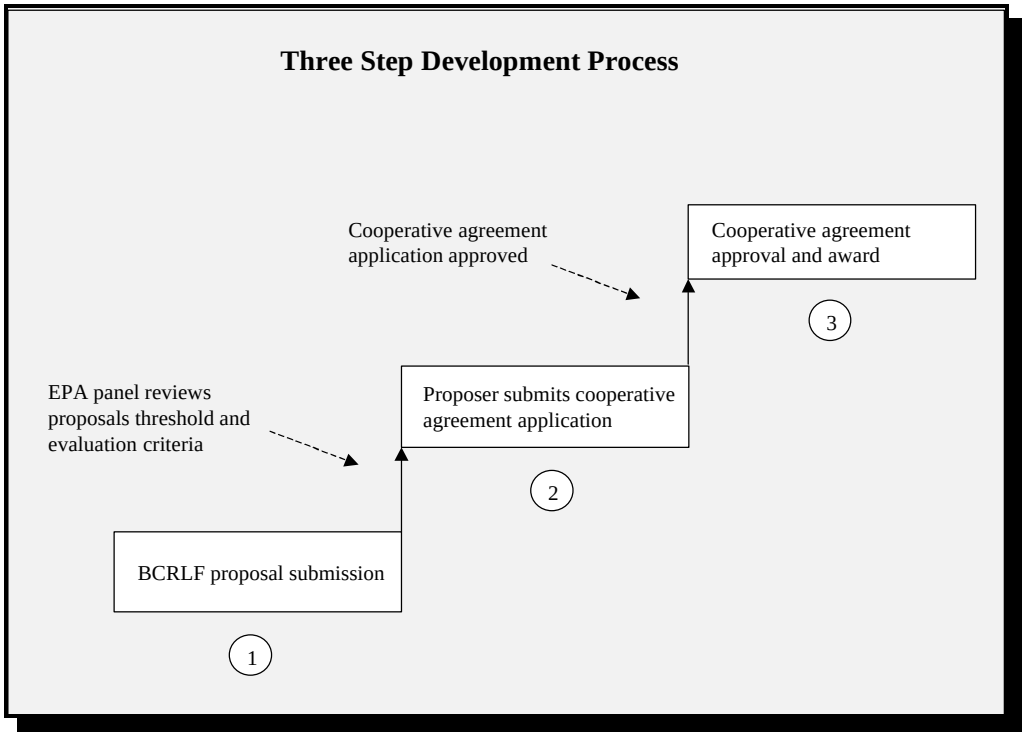
Any changes to CERCLA legislation may apply to all cooperative agreement recipients upon passage of new legislation or implementation of associated regulations. Loans made by the cooperative agreement recipients prior to the effective date of the change, however, will not be affected unless required by law or authorized by an amendment to the agreement.

II. Proposal and Cooperative Agreement Application Process Contents

II. Proposal and Cooperative Agreement Application Process

A. INTRODUCTION

Designation as a BCRLF pilot involves a three step process. States, political subdivisions of states (e.g., counties, cities, towns), territories, and Indian tribes first submit proposals for BCRLF demonstration pilot awards. The U.S. EPA reviews proposals based on threshold and evaluation criteria. Based on the U.S. EPA review, proposers may choose to submit a formal application for a cooperative agreement. This application is then processed and, *if approved*, becomes the basis of a cooperative agreement. These steps are described in more detail below. In addition, development of a BCRLF program includes creating or adapting a pre-existing institutional structure to meet the needs of the program (see Section IV.C.2., *Institutional Alternatives*).



B. BCRLF PILOT PROPOSAL

The U.S. EPA provides proposal instructions, minimum threshold criteria, and evaluation criteria for parties interested in BCRLF pilots in *The Brownfields Economic Redevelopment Initiative: Proposal Guidelines for Brownfields Cleanup Revolving Loan Fund* (the U.S. EPA, OSWER, 500-F-97-147 April 1997) and BCRLF Administrative Manual, Appendix B, *Proposal Guidelines for BCRLF Demonstration Pilots.*

C. COOPERATIVE AGREEMENT PACKAGE AND PROCESS

1. Overview

Upon proposal selection, the U.S. EPA Headquarters will send successful proposers letters confirming their selection and will simultaneously notify the appropriate U.S. EPA Regional Brownfields Coordinators and Regional Grant Specialists of the selections (see Appendix G, *Key Brownfields Regional and National Contacts*). Appropriate Regional Offices will then contact successful proposers and ask them to submit a formal cooperative agreement application package. 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 cooperative agreement application requires more detailed information on specific products, schedules, and budgets than initially submitted in BCRLF proposals.

The cooperative agreement application package should include:

- Standard application and budget forms (see Appendix D, *Sample Cooperative Agreement Application*);
- A formal workplan that provides a detailed description of the work to be performed, including a schedule, milestones, products, and budget backup information;
- Information related to community relations, health and safety, and quality assurance plans;
- Required certification forms;
- A letter from the state Governor or Attorney General (or, in the case of political subdivisions, from the Mayor or a resolution from the City Council) certifying that the applicant has the authority to enter into this agreement with the U.S. EPA and has the authority to carry out the work included in the application;
- When the applicant is a political subdivision, a letter of support from the appropriate state (see 40 C.F.R. §35.6205(c)); and
- Any written commitments necessary to establish the roles and responsibilities of the entities supporting the cooperative agreement

recipient.

U.S. EPA Regional Brownfields Coordinators and Regional Grants Specialists are responsible for working with each BCRLF applicant to process the application package and finalize the cooperative agreement (see Appendix C, *Cooperative Agreement Application Completeness Checklist*). The *cooperative agreement* and its associated workplan are the documents that cover the day-to-day operation of the BCRLF and the relationship between the U.S. EPA and the cooperative agreement recipient.

The cooperative agreement awards Federal funds, contains the Standard Terms and Conditions, as well as any Special Terms and Conditions, and covers issues such as environmental management and cleanup requirements, loan administration, reporting requirements, recordkeeping, etc. (see Appendix D, *Sample Cooperative Agreement Application*). Furthermore, the cooperative agreement details the amount of each award and a schedule and protocol for payment of cooperative agreement funds to the fund manager. In addition to these items, the cooperative agreement incorporates the cooperative agreement application package and workplan.

The *cooperative agreement workplan* is the document negotiated between the U.S. EPA and entities selected to receive BCRLF pilot funding. The cooperative agreement workplan develops the cooperative agreement recipient's strategy for accomplishing program goals and objectives.

The primary components of a cooperative agreement workplan include:

- The details of the recipient's procedures for selecting sites/loan recipients that meet the requirements of CERCLA and the NCP;
- The recipient's financial plan, including the BCRLF cooperative agreement payment structure or fund capitalization; and
- An approach for handling the day-to-day operation of the BCRLF.

The workplan will contain a schedule outlining milestones and a schedule for items to be delivered to the U.S. EPA during the course of the cooperative agreement. These items include quarterly reports, site-specific Community Relations Plans, and site-specific quality assurance project plans/sampling plans. Any site-specific information or plans required by 40 C.F.R. Part 35, Subpart O which was not submitted with an application also must be submitted to and approved by the U.S. EPA prior to field work beginning or in accordance with milestones laid out in the cooperative agreement.

Please note that unless a case specific deviation is granted, only costs incurred after the award of the cooperative agreement are eligible for reimbursement under the agreement.

2. Deviation Request

Since a program such as the BCRLF demonstration pilot program was not envisioned at the time 40 C.F.R. Part 35, Subpart O was promulgated, deviations from certain definitions and provisions of these regulations may be necessary to ensure that the BCRLF demonstration pilot program can meet its stated objectives. For example, a deviation has been granted for the first round of BCRLF Pilots from those portions of 40 C.F.R. §35.6105(a) (as referenced in §35.6205(a) and (c)) which require the Recipient to submit with its applications site-specific information because site identification will not occur at the application phase of the cooperative agreement. Cooperative Agreement Recipients will, however, submit all site-specific information required under §35.6105(a) to the U.S. EPA once a site is identified and the information becomes available (see Appendix H, *Approved Deviation Request*). This deviation was requested from the U.S. EPA's Grants Administration Division by the EPA's Office of Solid Waste and Emergency Response (OSWER).

3. State Agreement

Cooperative agreement recipients must obtain and forward to the U.S. EPA Region's BCRLF Project Officer written agreement from the state that the cooperative agreement recipient may assume the lead responsibility for removal activity at a particular site. If such an agreement cannot be obtained prior to cooperative agreement signature, then it must be received prior to the cooperative agreement recipient incurring any cost under a BCRLF cooperative agreement (this condition should be included as a special term or condition of the cooperative agreement). 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 required to initiate the cooperative agreement (see Section II.C.1., *Overview*).

What type of state agreement is required for the cooperative agreement recipient to take the lead responsibility for removal activities?

Cooperative agreement recipients must obtain and forward to the U.S. EPA BCRLF Project Officer written agreement from the state that the cooperative agreement recipient may assume the lead responsibility for removal activities. This requirement is in addition to and distinct from the intergovernmental review required to initiate the cooperative agreement (see Section II.C.1., *Overview*).

D. HIGH RISK COOPERATIVE AGREEMENT RECIPIENTS

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" cooperative agreement recipient:

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

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

- Payment from the U.S. EPA 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.

Prospective cooperative agreement recipients must be notified by the EPA Award Official[1] 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, as well as the method that the recipient should use to request reconsideration of the conditions/restrictions imposed.

Section II Endnotes:

1. Note that Regional Brownfield Coordinators are not "Award Officials." See 40 C.F.R. 31, "Uniform Administrative Requirements for Grants and Cooperative Agreements" for further details on "Award Officials."

III. Eligible BCRLF Cooperative Agreement Fund Uses and

Program Activities Contents

III. Eligible BCRLF Cooperative Agreement Fund Uses and Program Activities

A. INTRODUCTION

BCRLF cooperative agreement funds may be used to provide loans or other authorized financial assistance to eligible public and private borrowers. In order to ensure funds are loaned consistent with the "polluter pays" principle, the EPA has placed restrictions on parties eligible to receive loans. See section VI.B.7. of this manual for further discussion of borrower eligibility. Within established limits, funds also may be used to pay for allowable administrative costs of the BCRLF (see Section VII.D., *Administrative Costs*).

Cooperative agreement recipients may provide loans and/or other financial assistance with BCRLF pilot funds only for eligible sites and for eligible cleanup activities. Eligible sites and cleanup activities, as well as identified ineligible sites and cleanup activities, are described below (also see Section V.A., *Applicable Authority* and Section VI.B.7., *Borrower Eligibility*).

B. ELIGIBLE SITES

Use of BCRLF pilot funds is limited to sites that have an actual release or substantial threat of release of a "hazardous substance" (as listed under 40 C.F.R. §302.4) into the environment. BCRLF pilot funds also may be used to address releases or substantial threats of releases into the environment of a "pollutant" or "contaminant" (as defined by CERCLA §101(33)) that may present an imminent or substantial danger to public health or welfare. See CERCLA §104(a)(1).

BCRLF funds may be used at sites that are:

- Publicly-owned, either directly by a municipality or indirectly through a quasi-public entity such as a community development corporation; and
- Privately-owned and with clear means of recouping BCRLF expenditures (e.g., through an agreement with the owner or developer or through a lien or other security interests) -- this includes sites undergoing purchase by an entity who meets the definition of a prospective purchaser.[2]

C. INELIGIBLE SITES

BCRLF pilot funds may not be used at any sites:

- Listed, or proposed for listing, on the National Priorities List;
- At which a removal action must be taken within six months (i.e., time critical removal action);
- Where a Federal or state agency is planning or conducting a response or enforcement action; or
- Contaminated by petroleum products except to address a non-petroleum hazardous substance (e.g., co-mingled waste).

May BCRLF funds be used for further investigation or assessment activities required by the cleanup process?

No. BCRLF funds may only be used for cleanup activities and for site monitoring activities, including sampling and analysis, that are necessary to determine the effectiveness of a cleanup. BCRLF funds may not be used for pre-cleanup environmental response activities, such as site assessment, identification, and characterization. BCRLF funds may not be used for the preparation of Remedial Action Plans (RAPs) or feasibility studies.

D. ELIGIBLE ACTIVITIES TO BE FUNDED (AT ELIGIBLE SITES)

BCRLF pilot funds have been designated by the U.S. EPA's Administrator for cleanup activities only. BCRLF activities must be removals as defined in CERCLA §101(23), and described in 40 C.F.R. §300.415. These activities are summarized below:

- Actions associated with removing, mitigating, or preventing the release or threat of a release of a hazardous substance, pollutant, or contaminant (as appropriate to different site situations), including:
  - Fences, warning signs, or other security or site control precautions;
  - Drainage controls;
  - Stabilization of berms, dikes, or impoundments or drainage or closing lagoons;
  - Capping of contaminated soils;
  - Using chemicals and other materials to retard the spread of the release or mitigate its effects;
  - Excavation, consolidation, or removal of highly contaminated soils from drainage or other areas;
  - Removal of drums, barrels, tanks, or other bulk containers that contain or may contain hazardous substances, pollutants, or contaminants;
  - Containment, treatment, disposal, or incineration of hazardous materials; and
  - Provision of alternative water supply where necessary immediately to reduce exposure to contaminated household water and continuing until such time as local authorities can satisfy the need for a permanent remedy.
- Site monitoring activities, including sampling and analysis, that are reasonable and necessary during the cleanup process, including determination of the effectiveness of a cleanup.
- Costs associated with meeting public participation, worker health and safety, and interagency coordination requirements.

May BCRLF funds be used for demolition and/or site preparation related to cleanup?

Yes, BCRLF funds may be used for removal activities, including demolition and/or site preparation, that are part of site cleanup. BCRLF funds may not be used for pre-cleanup environmental response activities, such as site assessment, identification, and characterization.

E. INELIGIBLE ACTIVITIES

BCRLF funds may not be used for the following activities:

- Pre-cleanup environmental response activities, such as site assessment, identification, and characterization;[3]
- Cleanup of a naturally occurring substance, products that are part of the structure of and result in exposure within residential buildings or business or community structures (e.g., interior lead-based paint contamination or asbestos which results in indoor exposure), or public or private drinking water supplies that have deteriorated through ordinary use—except as determined on a site-by-site basis and approved by U.S. EPA Headquarters, consistent with CERCLA §104(a)(3) and (4);
- Monitoring and data collection necessary to apply for, or comply with, environmental permits under other Federal and state laws, unless such a permit is required as a component of the cleanup action;
- Development activities that are not removal actions (e.g., construction of a new facility or marketing of property).

May BCRLF funds be used for remediation of underground storage tanks, assuming non-petroleum contaminants are present?

Yes and No. There are two issues here: First, BCRLF funds may not be used for "remedial" actions. Secondly, BCRLF funds may be used to conduct non-time critical removal activities to address underground storage tanks only to respond to a non-petroleum hazardous substance (e.g., co-mingled waste).

The U.S. EPA also places other, non-cleanup related restrictions on the use of BCRLF pilot funds. These restrictions include the following provisions:

- Only up to 15 percent of the total award may be used to cover a cooperative agreement recipient's (including lead agency and fund manager) administrative and legal costs (e.g., loan processing, professional services, audit, legal fees, and state program fees), as negotiated by EPA and the cooperative agreement recipient during the cooperative agreement application and award process;

- Absent statutory authorization -- such as that which exist for community development block grants -- the recipient may not use BCRLF funds to meet a cost sharing or matching requirement for another Federal grant;[4]

- Funds may not support job training; and

- Funds may not support lobbying efforts of the cooperative agreement recipient (e.g., before the U.S. Congress, state legislatures, the U.S. EPA, or other Federal agencies).

Section III Endnotes:

2. See "Guidance on Agreements with Prospective Purchasers of Contaminated Property," U.S. EPA, Washington, D.C., May 1995.

3. Brownfields Assessment Pilots are awarded for these purposes.

4. The U.S. EPA, if requested to do so by the cooperative agreement recipient, will provide case specific guidance on whether borrowers may use BCRLF funds to meet cost sharing or matching requirements for another Federal grant (40 C.F.R. Part 31.24(b).

IV. Roles and Responsibilities Overview Contents

IV. Roles and Responsibilities Overview

A. INTRODUCTION

There are three primary entities involved in the development, oversight, and implementation of the BCRLF program: the U.S. EPA, cooperative agreement recipients, and borrowers. The roles and responsibilities of each, in the context of the BCRLF program, are detailed below (see also Section V, *BCRLF Environmental Response Requirements* and Section VI, *BCRLF Fund Manager Functions and Responsibilities*).

B. THE U.S. EPA RESPONSIBILITIES

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; developing scopes of work; and overseeing operational matters. However, the U.S. EPA does not intend to be involved in recipients' prioritization of loan recipients or day-to-day management of the loan program.

What level of involvement does the U.S. EPA expect to have with the cooperative agreement recipient?

The U.S. EPA expects to be substantially involved with the cooperative agreement. The U.S. EPA is responsible for monitoring BCRLF pilots' fulfillment of all reporting, recordkeeping, and other program requirements, including: 1) reviewing quarterly financial and performance reports; 2) ensuring that all environmental cleanup actions conducted under the BCRLF program are completed in accordance with CERCLA and consistent with the NCP.

For this demonstration pilot, the U.S. EPA will monitor a recipient's procedures to ensure that all cooperative agreement financial and environmental management and cleanup requirements are met. This includes reviewing quarterly financial and performance reports, as well as environmental cleanup status reports, and approving site-specific Community Relations Plans and quality assurance project plans/sampling plans. In its oversight role, the U.S. EPA is responsible for ensuring that all environmental response actions conducted under the BCRLF program are conducted in accordance with the cooperative agreement and CERCLA, and are consistent with the NCP.

The U.S. EPA is also responsible for monitoring cooperative agreement recipients to ensure that they comply with other applicable statutory and executive order based "cross-cutting" Federal requirements to the extent of Federal participation (i.e., the Federal monetary contribution) in the fund. Each recipient, in turn, is responsible for ensuring that its borrowers meet these requirements, as applicable.

The EPA expects that its 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. In some instances, special terms and conditions may be imposed (40 C.F.R. Part 31.12 and 40 C.F.R. Part 35.6790). The U.S. EPA also may provide technical assistance to BCRLF pilot recipients.

C. COOPERATIVE AGREEMENT RECIPIENT RESPONSIBILITIES

Cooperative agreement recipient responsibilities cover two basic functions: environmental cleanups; and financial management. A cooperative agreement recipient is legally responsible for ensuring proper environmental cleanups, managing BCRLF funds, and complying with all applicable Federal and state laws and regulations. For certain activities, the cooperative agreement recipient may obtain services, by contract or agreement with other organizations or individuals. Notwithstanding such contracts or agreements, the cooperative agreement recipient is the entity legally responsible to the U.S. EPA for all actions of the BCRLF pilot.

For the purposes of the BCRLF program, the cooperative agreement recipient is the "lead agency," as defined in the National Oil and Hazardous Substances Contingency Plan (NCP). The lead agency is responsible for ensuring that BCRLF response actions are conducted in conformance with the cooperative agreement, CERCLA, and the NCP. The lead agency also is responsible for designating 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 lead agency must designate a qualified government employee as the brownfields site manager. Both the lead agency and the brownfields site manager must work with the fund manager, prior to any final loan decisions and as loan agreements are developed, to ensure that all environmental cleanup requirements will be met and that BCRLF funds are used only for authorized activities (see Section V, *BCRLF Environmental Response Requirements -- Applicable Authority*).

Each cooperative agreement recipient also must act as or enlist the services of a "fund manager." Fund manager responsibilities include those related to financial management of the seed capitalization funding, as well as program income resulting from the lending of pilot funds (see Section VI, *BCRLF Environmental Response Requirements -- Fund Manager Functions and Responsibilities* and Section VII.B., *Use of Program Income*).

The cooperative agreement recipient may choose to enlist the services of other entities that have experience with overseeing and carrying out environmental response actions and fund management activities to help the lead agency, brownfields site manager, and the fund manager to fulfill their responsibilities. The cooperative agreement recipient may enter into written commitments (by contract or agreement) to obtain the services of other qualified agencies, organizations, or individuals (see Section IV.C.3., *Written Commitments* and Section IV.C.2, *Institutional Alternatives*). The cooperative agreement recipient, however, remains the entity legally responsible for carrying out all terms and conditions of the cooperative agreement, and complying with CERCLA and the NCP.

Does the U.S. EPA intend to review each loan application?

No. While the U.S. EPA does anticipate being sub stantially involved in the BCRLF program, the Agency does not intend to review individual loan applications.

1. Functions

There are four key roles and functions under the cooperative agreement. They include:

- The ***Cooperative Agreement Recipient***, who enters into the cooperative agreement with the U.S. EPA, receives BCRLF pilot funding from the U.S. EPA, and is legally responsible to the U.S. EPA for managing funds, ensuring proper environmental cleanups, and complying with all applicable laws and regulations.

- As ***Lead Agency,*** the cooperative agreement recipient is responsible for ensuring that environmental cleanups conducted using BCRLF pilot funds are conducted in accordance with the cooperative agreement and CERCLA and are consistent with the NCP.

> ***May the lead agency be a private party?***
>
> No. For the BCRLF program, the lead agency must be the cooperative agreement recipien t itself (i.e., state, political subdivision, etc. selected as cooperative agreement recipient). The lead agency may engage the services of another government organization or private entity to support lead agency functions.

- The ***Brownfields Site Manager,*** who is designated by the lead agency and is responsible for overseeing cleanups at specific sites. The brownfields site manager must be a qualified government employee (see definition of OSC in 40 C.F.R. §300.5.). One brownfields site manager must be responsible for each site, but a single manager may be responsible for more than one site.

- The ***Fund Manager***, who is responsible for ensuring that the BCRLF is managed in conformance with the cooperative agreement, applicable laws and regulations, and prudent lending practices. The fund manager may be a cooperative agreement recipient or a private lender or other private entity that has entered into a written agreement with the cooperative agreement recipient.

> ***May a private lender serve as fund manager as long as they meet the requirements of the BCRLF program?***
>
> Yes, under a written agreement with the cooperative agreement recipient, a private lender or other qualified private entity may serve as a fund manager.

2. Institutional Alternatives

Cooperative agreement recipients may be able to fill all BCRLF roles in-house, but many recipients likely will seek expertise from one or more other entities that have experience administering loan funds and/or carrying out environmental cleanups. The cooperative agreement recipient may obtain services of other qualified agencies,

organizations, or individuals to help perform its functions as lead agency or fund manager. Cooperative agreement recipients seeking expert assistance could look to such organizations as other revolving loan fund programs, such as those administered by the U.S. Economic Development Administration, U.S. Department of Housing and Urban Development, and the U.S. Small Business Administration, infrastructure banks or state revolving fund programs, or another city, county, or department.

A wide variety of institutional alternatives exist for BCRLFs due to the differing nature of program needs from location to location. The cooperative agreement recipient, however, remains the entity legally responsible for carrying out all terms and conditions of the cooperative agreement.

Entities that are likely candidates to help provide services for a BCRLF operation include, but are not limited to:

- Economic development offices;
- Environmental management offices;
- Executive offices (mayor's, governor's, and county executive's offices);
- Government finance departments;
- Metropolitan planning organizations (MPOs);
- Offices of management and budget;
- Public works departments;
- Public engineering agencies;
- Transportation departments;
- Environmental consultants;
- Non-profit community development; and
- For-profit and not-for-profit corporations.

Flexibility in the BCRLF program enables a cooperative agreement recipient to coordinate with other public, private, or non-profit organizations such as those listed above to take advantage of financial, environmental, project management, administrative, and other specialized personnel. A BCRLF can therefore be comprised of personnel from two or more organizations.

It is expected that BCRLF proposers will have given significant thought to potential institutional arrangements in developing their proposals and will have selected the one that best meets the pilot program's threshold criteria and most strongly demonstrates a cooperative agreement recipient and any partners' abilities to manage a revolving loan fund and environmental cleanups.

Could the BCRLF be administered by the cooperative agreement recipient, perhaps using the services of a review consultant under contract to the recipient to address technical issues?

Yes. Institutional arrangements of the BCRLF cooperative agreement are intentionally flexible. The cooperative agreement recipient may fulfill BCRLF roles/responsibilities itself or may use agreements or contracts with other public or private organizations to support lead agency functions or to serve as fund manager. The role of brownfields site manager must be performed by a government employee (e.g., local, tribal, state government). The brownfields site manager may oversee a private party that is employed to conduct site management activities.

3. Written Commitments

Cooperative agreement recipients wishing to enlist the services of other government entities or private parties to assist with the activities required to fulfill the responsibilities of lead agency or fund manager, must use written commitments to secure such services. Any transaction involving a transfer of cooperative agreement funds must comply with 40 C.F.R. §35.6550 through §35.6610. Cooperative agreement recipients cannot enter into intergovernmental agreements or award subgrants. BCRLF cooperating parties (i.e., organizations supporting fund manager and lead agency roles) must establish some type of written commitment, such as contracts, by the time the final workplan is being negotiated so that they may be incorporated by reference (if necessary) into the terms and conditions of that agreement. If these written commitments are not in place, the cooperative agreement recipient may not start work until the substantive terms are submitted to the U.S. EPA for approval. BCRLF pilot applicants should provide some indication of the intent of all cooperating parties to establish such an agreement(s) (e.g., a letter of intent or the equivalent) along with their proposal package.

What type of agreements must the cooperative agreement recipient have with other agencies that may be assisting with the activities of lead agency and/or fund manager? At what point in time must these agreements be established?

Cooperative agreement recipients must have written commitments (e.g., contracts, intergovernmental agreements, and/or memoranda of understanding) by the time the cooperative agreement is being negotiated so that they may be reviewed and approved by the U.S. EPA and incorporated by reference (if necessary) into the terms and conditions of that agreement. Ideally, they should be established as part of the cooperative agreement package before the award is signed. If these commitments are not in place, the cooperative agreement recipient may not start work until the substantive terms of the agreement are submitted to EPA for approval.

D. BORROWER RESPONSIBILITIES

Although the cooperative agreement recipient retains primary control and final decisionmaking authority over BCRLF response activities conducted using BCRLF funds, it is expected that a borrower will actively participate in developing and conducting a particular BCRLF response.

Borrowers are allowed to use BCRLF funds only for eligible activities (see Section III, *Eligible BCRLF Cooperative Agreement Fund Uses and Program Activities*). Borrowers also will be required to document their use of funds. Such documentation must be kept for a minimum of ten years after completion of the cleanup activities supported by the loan or for the length of the loan, whichever is longer (see Section VII.E., *Reporting and Audit*). Written approval of the lead agency must be obtained prior to destroying any records.

Can cooperative agreement recipients award subgrants to non-profit organizations?

No. Non-profit organizations are ineligible to receive CERCLA 104(d) cooperative agreements and are therefore ineligible for subgrants. Cooperative agreement recipients may award contracts to such organizations provided they follow applicable procurement procedures in 40 C.F.R. Part 35.

Cooperative agreement recipients are responsible for ensuring that BCRLF borrowers meet all relevant requirements. The EPA will have no direct contractual ties with individual borrowers. Instead, cooperative agreements shall specify those requirements that the BCRLF will impose on its borrowers. The EPA, through its monitoring and oversight, will verify that the cooperative agreement recipient is sufficiently fulfilling its responsibilities.

The cooperative agreement recipient must ensure that borrowers comply with all applicable Federal and state requirements as well as the intent of the BCRLF program. The requirements placed on the borrower should be spelled out in the loan agreement, including both environmental and financial compliance components.

V. BCRLF Environmental Response Requirements Contents

V. BCRLF Environmental Response Requirements

A. Applicable Authority

All environmental response activities carried out using BCRLF demonstration pilot funds must be in accordance with the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and consistent with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), located in 40 C.F.R. Part 300. BCRLF funds may only be used to carry out non-time critical removal activities authorized by CERCLA and the NCP (for purposes of this discussion, the term "BCRLF response" is equivalent to "non-time critical removal action").

Is compliance with the NCP required?

Yes, all environmental respons e activities carried out using BCRLF demonstration pilot funds must be consistent with the NCP at 40 C.F.R. Part 300.

CERCLA provides authority to the U.S. EPA, and to a state, or political subdivision of a state, an Indian Tribe, etc. operating pursuant to a §104(d) cooperative agreement, to respond to the release, or substantial threat of release, of any hazardous substance into the environment. The NCP establishes the responsibilities of the "lead agency" and various organizations that participate in responses, describes how coordination is to occur among these entities, outlines criteria for determining the appropriate response, discusses community involvement and public participation requirements, explains response action implementation activities, and establishes procedures for preparing administrative records that support the selection of response actions.

The following discussion is intended to highlight and clarify particular requirements of CERCLA and the NCP in the context of the BCRLF demonstration pilot program and the responsibilities of the BCRLF lead agency. It is not intended to apply to, and should not be used for, anything other than BCRLF response actions. It is not intended as a substitute for the statute or the regulations.[5]

B. Environmental Response Requirements

1. Determining if a BCRLF Response is

Prior to lending BCRLF funds for a response action at a particular site, the lead agency must first determine that a BCRLF response is authorized by CERCLA and the NCP. The lead agency must make this determination based on a site evaluation

Authorized

(its own and/or on site evaluation information submitted by the potential borrower), and current site conditions. Potential borrowers are strongly encouraged to include site evaluation information in their initial application to the lead agency.[6]

Site evaluations are described in the NCP at 40 C.F.R. §300.410. It is expected that an American Society for Testing and Materials (ASTM) Phase I/Phase II assessment will generally provide most of the information necessary for the lead agency to determine whether a BCRLF response is authorized. A lead agency also may require the borrower to submit additional site evaluation information. Any data generated by anyone including the lead agency must conform to the NCP at 40 C.F.R. §300.415 (b)(4)(ii) in order to be used as a basis for any findings or decisions by the lead agency.

What site evaluations are required to determine if a BCRLF response is authorized?

Site evaluations are described in the NCP at 40 C.F.R. §300.410. It is expected that an American Society for Testing and Materials (ASTM) Phase I/Phase II assessment will generally provide most of the information necessary for the lead agency to determine whether a BCRLF response is authorized. Potential borrowers are strongly encouraged to include site evaluation information in their initial application to the lead agency.

To determine whether a BCRLF response is authorized, the lead agency must make findings (a) - (e) on a site-by-site basis and must document its findings in a signed memorandum. It is recommended that determinations regarding the eligibility of the potential borrower and eligible sites also be made at this time. Note that, if responsible parties are known, the cooperative agreement recipient (lead agency) must initially, to the extent practicable, make an effort to determine whether the responsible party can and will perform the necessary removal action promptly and properly (see NCP at 40 C.F.R. §300.415(a)(2)). For purposes of this effort, a "responsible party" does not include an entity which meets the borrower eligibility criteria summarized in Section VI.B, *Establishing the BCRLF Financial Plan*.

The lead agency must make the following findings:

(a.) There is a release, or substantial threat of release, of any hazardous substance into the environment, <u>or</u> there is a release, or substantial threat of release, of a pollutant or contaminant into the environment which may present an imminent and substantial danger to the public health or welfare (see CERCLA §104(a)(1)).

"Hazardous substance" is defined at CERCLA §101(14) and the list of hazardous substances is at 40 C.F.R. §302.4. "Pollutant or contaminant" is defined at CERCLA §101(33). BCRLF response actions may not be undertaken at site contaminated with unlisted petroleum except to address a non-petroleum hazardous substance (e.g., a co-mingled waste). CERCLA expressly excludes petroleum from the definition of hazardous substance and pollutant or contaminant. The term "release" is defined at CERCLA §101(22). "Environment" is defined at CERCLA §101(8).

What type of release must the lead agency find to determine that a BCRLF response is authorized?

The lead agency must find that there is a release, or substantial threat of release, of any hazardous substance into the environment (as defined at CERCLA §101(14)), or that there is a release or substantial threat of release, of a pollutant or contaminant into the environment which may present an imminent and substantial danger to the public health or welfare (see CERCLA §104(a)(1)).

(b.) The release does not involve: (1) a naturally occurring substance from a location where it is naturally found; (2) a product that is part of the structure, and results in exposure within, a residential building or business or community structure (e.g., interior lead-based paint or asbestos which results in indoor exposure); or (3) a public or private drinking water supply that has deteriorated through ordinary use (see CERCLA §104(a)(3) and (4)).

If the release involves any of the substance(s) described above, BCRLF funding may not be used for a BCRLF cleanup, except as determined on a site-by-site basis and approved by U.S. EPA Headquarters, consistent with CERCLA §104(a) (3) and (4).[7]

(c.) A removal is appropriate because there is a threat to public health or welfare or the environment (see NCP at 40 C.F.R. §300.415(b)(1)).

The lead agency must consider the following factors in making this determination:

1. *Actual or potential exposure to nearby human populations, animals, or the food chain from hazardous substances or pollutants or contaminants;*
2. *Actual or potential contamination of drinking water supplies or sensitive ecosystems;*
3. *Hazardous substances or pollutants or contaminants in drums, barrels, tanks, or other bulk storage containers, that may pose a threat of release;*
4. *High levels of hazardous substances or pollutants or contaminants in soils, largely at or near the surface, that may migrate;*
5. *Weather conditions that may cause hazardous substances or pollutants or contaminants to migrate or be released;*
6. *Threat of fire or explosion;*
7. *The availability of other appropriate Federal or state response mechanisms to respond the release; and*
8. *Other situations or factors that may pose threats to public health or welfare of the U.S. or the environment.*

(d.) Sufficient time is available to plan and select a BCRLF response and to implement the community relations and public involvement activities before any on-site cleanup activities may take place.

BCRLF funds may only be used at a site where the lead agency determines that this planning period exists. The lead agency must ensure that all NCP requirements regarding planning and selecting a BCRLF response, community relations and public involvement, and the administrative record have been met prior to initiating any on-site cleanup activity. Community relations and public involvement requirements in BCRLF actions are further discussed in Section V.B.3, Community Relations and Public Involvement in BCRLF Response Actions.

If a state or local government have public participation requirements associated with its cleanup and economic development programs, will they suffice for BCRLF response actions?

BCRLF response actions must, at a minimum, meet NCP public participation requirements. If the state or local government requirements meet or exceed the NCP requirements, then their community relations and public involvement activities will suffice. However, state and local government public participation requirements must at a minimum meet those outlined in Section V.B.3., *Community Relations and Public Involvement in BCRLF Response Actions.*

(e.) Cleanup of the site will contribute to brownfields revitalization.

BCRLF funds may only be used to conduct response actions at brownfields sites, and the lead agency should consider whether cleanup will significantly contribute to local community revitalization.

2. Selecting a BCRLF Response

The lead agency is responsible for conducting an analysis of BCRLF response alternatives for a site and must ensure that an appropriate BCRLF response action is selected (see the NCP at 40 C.F.R. §300.415(b)(4)(i)). This analysis is referred to as an "engineering evaluation/cost analysis (EE/CA) or its equivalent" in the NCP. The EE/CA or its equivalent should identify the objectives of a BCRLF response and analyze the effectiveness, feasibility, and costs of alternatives that also would satisfy BCRLF response objectives. As part of this analysis, the lead agency should consider whether a BCRLF response may take more than 12 months. BCRLF response actions may last only 12 months.[8] This restriction will be referred to as the "12 month limit." The lead agency also should consider current use restrictions and potential future land use. An ASTM Phase I/Phase II assessment may supply sufficient information to conduct the EE/CA or its equivalent. The lead agency may rely on information supplied by the potential borrower to conduct this analysis.

(a.) Sampling and analysis plan

The lead agency must 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 generated by anyone,

including the lead agency, must conform to the NCP at 40 C.F.R. §300.415 (b)(4)(ii) in order to be used as a basis for any findings or decisions by the lead agency. Note that 40 C.F.R. Part 35, Subpart O requires submission of a quality assurance project plan and sampling plan to the U.S. EPA. Field work may not begin until the U.S. EPA approves the plan.[9] Sampling and analysis plans must consist of two parts:

(i) The field sampling plan which describes: the rationale; the number, type, and location of samples; and the type of analyses and data quality objectives.

(ii) The quality assurance project plan which describes: policy, organization, and functional activities; and the data quality objectives and measures necessary to achieve adequate data for use in planning and documenting the removal action.

What information does the EE/CA, or its equivalent, require?

The EE/CA, or its equivalent, should identify the objectives of a BCRLF response and analyze the effectiveness, feasibility, and costs of alternatives that also would satisfy BCRLF response objectives. An American Society of Testing and Materials (ASTM) Phase I/Phase II site assessment submitted by the borrower may supply sufficient information for the lead agency to conduct an "engineering evaluation/cost analysis (EE/CA) or its equivalent," as described in the NCP.

(b.) BCRLF response actions that may be taken

BCRLF funds may only be used to support removal activities authorized by CERCLA and the NCP. "Removal" is defined in CERCLA §101(23). Removal activities include actions associated with removing, mitigating, or preventing the release or threat of release of a hazardous substance, pollutant, or contaminant (as appropriate to different site situations). Some specific examples of removal activities are described in the NCP at 40 C.F.R. §300.415(e) and include:

- Fences, warning signs, or other security or site control precautions;
- Drainage controls;
- Stabilization of berms, dikes, or impoundments or drainage or closing lagoons;
- Capping of contaminated soils;
- Using chemicals and other materials to retard the spread of the release or mitigate its effects;
- Excavation, consolidation, or removal of highly contaminated soils from drainage or other areas;
- Removal of drums, barrels, tanks, or other bulk containers that contain or may contain hazardous substances, pollutants, or contaminants;
- Containment, treatment, disposal, or incineration of hazardous materials; and

- Provision of alternative water supply where necessary immediately to reduce exposure to contaminated household water and continuing until such time as local authorities can satisfy the need for a permanent remedy.

(c.) Requirements of other environmental laws (i.e., ARARs)

BCRLF response actions must be designed to attain, to the extent practicable, applicable or relevant and appropriate requirements (ARARs) under Federal environmental or state environmental or facility siting laws (see the NCP at 40 C.F.R. §300.415(j)). Other Federal and state advisories, criteria, or guidance may, as appropriate, be considered in formulating the BCRLF response action (see the NCP at 40 C.F.R. §300.400(g)(3)). Identification and evaluation of ARARs should occur throughout the BCRLF response selection process. It is recommended that the lead agency work with the state to identify ARARs.

"Applicable" requirements are Federal or state environmental standards that specifically address a particular hazardous substance, pollutant, contaminant, removal action, location, or other site specific issue. "Relevant and appropriate requirements" are not specific (i.e., not "applicable") to the location, action, or substance of concern, but address problems or situations similar to those encountered at the BCRLF site (see the NCP at 40 C.F.R. §300.500 for complete definitions of "applicable" and "relevant and appropriate" requirements).

ARARs are required for removal actions "to the extent practicable considering the exigencies of the circumstances." In determining whether compliance with ARARs is practicable, the cooperative agreement recipient (lead agency) should consider appropriate factors, including:

(i) *The urgency of the situation*. Because BCRLF responses will be non-time critical removal actions, it is not generally expected that compliance with ARARs will be impracticable due to the urgency of the situation.

(ii) *The scope of the removal action to be conducted.* The scope of the removal action relates to the sometimes limited scope and purpose of a removal action, e.g., site stabilization and mitigation of near term threats. For the BCRLF Pilot Program, the Cooperative Agreement Recipient (lead agency) must consider current and future land use to determine ARAR practicability. For the BCRLF pilot program, the lead agency must consider current and future land use to determine ARAR practicability.

(iii) In addition, even if attaining ARARs is practicable, ARARs identified for a particular BCRLF response may be waived under the NCP (40 C.F.R. §300.415(j)).

(d.) Post-BCRLF response site control[10]

The cooperative agreement recipient (lead agency) should review a borrower's proposed response actions to assess whether post-BCRLF response site controls will be necessary. Such site controls include actions necessary to ensure the effectiveness and integrity of the response action after the completion of the BCRLF response or

the 12 month limit. Post-BCRLF response site controls may be removal actions under CERCLA; however, controls necessary beyond the 12 month limit cannot be funded with BCRLF funds.

> ***May BCRLF funds be used for post-BCRLF cleanup response site control?***
>
> Post-BCRLF cleanup response site controls may be removal actions under CERCLA ; however, controls necessary beyond the 12 month limit cannot be funded with BCRLF funds.

(e.) Documenting the BCRLF response selection decision

The lead agency must document final selection of a BCRLF response for a particular site in a decision document. The decision document should explain why the BCRLF response is authorized, identify the selected action, and explain the rationale for selecting that particular response. In addition, the decision document should document all ARARs and provide reasons for any waivers or findings of impracticability. See the sample "action memo" in Exhibit 1 for a model outline of a decision document).

Prior to signing the decision document, the lead agency must ensure that the public has had an opportunity to review and comment on the EE/CA or its equivalent, and that a response has been provided to any significant comments (see Section V.B.3., *Community Relations and Public Involvement in BCRLF Response Actions*). *Final loan decisions should not be made prior to signing the decision document and in no event shall any loan decision preclude the ability of the lead agency to change a BCRLF response, or any portion of response, based on comments from the public or on any new information acquired by the lead agency.*

3. Community Relations and Public Involvement in BCRLF Response Actions

Community relations and public involvement activities occur throughout the BCRLF response and implementation process, and the BCRLF funds may be used to support these activities. Community relations and public involvement activities are not administrative costs, and therefore, are not subject to the Cooperative Agreement Recipient's fifteen percent limit on such expenditures. The lead agency must meet the requirements described in 40 C.F.R. §300.415(n) and summarized below:

- Designate a spokesperson to inform the community of actions taken, respond to inquiries, and provide information.
- Prior to completion of the engineering evaluation/cost analysis (EE/CA) or its equivalent, conduct interviews with local officials, community residents, public interest groups, or other interested and affected parties, as appropriate.
- Prior to completion of the EE/CA or its equivalent, prepare a Community Relations Plan (CRP) based on community interviews and other relevant

information, specifying the community relations activities that the lead agency expects to undertake during the response.[11]

- Prior to formal documentation that a BCRLF response is authorized at a particular site, establish at least one local information repository at or near the location of the potential response action that includes public information related to that action and an administrative record file. The cooperative agreement recipient (lead agency) must inform the public of the information repository and provide notice of availability of the administrative record for public review.
- Publish notice of availability of the EE/CA or its equivalent in a major local newspaper of general circulation.
- Provide reasonable opportunity (not less than 30 days) for written and oral comments on the EE/CA or its equivalent. Upon timely request, extend the public comment period by a minimum of 15 days.
- Prepare a written response to significant comments.

Compliance with the requirements for interviews, a CRP, and information repository discussed above must be documented in the Administrative Record file (see Section V.B.6., *Administrative Record* and the NCP at 40 C.F.R. §300.820(a)(3)).

Public participation is a critical component of developing and selecting a BCRLF response. *Final loan decisions should not be made prior to carrying out the required community relations and public involvement activities, and in no event shall any loan decision preclude the ability of the lead agency to change a BCRLF response, or any portion of a response, based on comments from the public or on any new information acquired by the lead agency*.

Exhibit 1. Sample Action Memorandum Outline

I. Purpose

II. Site Conditions and Background
- A. Site Description
  1. Removal site evaluation
  2. Physical location
  3. Site characteristics
  4. Release or threatened release of a hazardous substance, pollutant, or contaminant
  5. Maps, pictures, and other graphic representations
- B. Other Actions
  1. Previous actions
  2. Current actions
- C. State and Local Authorities' Roles
  1. State and local actions to date
  2. Potential for continued State/local response

III. Threats to Public Health or Welfare or the Environment, and Statutory and Regulatory Authorities
- A. Threats to Public Health or Welfare
- B. Threats to the Environment

IV. Proposed Actions and Estimated Costs
- A. Proposed Actions
  1. Proposed BCRLF response
  2. Engineering Evaluation/Cost Analysis (EE/CA) or its equivalent
     - i. EE/CA summary or EE/CA Executive Summary
     - ii. Summary of written responses to public comment
  3. Applicable or relevant and appropriate requirements (ARARs)
  4. Project schedule
- B. Estimated Costs

V. Decision to Proceed

VI. Attachments [e.g., the loan agreement (as available); a copy of the EE/CA or its equivalent; and the lead agency's response to significant public comments]

4. Implementation of Response Action and Ongoing Activities

BCRLF cooperative agreement recipients and brownfields site managers must ensure the adequacy of each BCRLF response as it is implemented. Each loan agreement should contain terms and conditions which allow the cooperative agreement recipients to change response activities as necessary. In some situations, the planned environmental response may fail to fully address the threats at a site, or new threats may be discovered. If the selected response action will not fully address threats posed by releases, or a borrower is unable or unwilling to complete the response, the cooperative agreement recipient must ensure that the site is secure and poses no immediate threat to human health or the environment. The cooperative agreement recipient also must notify the appropriate state agency and the U.S. EPA to ensure an orderly transition to other appropriate response activities.

Other requirements to be aware of during selection and implementation of BCRLF response actions include:

(a.) Subpart O site-specific information requirements
The cooperative agreement recipient (lead agency) and brownfields site manager must ensure that applicable 40 C.F.R. Part 35, Subpart O site-specific information requirements, including budget sheets, site description, site-specific scopes of work, designation of the lead site project manager, and the community relation plan, are delivered to the U.S. EPA. This obligation terminates at cooperative agreement closeout (see Section VIII, *Closeout and Additional Requirements*).

(b.) Notification of natural resource trustees
The cooperative agreement recipient (lead agency) and brownfields site manager must ensure that Natural Resource Trustees (including, but not limited to, the U.S. Department of the Interior, the National Oceanic and Atmospheric Administration, etc.) are promptly notified of potential damages to natural resources and must coordinate all BCRLF activities with such affected Trustees.

(c.) Worker health and safety
The cooperative agreement recipient (lead agency) and brownfields site manager must ensure that all Federal and state requirements for worker health and safety are met during BCRLF response activities. 40 C.F.R. §35.6105(a)(v), Subpart O requires the cooperative agreement recipient (lead agency) to have a site-specific health and safety plan which complies with 29 C.F.R. §1910.120. This should be submitted with the cooperative agreement application or an assurance must be provided that a final plan will be in place before starting field work.

(d.) Notification of out-of-state transfer of CERCLA wastes
The cooperative agreement recipient (lead agency) must provide written notification of off-site shipments of CERCLA waste to an out-of-state waste management facility to the appropriate officer as described in 40 C.F.R. §35.6120, Subpart O.

5. Completion of BCRLF Response

At the completion of a BCRLF response, the cooperative agreement recipient (lead agency) and brownfields site manager must, at a minimum, ensure that the closeout report contain the following items found in 40 C.F.R. §300.165(b):

- Documentation that addresses the situation as it developed;
- Documentation regarding the actions that were taken;
- Documentation of the resources committed; and
- Documentation of any problems encountered.

What happens in the event that a project funded by a BCRLF loan must be terminated?

In the event that a project must be terminated, the lead agency is required to secure the site (e.g., ensure public safety) and inform the U.S. EPA and the state.

6. Administrative Record

The cooperative agreement recipient (lead agency) is responsible for establishing an administrative record containing the information forming the basis for the selection of a BCRLF response action (see the NCP at 40 C.F.R. §300.800(a)). This should generally include all site information submitted by the borrower and may include appropriate sections of loan documents necessary to ensure cleanup requirements are met.

As described in the community relations section above, the cooperative agreement recipient is responsible for establishing at least one docket of information that is available for public inspection at or near the site at issue. Information regarding the BCRLF response action that is not required to be kept on-site is outlined in the NCP at 40 C.F.R. §300.805(a)(1-5). Typical contents of the administrative record are found in the NCP at 40 C.F.R. §300.810 and summarized below:

- Documents containing data and information that may form the basis for selection of a response action, including: sampling data; quality control and assurance documentation; chain of custody forms; site inspection reports; preliminary assessment and site evaluation reports; ATSDR health assessments; public health evaluations; and technical and engineering evaluations.
- Guidance documents, technical literature, and site-specific policy memoranda that may form the basis for the selection of the response action.
- Documents received, published, or made available to the public for non-time critical removal actions or the BCRLF pilot program.
- Decision documents (e.g., initial determination that BCRLF response is authorized).
- An index of documents included in the administrative record file.

Certain documents generated or received after the BCRLF response selection decision document is signed must be added to the administrative record file in accordance with 40 C.F.R. §300.825 (see 40 C.F.R. §300.820(a)(4)).

In establishing the administrative record, cooperative agreement recipients also should be conscious of NCP provisions governing information that need not be included, such as privileged documents, and summaries of confidential information (see the NCP at 40 C.F.R. §300.810(b-d)).

It is the responsibility of the cooperative agreement recipient to make the administrative record file available for inspection at the time that the EE/CA or its equivalent is released for public comment and review (see the NCP at 40 C.F.R. §300.820(a)(1)).

C. USE OF STATE VOLUNTARY CLEANUP PROGRAMS

The U.S. EPA expects that cooperative agreement recipients and borrowers may want to conduct cleanups pursuant to their respective State Voluntary Cleanup Program (State VCP). BCRLF funds may be used to clean up a site pursuant to a State VCP, so long as the BCRLF response meets the substantive and procedural requirements of CERCLA and the NCP, and all terms and conditions of the cooperative agreement are met. The BCRLF lead agency and brownfields site manager are responsible for ensuring that these requirements will be met on a site-specific basis, including ensuring that appropriate terms and conditions are included in each loan agreement.

In instances where the BCRLF pilot is located in a state with a voluntary cleanup program (State VCP), what is the most appropriate way to handle discrepancies between the State VCP and the NCP (e.g., differing public participation/community involvement requirements)?

BCRLF funds may be used to clean up a site pursuant to a State VCP, so long as the cleanup is carried out in accordance with all terms and conditions of the cooperative agreement and CERCLA and consistent with the NCP. The BCRLF lead agency and brownfields site manager are responsible for ensuring that these requirements will be met on a site-specific basis.

Section V Endnotes:

5. The U.S. EPA publication "Guidance on Conducting Non-Time Critical Removal Actions Under CERCLA," PB93-963402, the U.S.EPA 540-R-93-057, August 1993, also can be consulted for further reference.

6. BCRLF funds, however, may not be used to fund site assessment activities.

7. The U.S. EPA guidance "Response Actions At Sites with Contamination Inside Buildings," OSWER Directive 9360.3-12, August 1993, should also be consulted for further reference.

8. BCRLF response actions may last only 12 months unless the U.S. EPA determines that the response may continue (consistent with CERCLA §104(c)(1) and the NCP §300.415(b)(5)).

9. The U.S. EPA Regions may use the same process for reviewing quality assurance plans for both brownfields site assessment pilots.

10. See the NCP at 40 C.F.R. §300.415(1).

11. Please note that 40 C.F.R. §35.6105(a)(2)(iv), Subpart O requires that a Community Relations Plan (CRP) be submitted to the U.S. EPA as part of the cooperative agreement. The U.S. EPA Region managing the BCRLF demonstration pilot cooperative agreement may consider scheduling options for addressing this requirement on a pilot-by-pilot basis, however, field work cannot begin until the CRP has been approved by the U.S. EPA.

VI. BCRLF Fund Manager Functions and Responsibilities Contents

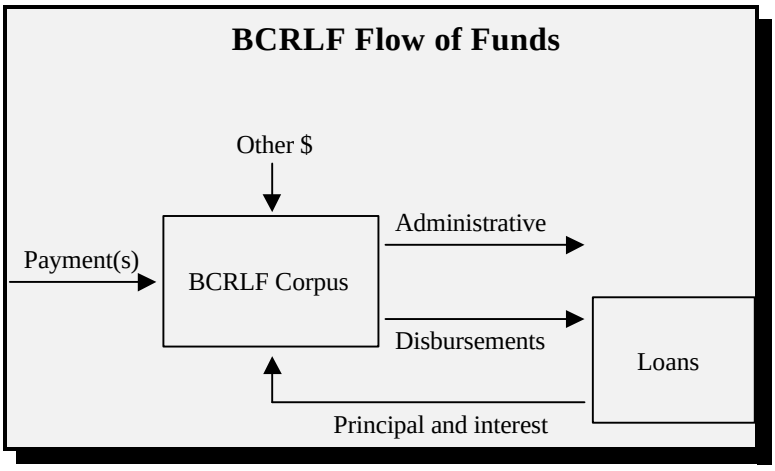
VI. BCRLF Fund Manager Functions and Responsibilities

A. INTRODUCTION

This section describes the objectives and mechanics of capitalizing and operating a BCRLF and the specific responsibilities of the fund manager in administering the financial and loan administration components of cooperative agreements. These methods should be considered in conjunction with the more technical requirements and procedures outlined in Section VII, *Administrative Procedures and Restrictions.*

Under the BCRLF pilot program, cooperative agreement recipients are responsible for ensuring that the fund is set up to optimize its lending potential in order to meet demands for financial assistance in the pilot area. A cooperative agreement recipient may conduct the necessary financial management activities itself or, through a written commitment with another qualified entity or individual, designate such an entity to serve as fund manager for the BCRLF (see Section IV.C.2., *Institutional Alternatives*).

The overall financial objectives of a BCRLF can be achieved by establishing a fully revolving fund whereby initial cooperative agreement award payments and any other start-up capitalization funds form the initial capital of the fund. These funds are used to make loans to eligible public and private borrowers, and, within established limitations, to pay for administrative costs of the BCRLF (see Section VII.D., *Administrative Costs*). Over time, these loan funds are returned to the BCRLF, via repayments of principal and interest. Additional funds may accrue to the fund in the form of loan processing and other loan-related charges imposed on borrowers, as well as interest earned on fund balances. These relationships are illustrated in the diagram below.



B. ESTABLISHING THE BCRLF FINANCIAL PLAN

Prior to the receipt of capitalization funds for the BCRLF, cooperative agreement recipients or their designated fund managers must establish the objectives and financial administration of the fund. These decisions include: the source(s) and level of capitalization and provision for utilizing program income; the types of assistance to be offered; capital utilization provisions (i.e., the revolving nature of the fund); underwriting principles to be followed; and assurance that all financial restrictions on funds use are met by the BCRLF and its borrowers.

1. Sources of Capital for BCRLF Pilots

Sources of capital for BCRLF pilots include the U.S. EPA cooperative agreement funds and may include financial contributions from participating states, political subdivisions, Indian Tribes, or private parties (see Section VII.A., *Payment Procedures and Methods of Disbursement*). The BCRLF pilot program does not require cost share or matching funds, but, as noted in the proposal guidelines, non-federal financial participation is encouraged.[12] Program income, including principal repayments on outstanding loans, interest, and other loan-related charges are expected to recapitalize BCRLFs as they revolve over time.

2. Capital Utilization

Cooperative agreement recipients are expected to manage BCRLF lending schedules to minimize the amount of uncommitted funds, in accordance with the terms and conditions of their agreement. Generally the terms and conditions require BCRLF assets be managed to maintain a minimum of 50 percent of the BCRLF capital loaned out or committed at all times. The U.S. EPA Regions may negotiate alternate capital utilization standards with cooperative agreement recipients in their jurisdiction.

3. Types of Assistance

As currently envisioned, the primary form of financial assistance to be provided by a BCRLF to eligible borrowers is a direct loan. Such loans may be provided at below-market interest rates, but not less than zero percent (see discussion of interest rates below). There also is no limit on the size of individual loans.

The use of BCRLF assets to provide other forms of financial assistance, such as financial guarantees, etc. may be considered on a case-by-case basis. If a cooperative agreement recipient chooses to use BCRLF funds to support loan guarantees, it must: (1) document the relationship between the expenditure of CERCLA 104(d) funds and response actions; (2) maintain an escrow account expressly for the purpose (see Section VII.A.3., *Methods of Disbursement*); and (3) ensure that any and all response actions guaranteed by BCRLF funds are conducted in accordance with the terms and conditions of the cooperative agreement and CERCLA and consistent with the NCP.

In instances where cooperative agreement recipients are providing borrowers with loan guarantees rather than direct loans, the cooperative agreement recipient will not receive payment from the U.S. EPA until the guaranteed loan has been issued from a bank or other financial institution. That is, loans guaranteed with BCRLF funds may only be made available on an as-needed basis for specific cleanup activities. Funds used to provide the guarantee should remain in escrow and return

to the cooperative agreement recipient only when borrowers repay the guaranteed loans. Escrow accounts should be established consistent with the standards for "disbursement" of grant funds discussed by the General Accounting Office in 64 Comp. Gen. 96 (1984).

May BCRLF monies be used for loan guarantees?

Yes. If the cooperative agreement recipient chooses to use BCRLF funds to support a loan guarantee approach, the cooperative agreement recipient must: (1) document the relationship between the expenditure of CERCLA 104 (d) funds and response actions; (2) maintain an escrow account expressly for this purpose, by following disbursement requirements described below; and (3) ensure that response actions guaranteed by BCRLF funds are conducted in accordance with the terms and conditions of the cooperative agreement and CERCLA and are consistent with the NCP.

To ensure that funds transferred to the cooperative agreement recipient are credited as disbursements of assisted funds, the escrow account supported by the loan guarantees must be structured in accordance with the standards of 64 Comp. Gen. 96 (1984). To qualify as a disbursement: (1) the recipient cannot retain the funds; (2) the recipient must not have access to the escrow funds on demand; (3) the funds must remain in escrow unless there is a default of a guaranteed loan; (4) the organization holding the escrow must be a bank or similar financial institution that is independent of the recipient; and (5) there must be an agreement with participating financial institutions 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.

Any obligations that the cooperative agreement recipient incurs for loan guarantees in excess of the BCRLF award are the responsibility of the cooperative agreement recipient. Cooperative agreement recipients are further required to communicate the terms of their cooperative agreements and the limits described herein to all participating banks and borrowers.

4. Insurance

A 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 (see Section VII.D., *Administrative Costs*).

May a cooperative agreement recipient use the BCRLF funds to purchase insurance, including environmental insurance?

Yes. Purchase of insurance, including environmental insurance, is an allowable administrative cost for the cooperative agreement recipient, if the expense is incidental to costs it incurs as a lead agency associated with a specific loan agreement or site cleanup. Unlike borrowers, such insurance does count against the 15 percent limit on cooperative agreement recipient administrative costs.

If a cooperative agreement recipient wishes to use BCRLF funds for the sole purpose of purchasing environmental insurance, approval from the EPA Headquarters must be obtained.

Borrowers also may 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). Unlike for a cooperative agreement recipient, incidental insurance purchased by a borrower is not counted against the borrower's ten percent limit on administrative costs.

May BCRLF funds be used by the borrower to pay for insurance, including environmental insurance, associated with site cleanup?

Yes. Purchase of insurance, including environmental insurance, by the borrower using BCRLF funding, is allowable if the expense is incidental to, and associated with BCRLF costs it incurs for site-specific cleanup activities. Insurance coverage that is purchased by the borrower associated with a specific cleanup activity is not counted against the borrower's ten percent limit on administrative costs.

U.S. EPA Headquarters approval must be obtained if the borrower wishes to use the BCRLF funds for the sole purpose of purchasing environmental insurance.

With the U.S. EPA Headquarter's 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.

5. Prudent Lending Practices

Cooperative agreement recipients should ensure that necessary institutional and personnel structures are in place to maintain the BCRLF and meet long-term brownfield cleanup and lending objectives. BCRLF cooperative agreement recipients must operate the BCRLF in accordance with lending practices generally accepted as prudent for Federally-assisted public loan programs.

Prudent underwriting principles include those related to the establishment of interest rates, repayment terms, and collateral requirements (discussed below), as well as practices covering loan processing, documentation, loan approval, collections, servicing, administrative procedures, and recovery actions (discussed later in this section).

(a.) Interest rates

Fund managers may make loans to eligible borrowers at interest rates that are less than or equal to the market interest rate, but not less than zero percent. The cooperative agreement recipient is responsible for identifying in the cooperative agreement workplan the method it will use to determine the "prevailing" market interest rate at the time a particular loan is executed with a borrower.

(b.) Repayment terms

As a condition of the cooperative agreement, BCRLF cooperative agreement recipients are required to develop a plan for how repayment terms on individual loans will be determined. This plan should provide enough detail to assure the U.S. EPA that loans will be repaid in a timely and efficient manner. It is not necessary for these plans to specify the details of individual loan repayment schedules, since these conditions will vary based upon the needs of individual borrowers.

No requirements for the length of the term of a loan repayment have been established. The cooperative argument recipient is simply expected to use sound judgement and apply standard practices when establishing loan durations.

(c.) Security

BCRLF cooperative agreement recipients are required to obtain adequate and appropriate financial security from borrowers and to act diligently to protect the interests of the revolving loan fund through collection, foreclosure, or other recovery actions on defaulted loans. The U.S. EPA requires that cooperative agreement recipients ensure that all loans are properly secured, but leaves the details of the collateral to the cooperative agreement recipient as an operational decision. The recipient should determine, on a case-by-case basis, whether a lien on the brownfield site is appropriate collateral. Other collateral may include security interests in equipment, accounts, and personal guarantees.

6. Project Selection Procedures

Each cooperative agreement recipient or designated fund manager, in cooperation with the lead agency, is responsible for developing a systematic approach for selecting borrowers and projects that are eligible for funding (see Section III.B., *Eligible Sites*; Section III.C., *Ineligible Sites*; and Section V, *BCRLF Environmental Response Requirements -- Applicable Authority*). It is the responsibility of cooperative agreement recipients to establish appropriate project selection criteria consistent with Federal and state requirements, the intent of the BCRLF program, and the cooperative agreement entered into with the U.S. EPA.

Cooperative agreement recipients must identify procedures for determining how potential borrowers are qualified to direct proposed cleanup and redevelopment activities. For program operation, it is expected that cooperative agreement recipients will develop a formal protocol for potential borrowers to demonstrate eligibility, based on the procedures described in the proposal and cooperative agreement application. Such a protocol may include descriptions of projects that will be financed, how loan monies will be used, and qualifications of the borrower to make legitimate use of the funds. Additionally, cooperative agreement recipients may ask borrowers for an explanation of how a project, if selected, would be consistent with BCRLF program objectives.

Are there any requirements for the term of repaying loans to the cooperative agreement recipient as BCRLF lender?

No. There are not any requirements for the length of repayment period(s). However, the cooperative agreement recipient is expected to use sound judgement and standard practices when establishing the overall loan terms (i.e., length of repayment, repayment start date, security, and amortization) of loans. The requirement for interest rates is as follows: a cooperative agreement recipient may make loans with interest rates that are less than or equal to the market interest rate, including zero percent loans. Negative interest rates are not allowed. The cooperative agreement recipient is responsible for identifying in the cooperative agreement the method it will use to determine the "prevailing" market interest rate at the time a particular loan is executed with a borrower.

When several project borrowers are competing for BCRLF funds, cooperative agreement recipients should be prepared to substantiate methods and reasons for choosing one project over another. Project selection systems may be subject to review to ensure that BCRLF program objectives are being met.[13] However, the U.S. EPA will not make decisions on individual loans.

7. Borrower Eligibility

Each fund manager should work with its respective BCRLF lead agency to establish borrower eligibility provisions and ensure they are met. Generally, eligible borrowers include any public or private entities with control over or access to an eligible site (as defined in Section III. B., *Eligible Sites*).

Some restrictions do apply on the eligibility of potential borrowers. They are listed below.

- A cooperative agreement recipient may not lend to itself.
- A party which is determined to be a generator or transporter of contamination at a brownfields site(s) is ineligible for a BCRLF pilot loan for that same site.
- 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 (see Appendix F, *List of the U.S. EPA Brownfields Policy and 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 (see Appendix B, *Proposal Guidelines for BCRLF Demonstration Pilots*).

- A borrower must submit information regarding its environmental compliance history. The cooperative agreement recipient will strongly consider this history in its analysis of the borrower as a cleanup and business risk.

- Each borrower must 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.

- Someone that has been suspended, debarred, or otherwise declared ineligible cannot be a borrower.

If a city is the cooperative agreement recipient, may it lend BCRLF dollars to another government agency (i.e., a Redevelopment Agency) if that agency is part of the same municipal government?

No. An entity would not be eligible to be a borrower if the entity is an agency of the same government as the cooperative agreement recipient, unless a state or local law establishes that the agency may borrow money from the political jurisdiction of the cooperative agreement recipient and raise funds to pay the loan back (otherwise the state or city would be lending money to itself).

Is the cooperative agreement recipient eligible to be a borrower? What if an organization is filling any of the roles (lead agency, fund manager, or site manager)?

No, a cooperative agreement recipient may not lend to itself. The cooperative agreement recipient also must establish and enforce conflict of interest provisions governing the roles and responsibilities of the lead agency, fund manager, brownfields site manager, and borrower.

C. LOAN ADMINISTRATION

BCRLF fund managers are responsible for ensuring that the overall objectives of the fund are met through the selection and structuring of individual loans and lending practices. Such practices include the management of loan funds and timing of disbursements.

1. Loan Agreements and Borrower Terms and Conditions

There are a number of general terms and conditions that BCRLF borrowers must agree to in order to receive a loan or other financial assistance from the BCRLF. It is the responsibility of the fund manager to work with the lead agency to establish appropriate terms and conditions in general and for individual borrowers. The fund manager must consult with the lead agency in developing loan agreements to ensure that all environmental cleanup requirements will be met and to ensure that BCRLF monies are used only for authorized activities (see Section V.A., *Applicable Authority*; Section III, *Eligible BCRLF Cooperative Agreement Fund Uses and Program*

Activities; and Section VII.E., *Reporting and Audit*).

2. Loan Processing

BCRLF fund managers must establish procedures for handling the day-to-day management and processing of loans and repayments. These procedures include coordination with the U.S. EPA on funds payment as well as disbursement of loans to borrowers. All loan processing procedures will be subject to the Single Audit Act of 1984, as amended, as implemented by OMB Circular A-133, *Audits of States, Local Governments, and Non-Profit Organizations* and 40 C.F.R. Part 31 (see Section VII.A., *Payment Procedures and Methods of Disbursement*).

Cooperative agreement recipients may choose to disburse funds to borrowers by means of "schedule" or "actual expense." A schedule disbursement is one in which all or an agreed upon portion of the obligated funds are disbursed on the basis of an agreed upon schedule (e.g., progress payments) or upon execution of the loan. An actual expense disbursement approach requires the cooperative agreement recipient to submit documentation of the borrower's expenditures (e.g., invoices or other contractual agreements) to the U.S. EPA Regional BCRLF project officer to request payment (see Section VII.E., *Reporting and Audit*).

3. Default Provisions

In the event of a loan default, the BCRLF cooperative agreement recipient must 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. Differences between assets seized and outstanding loan balances should be considered unrecoverable losses to the fund. If the cleanup is not complete at the time of default, the BCRLF cooperative agreement recipient is responsible for: (1) documenting the nexus between the amount loaned to the borrower or, in the case of guaranteed loans, 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 public safety) and informing the U.S. EPA and the state. The EPA will not make any financial decisions regarding the default of BCRLF loans. Recipients may consult with the U.S. EPA on these matters, but recipients ultimately must exercise their own discretion regarding loan default. However, the U.S. EPA may be involved in cleanup decisions regarding the default of BCRLF loans.

> ***Will the U.S. EPA make any decisions regarding loan defaults?***
>
> No. The U.S. EPA will not make any financial decisions regarding the default of BCRLF loans. However, the U.S. EPA may be involved in cleanup decisions regarding default of BCRLF loans.

Could a cooperative agreement recipient be liable for cleanup costs if the borrower defaults on the loan, or if the borrower fails to complete the cleanup in compliance with CERCLA requirements?

Maybe. Whether a cooperative agreement recipient becomes liable for cleanup costs under CERCLA §107 will depend upon the facts of the particular situation. CERCLA §107 generally imposes liability on owners and operators of facilities with hazardous substances and persons who arranged for disposal, treatment or transportation of hazardous substances. Whether BCRLF participants are liable under CERCLA §107 will depend upon the facts of the particular situation. The following provisions may limit the liability of BCRLF participants: Section 107(d) exempts from liability actions "in the course of rendering care, assistance, or advice in accordance with the [NCP]" except as the result of negligence. Section 107(d)(2) exempts from liability state or local government actions "in response to an emergency created by the release or threatened release of a hazardous substance," except as a result of gross negligence or intentional misconduct."

Section 101(20), as revised by the "Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996," 104 P.L. 208, provides that the terms "owner" and "operator" do not include lenders who do not participate in the management of a facility. In addition, Section 101(20)(D) provides that the terms "owner" and "operator" do not include "a unit of state or local government which acquired ownership or control involuntarily...by virtue of its function as sovereign.

Section VI Endnotes:

12. "Proposal Guidelines for Brownfields Cleanup Revolving Loan Fund," U.S. EPA, OSWER, Washington, D.C., 500-F-97-147, April 1997.

13. The recipient's decision to make a loan is not a procurement subject to 40 C.F.R. §31.36 and 40 C.F.R. §35.6550 through §35.6610.

VII. Administrative Procedures and Restrictions Contents

VII. Administrative Procedures and Restrictions

The U.S. EPA has established procedures governing how BCRLF funds may be transferred (i.e., paid) to cooperative agreement recipients and subsequently disbursed to borrowers. Furthermore, the U.S. EPA has put in place requirements regarding the use of program income, meeting cross- cutting requirements, program audit and recordkeeping, allowable administrative costs, remedies for noncompliance, program termination, and recovery of BCRLF assets. These administrative procedures and restrictions are discussed below (see also Section VI.B., *Establishing the BCRLF Financial Plan*).

A. Payment Procedures and Methods of Disbursement

For the purposes of the BCRLF program, "payment" refers to the U.S. EPA's transfer of funds to the cooperative agreement recipient and "disbursement" refers to the transfer of funds from the cooperative agreement recipient to the borrower. The cooperative agreement recipient incurs an "obligation" when it enters into a loan agreement with a borrower.

1. Pre-payment Requirements

Each cooperative agreement recipient must make positive assertions regarding its fund management capabilities and provide necessary certifications prior to any receipt of cooperative agreement award funds. In particular, a cooperative agreement recipient must certify that its accounting system is adequate to identify, safeguard, and account for all BCRLF funds, including BCRLF program income. Certification is normally completed through an independent accountant. The recipient also must 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 the Terms and Conditions of the award.

2. Payment Procedures

All payments to cooperative agreement recipients will be made consistent with 40 C.F.R. Part 35.6280. Depending on the method of disbursement established for the cooperative agreement, recipients may request payment from the U.S. EPA after incurring an obligation or administrative expense or based on a pre-established schedule. Funds for cooperative agreement recipients' administrative costs (up to 15 percent of the total award) may be paid as appropriate.

The U.S. EPA will make payments to the cooperative agreement recipient on a schedule which minimizes the time elapsing between transfer of funds from the U.S. EPA and disbursement by the recipient. For funds covering a cooperative agreement recipient's loan to a borrower, 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 (see discussion below). The cooperative

agreement recipient must disburse accrued program income to meet all or part of this obligation or administrative expenses prior to requesting payment from the U.S. EPA.

If funds are requested but the loan agreement signing delayed, a cooperative agreement recipient may hold funds for a reasonable time period, but should return the funds if disbursement to borrowers is unlikely within a 30-day period. Returned funds will be available to the recipient for future drawdown for legitimate incurred costs. Interest earned on prematurely drawn funds must be returned to the U.S. EPA unless there is a statutory exemption.

What is the procedure by which the U.S. EPA plans to submit payment of funds to cooperative agreement recipients?

The method of payment will vary. The Region and the cooperative agreement recipient should work out the method of payment at the Region's discretion.

If the Automated Clearing House (ACH) Vendor Payment System is used to comply with the Debt Collection Improvement Ac t of 1996, the cooperative agreement recipient must complete and return the Payment Information Form ACH Vendor Payment System (TFS Form 3881).

Each cooperative agreement recipient should work with its regional EPA project officer to establish the method of payment that will be used. Appropriate methods of payment may include the Automated Clearing House Electronic Funds Transfer (ACH/EFT) system and U.S. Treasury check.

The ACH/EFT system wires funds directly to a cooperative agreement recipient's bank account. If the ACH Vendor Payment System is used, the cooperative agreement recipient must comply with all relevant provisions of the Debt Collection Improvement Act of 1996, including completing and returning (to the U.S. EPA project officer) the Payment Information Form ACH Vendor Payment System (Standard Form 3881). Once the SF 3881 has been submitted and accepted, a payment form (SF 270, *Request for Advance or Reimbursement*) or reimbursement form (SF 271, *Outlay Report and Request for Reimbursement for Construction Programs*) should be used to request payment, unless the cooperative agreement recipient already uses the ACH/EFT system.

Alternatively, a U.S. Treasury check may be used for payment(s). To request payment, each cooperative agreement recipient must submit a completed (SF 270 or 271) to the U.S. EPA.

3. Methods of Disbursement

There are two ways that the cooperative agreement recipient may elect to disburse funds to the borrower: via an "actual expense"approach or on a pre-determined "schedule." An "actual expense" disbursement approach requires the cooperative agreement recipient to submit documentation of the borrower's expenditures (e.g.,

invoices) to the U.S. EPA to request payment. A "schedule" disbursement approach requires that 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) which may coincide with execution of the loan. If a schedule disbursement approach is employed, the cooperative agreement recipient must submit documentation of the agreed-upon disbursement schedules to the U.S. EPA.

What is the procedure by which cooperative agreement funds are disbursed to individual borrowers?

The cooperative agreement recipient may choose to disburse funds to borrowers by means of a "schedule" disbursement or via an "actual expense" mechanism. 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 which may coincide with execution of the loan. The cooperative agreement recipient must submit documentation of disbursement schedules to the U.S. EPA. The "actual expense" approach requires the cooperative agreement recipient to submit documentation of the borrower's expenditures (e.g., invoices) to the U.S. EPA to request payment.

B. USE OF PROGRAM INCOME

Program income is the gross income received by the cooperative agreement recipient, directly generated by the cooperative agreement award or earned during the period of the award (the time between the effective date of the award and the ending date of the cooperative agreement, as defined in 40 C.F.R. §31.25). The terms of the cooperative agreement allow the recipient to add program income to the funds awarded by the U.S. EPA and use the program income under the terms and conditions of its agreement (as defined in 40 C.F.R. §31.25(g)(2)), including eligible administrative costs and environmental response requirements.

Program income includes principal repayments, interest earned on outstanding loan principal, interest earned on accounts holding BCRLF program income not needed for immediate lending, all loan fees and loan-related charges received from borrowers, and other income generated from BCRLF operations.

Will repaid loan funds (principal and interest) be subject to the same restrictions as the initial BCRLF assistance funds? Could, for instance, local pilots lend these funds for other uses (e.g., petroleum sites) as long as the uses are consistent with the objectives of the Brownfields program?

Yes, repaid loan funds are subject to the same restrictions as the initial BCRLF assistance funds. Cooperative agreement recipients must use program income in a manner consistent with the terms and conditions of the cooperative agreement affecting disposal of program income, eligible costs and in accordance with CERCLA and consistent with the NCP. Providing funds to respond to petroleum contamination would <u>not</u> be consistent with these requirements.

BCRLF cooperative agreement recipients are encouraged to earn income to defray administrative costs and preserve the fund corpus. While up to ten percent of principal repayments and up to 100 percent of interest and fees may be used for administrative costs, fund managers are strongly encouraged to maximize the lending capacity of the BCRLF (see Section VII.D., *Administrative Costs*). In accounting for program income, any proceeds from the sale, collection, or liquidation of a defaulted loan, up to the amount of the unpaid principal and any proceeds in excess of the unpaid principal, will be treated as program income and must be placed in the BCRLF for lending purposes or to cover administrative costs.

All program income from active BCRLF loans received by cooperative agreement recipients should be placed immediately in the BCRLF and made available for relending. As new loans are made, cooperative agreement recipients may request new payments only for the difference, if any, between the amount of program income available for relending and the amount of the new loan. As noted earlier, up to ten percent of repaid principal and up to 100 percent of interest and fees may be deducted from funds available for relending to cover administrative costs.

Cooperative agreement recipients are expected to maintain a fund for future borrowing needs within the eligible lending area. To determine the amount of program income to use for administrative expenses, fund managers should consider the costs necessary to operate a BCRLF program, the availability of other monetary resources, the portfolio risk level and projected capital erosions from loan losses and inflation, the community's (or area's) financial commitment to the BCRLF, and the anticipated demand for BCRLF loans.

Cooperative agreement recipients electing to use program income to cover all or part of a BCRLF's administrative costs must 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 Office of Management and Budget cost principles when charging costs against program income.[14] For any costs determined by the U.S. EPA to have been an ineligible use of program income, the recipient must reimburse the BCRLF or the U.S. EPA. The U.S. EPA will notify the recipient of the time period allowed for reimbursement.

After the period of the cooperative agreement has elapsed, cooperative agreement recipients are required to 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 (see Section VIII, *Closeout and Additional Requirements*).

C. Ensuring Equivalency Standard Is Met for

Each cooperative agreement recipient must ensure that loans made with BCRLF funding in combination with other non-Federal funding sources, meet Federal cross-cutting requirements to the extent of the Federal participation in the loan. Approaches to meeting cross-cutting requirements include requiring borrowers to segregate expenditures between Federal and non-Federal sources, meeting cross-

CROSS-CUTTING REQUIREMENTS

cutting requirements to the extent Federal funding is included in the loan pool, and applying cross-cutting requirements to all BCRLF loans (see Section IX.B., *Applicable Cross-cutters*).

D. ADMINISTRATIVE COSTS

In addition to the requirements of OMB Circular A-87, the U.S. EPA places restrictions on the level and types of administrative costs for which BCRLF funds may be used—for both cooperative agreement recipient and borrower administrative costs.

May the fund manager (lender) recover administrative costs through interest rates, loan application fees, and/or loan processing fees?

Yes. To the extent possible, cooperative agreement recipients are encouraged to set up their BCRLF programs to recoup administrative costs through interest charges and/or loan application and processing fees. Cooperative agreement recipients or designated fund managers may use up to 100 percent of interest and fees for administrative costs. Only 10 percent of the repayments of principal may be used for this purpose.

1. Cooperative Agreement Recipient

Cooperative agreement recipients may use BCRLF pilot funds for the lead agency's or fund manager's administrative and legal costs up to 15 percent of the total initial award, to be determined during cooperative agreement application negotiations with the U.S. EPA. Cooperative agreement recipients also may use up to ten percent of repaid principal and up to 100 percent of the borrower's interest payments and any program fees for eligible administrative costs. This is allowable for every loan made and repaid to the fund.

What are the allowable administrative costs of the cooperative agreement recipients?

The cooperative agreement recipient may use no more than 15 percent of the total award to cover administrative and legal costs (e.g., insurance, loan processing, professional services, audit, legal fees, and state program fees incurred by lead agency and/or fund manager), as negotiated by the U.S. EPA and the cooperative agreement recipient during the cooperative agreement application process.

Furthermore, the cooperative agreement recipient may use no more than ten percent of the borrower's principal repayments to the fund, and up to 100 percent of the borrower's interest payments and program fees (e.g., loan origination or processing fee) for administrative and legal costs.

Allowable administrative costs include loan processing, professional services, administering the BCRLF, audit, legal fees, and state program fees. In addition, allowable administrative costs also may include the costs incurred by the cooperative

agreement recipient in ensuring that the BCRLF borrower complies with program requirements, such as public participation, worker health and safety, and interagency coordination.

2. Borrowers

Borrowers may use up to ten percent of borrowed funds for administrative costs, including costs for BCRLF response planning. Cooperative agreement recipients should define the borrowers administrative costs in the loan agreement.

> ***To what extent may the borrower use the BCRLF for administrative costs?***
>
> Borrowers may use up to ten percent of borrowed funds for administrative costs. It also should be noted that while a borrower may not use BCRLF pilot funds to conduct environmental response activities preliminary to cleanup, such as site assessment, site identification, and site characterization, the fund manager may negotiate with the borrower a limit of up to ten percent of the total loan to cover *both* administrative and BCRLF response planning costs.

E. REPORTING AND AUDIT

1. The U.S. EPA Responsibilities

The U.S. EPA is responsible for monitoring BCRLF pilots' fulfillment of all reporting and recordkeeping requirements. This section describes those responsibilities.

(a.) Recordkeeping

The U.S. EPA Regional Offices will provide central storage/processing of data, reports, and evaluations related to BCRLF cooperative agreements in their region. Quarterly reports summarizing key information will be forwarded from the Regions to U.S. EPA Headquarters. This information may be used to address performance measures contained in the Government Performance and Results Act (GPRA) and other national performance measurement programs.

(b.) Program review

The U.S. EPA will conduct periodic reviews of each BCRLF to assess the success of the award recipient in meeting goals set forth by the BCRLF cooperative agreement workplan. The review will determine if the BCRLF is meeting program requirements, including recordkeeping, reporting, and audit requirements.

(c.) Evaluation

The U.S. EPA may develop case studies and other information to assist in periodic program evaluations. Program evaluation data may include: total acres cleaned up, total number of cleanups, total number of cleanup jobs leveraged, total number of long-term jobs leveraged, total cleanup dollars leveraged, total redevelopment dollars leveraged, and total tax dollars generated.

(d.) Dispute resolution

Any cooperative agreement recipient that believes it has been adversely affected by an agency action or omission may request a review of such action or omission as provided in 40 C.F.R. Part 31.70.

2. Cooperative Agreement Recipient Responsibilities

Cooperative agreement recipients are responsible for ensuring compliance with all necessary reporting and records management for themselves, their implementation partners (e.g., fund manager), and their borrowers. This section describes those responsibilities.

(a.) Deliverables

Each cooperative agreement recipient is responsible for reporting to the EPA requested measures of performance and other program-specific milestones. These measures will relate both to environmental cleanup and success of the loan program (see Section VII.E.1.b., *Program review* and Section VII.E.1.c., *Evaluation*). Measures will be used to evaluate the success of the pilot in advancing the goals of the National Brownfields Initiative. All cooperative agreement recipients will be requested to provide measures of success and program milestones. This information should be provided consistent with reporting intervals established by the U.S. EPA in accordance with applicable regulations.

(b.) Records maintenance

Cooperative agreement recipients must keep records of how they select borrowers of BCRLF loans. Beyond a simple record of borrower identity, cooperative agreement recipients must maintain documentation of criteria met by the borrower that explains why the borrower was selected over other interested potential borrowers. Thus, cooperative agreement recipients will have to establish selection criteria at the outset of the BCRLF. This may involve a threshold set of criteria and an evaluation set, similar to those approved for the evaluation of the BCRLF demonstration pilots. Under this scenario, all applicants would be required to meet the threshold criteria, and could subsequently be evaluated based on the evaluation criteria.

If the BCRLF cooperative agreement recipients include administrative or legal fees as part of their BCRLF costs, the exact fees to be paid out of the BCRLF must be documented. Recipients also must maintain adequate accounting records and source documentation to substantiate the amount and percent of program income expended for eligible BCRLF administrative costs, and also must comply with applicable Office of Management and Budget cost principles when charging costs against program income.

How long must cooperative agreement recipients keep records (financial, cleanup, etc.)?

As per 40 C.F.R. Part 35.6705, a cooperative agreement recipient must maintai n documentation for a minimum of 10 years after completion of the cleanup activity supported by each loan and must obta in written approval from the U.S. EPA prior to destroying records. Microform copies may be substituted for the original records, but the U.S. EPA writte n approval must still be obtained before destroying original records. The microform copyin g must comply with 36 C.F.R. Part 1230 and U.S. EPA Directive 2160 Records Management Manual. Additionally, cooperative a greement recipients must maintain records regarding post close-out program income, if applicable.

Records must be maintained in accordance with 40 C.F.R.§35.6705. At a minimum, records must be maintained for ten years after submission of the Financial Status Report, closeout of the cooperative agreement, completion of an ongoing audit, or for the length of the individual loan, whichever is longest. In addition, the cooperative agreement recipient must obtain written approval from the U.S. EPA prior to destroying any records. Microform copies may be substituted for the original records, but the U.S. EPA written approval must still be obtained before destroying original records. The microform copying must comply with 36 C.F.R. Part 1230 and the U.S. EPA Directive 2160.

(c.) Quarterly reporting

Reporting serves to keep the U.S. EPA apprised of the BCRLF's performance. As such, the cooperative agreement recipient must report quarterly on their performance and the reports must be submitted within 30 days of the end of each Federal fiscal quarter. The U.S. EPA may provide information to cooperative agreement recipients in order to elicit reporting responses from them.

At a minimum, the items included in 40 C.F.R. §35.6650 should be included in quarterly reports. Examples of activities which cooperative agreement recipients may include in their quarterly report:

- Types of projects assisted;
- Criteria used in selection of sites / borrowers;
- Maintenance of adequate funds for continued brownfields assistance;
- Certification of efficient and timely funds administration;
- Details of separate accounts that provide loans for the purpose of cleanup of brownfields properties; and
- Provider of environmental cleanup.

Generally, reports should inform the U.S. EPA as to whether the individual BCRLF is meeting the goals of the pilot program. The U.S. EPA regions may require additional reporting items as necessary and appropriate to ensure cleanups are

carried out in accordance with CERCLA and consistent with the NCP.

For what period of time will cooperative agreement recipients be required to provide quarterly reports to the U.S. EPA?

Cooperative agreement recipients will be required to submit quarterly reports to the U.S. EPA until the end of the closeout of their cooperative agreement.

(d.) Audit

Cooperative agreement recipients must ensure that periodic audits of their programs are conducted by an outside auditor in accordance with General Accounting Office (GAO) accounting standards or generally accepted government auditing standards. Furthermore, a cooperative agreement recipient must 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, a cooperative agreement recipient must, as a condition of making a loan, require borrowers to maintain project accounts in accordance with generally accepted accounting principles. For example, charges against the loan must be properly supported, related to eligible construction costs, and documented by appropriate record. In some cases, the U.S. EPA Office of Inspector General may also conduct audits of specific cooperative agreements.

3. Borrower Reporting and Recordkeeping

Cooperative agreement recipients are required to ensure that borrowers comply with all relevant Federal and state regulations as well as the requirements of the BCRLF program. Cooperative agreement recipients should require borrowers to document that they are meeting their responsibilities with regard to BCRLF program objectives in regularly submitted reports. The cooperative agreement recipient must ensure that borrowers provide financial records on a regular basis, and maintain the records on file for a minimum of ten years from the end of the loan term.

Individual reporting systems will vary among cooperative agreement recipients and borrowers, but such systems should include basic accounting and control mechanisms to help ensure legitimate use of funds and to document that funds are put to authorized uses. It is the role of the cooperative agreement recipient to direct the borrower in filling out necessary forms to demonstrate compliance. This will include, for instance, any pertinent requirements to seek minority- and women-owned businesses when choosing contractors.

How long must borrowers keep records (financial, cleanup, etc.)?

The cooperative agreement recipient must ensure that borrowers maintain documentation for a minimum of ten years after the completion of the activity supported by each loan and must obtain written approval from the lead agency prior to destroying records.

Cooperative agreement recipients must ensure that borrowers keep records of compliance with the terms and conditions of the loans including requirements of

Does the U.S. EPA intend to audit the BCRLF programs? If so, what procedures will be used? How often will audits be conducted?

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

CERCLA, the NCP, and allowable costs. A system of accounting must be in place that is both accurate and complete. The system should charge to individual sites, activities, and operable units. The system should have the ability to maintain records and track site-specific costs, and track costs by activity and operable unit.

The cooperative agreement recipient must ensure that borrowers meet pre-established financial reporting requirements, including submitting financial reports on a regular basis (may be required as often a quarterly). Reporting mechanisms should provide financial information by site, activity, and operable unit. Additionally, financial reports must show amount of funds received and expended, direct and indirect project costs, and a record of property use, procurement methods and records, and documentation of compliance with pertinent statutes and regulations.

Pursuant to CERCLA reporting and recordkeeping requirements, the cooperative agreement recipient must ensure that borrowers retain records for a minimum of ten years, unless otherwise directed. Permission must be obtained from the lead agency before records can be removed from storage systems, once records have been in storage for a minimum of ten years.

F. TERMINATION

1. Termination for Convenience

A cooperative agreement recipient may terminate the agreement for convenience of the cooperative agreement. In the case of a partial termination, the U.S. EPA must determine that sufficient funds remain to permit an effective BCRLF operation. Otherwise, the agreement may be terminated in its entirety by the U.S. EPA under 40 C.F.R. §31.43 or by mutual agreement. Upon termination, the Federal share of the funds must be returned to the Superfund Trust Fund (see Section VII.F.3., *Recovery of the U.S. EPA Interest in BCRLF Assets*).

What happens if the cooperative agreement recipient wants to terminate the program and dissolve the BCRLF? Do any limits apply to the pilots' use of remaining funds?

In case of termination, for cause or convenience, the cooperative agreement recipient must return to the U.S. 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 the use of the funds. These assets will be returned to the Superfund Trust Fund. And yes, limits would apply to the pilot's use of remaining funds. Use of remaining funds must

2. REMEDIES FOR NONCOMPLIANCE

If the U.S. EPA determines that a cooperative agreement recipient has failed to comply with the terms of the cooperative agreement, the Agency may take action under 40 C.F.R. §31.43 and 40 C.F.R. §35.6760 These actions may include temporarily withholding payments, disallowing all or part of the cost activities not in compliance with the terms of the award, whole or partial suspension or termination, or whole or partial annulment of the agreement.

Before taking action, the U.S. EPA may give the recipient a reasonable period of time in which to take the necessary corrective action to comply with the terms of the cooperative agreement. However, should it appear that an award recipient will not take the necessary action, and/or that continued operation of the BCRLF would place the assets at risk, the EPA may suspend the cooperative agreement immediately under 40 C.F.R. §31.43(a)(3).

Upon suspension, the cooperative agreement recipient and its designated fund manager could be prohibited from any new lending activity, although normal loan servicing and collection efforts would continue. The recipient may be subject to restrictions on the use of BCRLF program income. Further, the U.S. EPA may recover payments to the recipient that were expended in violation of the terms and conditions of the agreement or in violation of applicable law and regulations.

In the event that compliance problems are not resolved during the suspension period, the U.S. EPA may identify a successor recipient to assume responsibility for administering the BCRLF in accordance with the terms of the original cooperative agreement. If a successor is identified, the noncompliant recipient's fund manager is expected to cooperate fully in the transfer of assets.

When a fund manager fails to complete the initial round of lending in the time schedule provided in the cooperative agreement, the agreement may be partially terminated and unused cooperative agreement funds may be de-obligated and the cooperative agreement award amended to reflect the reduced amount of the cooperative agreement. Cooperative agreement recipients who persistently fail to make maximum use of the available BCRLF capital, as defined by the Terms and

Conditions of the agreement, will be required to return excess funds, in an amount determined by the U.S. EPA, to the Superfund Trust Fund. This amount will not be greater than the EPA's proportionate share of the BCRLF funds. The cooperative agreement award will be amended to reflect the reduced amount of the U.S. EPA's participation.

3. Recovery of U.S. EPA Interest in BCRLF Assets

In case of termination, for cause or convenience, the U.S. EPA has the responsibility, on behalf of the Federal government, to recover its proportionate 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. Recovered BCRLF assets must be returned to the Superfund Trust Fund. The U.S. EPA's proportionate share is the amount computed by applying the percentage of the EPA participation in the total capitalization of the BCRLF to the current fair market value of the assets thereof. In addition, the U.S. EPA has the right to compensation, over and above its share of the current fair market value of the assets, when it is determined that the value of such assets has been reduced by the improper/illegal use of cooperative agreement funding.

Section VII Endnotes:

14. As appropriate, please reference Office of Management and Budget circulars A-87, "Cost Principles for State and Local Governments," and A-122, "Cost Principles for Non-Profit Organizations."

VIII. Closeout and Additional Requirements Contents

VIII. Closeout and Additional Requirements

This section describes the procedures for closing out a BCRLF demonstration pilot, as well as the requirements that cooperative agreement recipients must meet after the period of the award. Closeout is the process that the U.S. EPA follows to ensure that all administrative actions and work required under a cooperative agreement have been completed, and to de-obligate any funds that a BCRLF cooperative agreement recipient has been unable to use. Post-award requirements are administrative, or other requirements, that continue beyond the period of the award.

For the purposes of the BCRLF demonstration pilot program, the following definitions apply: *"payment"* is the U.S. EPA's transfer of funds to the cooperative agreement recipient; *"obligation"* is what the cooperative agreement recipient incurs when it enters into a loan agreement with the borrower; and *"disbursement"* is the transfer of funds from the cooperative agreement recipient to the borrower.

A. CLOSEOUT

1. Criteria

There are two fundamental criteria for closeout: (1) final payment of funds from the U.S. EPA to a cooperative agreement recipient; and (2) completion of all cleanups funded by the amount of the award. All BCRLF cleanup responses must be completed within 12 months from the date that on-site cleanup activity is initiated, unless the U.S. 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.

How is the cooperative agreement closed out once the term has ended?

There are two fundamental criterion for closeout: (1) final payment; and (2) completion of all cleanups funded. The first criterion of cooperative agreement closeout is met when the cooperative agreement recipient receives all payments from the U.S. EPA. The second closeout criterion is met when all cleanups funded by the amount of the award are complete (all cleanups are expected to be complete within 12 months from the date that on-site cleanup activity is initiated).

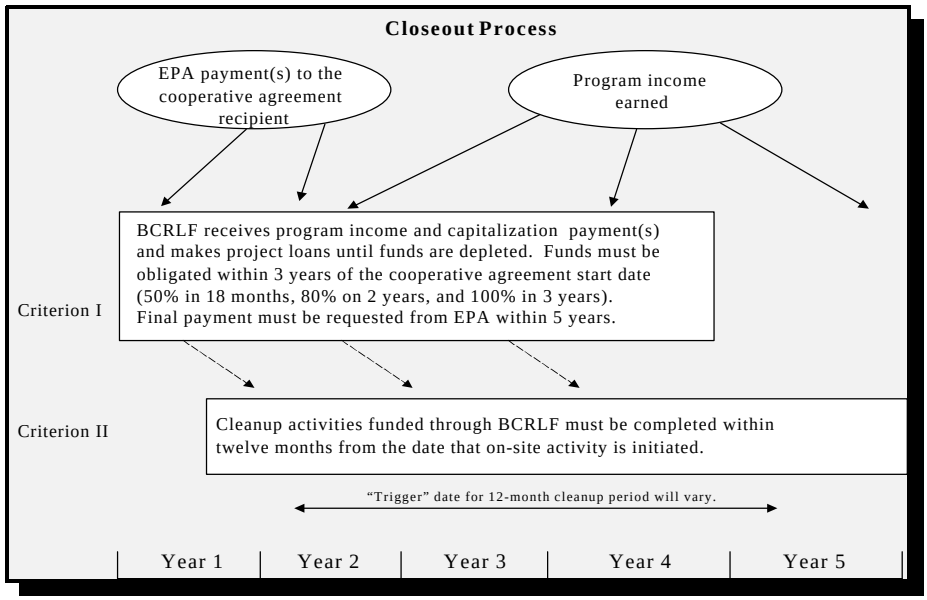
Each cooperative agreement recipient has three years from the cooperative agreement start date to obligate all funds awarded (i.e., the BCRLF seed principal). The schedule of obligation should be no less than 50 percent of the amount awarded within 18 months; 80 percent within two years; and 100 percent within three years. Final payment and disbursement of award funds must 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 the U.S. EPA (per 40 C.F.R. §31.21(f)).

Each cooperative agreement recipient has five years from the agreement start date to request final payment from the U.S. EPA. Therefore, closeout could occur at any point between one and five years, depending on the method of disbursement (i.e., schedule or actual expense) in use (see Section VII.A., *Payment Procedures and Methods of Disbursement*) and compliance with other terms and conditions of the agreement.

What is the anticipated term for the cooperative agreement?

The cooperative agreement recipient has five years from the agreement start date to request final payment from the U.S. EPA. This will require the cooperative agreement recipient to obligate and disburse all award funds and any program income (i.e., fees, repayments of principal and related interest, and other income) that accrues before final payment from the U.S. EPA (per 40 C.F.R. §31.21(f)). The schedule of obligation and disbursement must be no less than 50 percent of the amount awarded within 18 months; 80 percent within two years; and 100 percent within three years. It is then anticipated that associated cleanups and necessary documentation will be completed in five years.

Under this process, the maximum cooperative agreement award period expected would be five years (i.e., three years to obligate all of the award funding and five years to complete disbursement of all award funds and any program income earned during the award period, complete all cleanups, and request final payment from the U.S. EPA, assuming the last cleanup is initiated no later than one year after the final day of the three-year obligation period). This represents the end of the U.S. EPA's cooperative agreement, but not necessarily the end of a BCRLF itself. Also, a cooperative agreement recipient may request early closeout if both the payment and cleanup closeout criterion are met before the five year period ends. The diagram below graphically depicts the closeout process.



2. Closeout and Adjustments

In accordance with applicable regulations, the U.S. EPA will close out a cooperative agreement, or an activity under a cooperative agreement, when it is determined that all applicable administrative actions and all required work of the award has been completed. Within 90 days of completion, the cooperative agreement recipient must submit all financial, performance, and other reports required as a condition of the award which include, but are not limited to financial information (such as status of payment, obligation, and disbursement) and cleanup information (such as the cleanup completion dates). At the request of the cooperative agreement recipient, the U.S. EPA may extend this timeframe.

Reports that will be included in closeout proceedings are:

- Financial performance or progress reports;
- Financial status report (SF 269);Final request for payment (SF 270);
- Invention disclosure (if applicable);
- A property inventory report (if applicable) including a request for instructions regrading disposition of any property purchased with cooperative agreement funds; and
- A Federally owned property inventory report (if applicable).

Following submission of reporting forms and materials, the EPA will make (any necessary) adjustments to allowable costs within 90 days. The U.S. EPA also will make, if applicable, any necessary cash reimbursements on a timely basis. Cooperative recipients must return unused principal funds (i.e, of the original $350,000) to the U.S. EPA unless those funds had been pre-authorized by the U.S. EPA for use on other programs.

The closeout of an award does not affect the U.S. EPA's right to disallow costs and recover funds on the basis of a later audit or other review. Additionally, closeout does not affect a cooperative agreement recipient's responsibility to return any funds due as a result of later refunds, corrections, or other transactions.

B. POST CLOSEOUT

1. Post Closeout Requirements

During the closeout process, the cooperative agreement recipient must advise the EPA whether the BCRLF will continue to operate beyond the project period (i.e., continue to make loans). If the cooperative agreement recipient chooses not to continue the BCRLF, remaining funds not obligated by the cooperative agreement recipient via a loan agreement shall be returned to the Superfund Trust Fund, or the EPA region may choose to modify the cooperative agreement to allow the recipient to use funds for other activities consistent with brownfields cleanup.

If the cooperative agreement recipient chooses to continue the operation of the BCRLF, the cooperative agreement recipient, as part of the closeout agreement, shall reaffirm the use of 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 response requirements. The recipient shall maintain appropriate records to document compliance with these requirements. Should the cooperative agreement recipient choose to cease operation of the BCRLF post-closeout, the remaining principal funds (i.e, of the original $350,000) shall be returned to the Superfund Trust Fund or the Region may choose to modify the close-out agreement to allow the recipient to use funds for other activities consistent with brownfields cleanup. The U.S. EPA may review the cooperative agreement recipient's compliance work plan.

2. Post-Cooperative Agreement Program Income

After the cooperative agreement award period has elapsed, cooperative agreement recipients must continue to 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 in accordance with CERCLA and consistent with the NCP (see Section VII.B., *Use of Program Income*; Section VII.D., *Administrative Costs*; and Section V.A., *Applicable Authority*). Furthermore, each cooperative agreement recipient is responsible for maintaining records to document compliance with these requirements. An appropriate disposition of program income will be negotiated with recipients who decide not to operate the BCRLF after the project period.

3. Post-Cooperative Agreement Reporting and Records Maintenance

As noted previously, cooperative agreement recipients are required to submit quarterly reports to the U.S. EPA until the cooperative agreement is closed out (see Section VII.E.2., *Cooperative Agreement Recipient Responsibilities*). However, the U.S. EPA is responsible for continuing to monitor the recipient's compliance with the terms and conditions in the agreement relating to the disposition of program income earned after the award period. Therefore, in accordance with 40 C.F.R. 31.42, cooperative agreement recipients must also maintain records relating to the use of post-award program income. The U.S. 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.

Will the U.S. EPA monitor the loan fund beyond the cooperative agreement's closeout?

Yes. Formal reporting requirements will end when the agreement is closed out. However, the U.S. EPA will monitor the recipient's compliance with the terms and conditions in the agreement relating to the disposition of program income earned after the award period. Therefore, the recipient must maintain records relating to the use of post-award program income. The 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.

In general, cooperative agreement recipients must maintain documentation for a minimum of 10 years after completion of the cleanup activity supported by each loan (or longer, if the stream of program income from outstanding loans continues beyond this period). Written approval from the U.S. EPA prior to destroying of any records (see Section VII.E.2., *Cooperative Agreement Recipient Responsibilities*).

Similarly, borrowers are required to maintain documentation for at least 10 years after the final BCRLF funded cleanup is complete and obtain written approval from the lead agency prior to destroying records (see Section VII.E.3., *Borrower Reporting and Recordkeeping*).

Will recipients have to report on the use of repaid loan funds or only on the initial round of loans made by the pilots?

No. During the term of the cooperative agreement, cooperative agreement recipients are required to report on all fund activities, including loans made from the award and from program income (i.e., repaid loan funds, etc). Formal reporting requirements will end when the agreement is closed out. However, the U.S. EPA will monitor the recipient's compliance with the terms and conditions in the agreement relating to the disposition of program income earned after the award period.

4. Repayment of Funds if BCRLF is Terminated Prior to Closeout

Cooperative agreement recipients may be required to repay assistance funds and associated program income that are not used in accordance with the terms of their cooperative agreement. Under BCRLF closeout provisions, cooperative agreement recipients are required to obligate (i.e., sign loan agreements for) all awarded funds by the end of three years. If at the end of three years, a cooperative agreement recipient has not obligated all award funds, the U.S. EPA may de-obligate the remaining funds by amending the term and condition related to post cooperative agreement program income. If, at that time, EPA decides that the purpose of the agreement cannot be met, the U.S. EPA may terminate the cooperative agreement and recover the Federal share of its assets. If the agreement is terminated, the cooperative agreement recipient must return to the U.S. EPA its proportionate share of the value of BCRLF assets consisting of cash, receivables, personal and real property, and notes or other financial instruments developed through use of the funds (see Section VII.F.3., *Recovery of the U.S. EPA Interest in BCRLF Assets*). At the U.S. EPA's discretion, the cooperative agreement may be extended in cases where the recipient has not obligated all the funds but has an acceptable justification and a viable plan for obligating funds expeditiously. The U.S. EPA may allow BCRLFs to redirect funds for other brownfield cleanup related activities.

Are cooperative agreement recipients required to repay the funds to the U.S. EPA?

Yes. Cooperative agreement recipients may be required to repay assistance funds, and associated program income, that are not used in accordance with the terms of the cooperative agreement. Under BCRLF closeout provisions, the cooperative agreement recipient should not retain any award funds at the end of three (3) years. At the end of three (3) years, if the recipient has not disbursed or obligated (i.e., a loan agreement is in place but the recipient has not yet disbursed funds to "liquidate" the obligation) award funds, the U.S. EPA may terminate the agreement and de-obligate the balance of the funds awarded under the cooperative agreement and return the money to the Superfund Trust Fund. At the EPA's discretion, the cooperative agreement may be extended in cases where the recipient has not obligated all the funds but has an acceptable justification and a viable plan for obligating funds expeditiously.

IX. Cross-cutting Federal Statutes, Executive Orders, and Regulations Contents

IX. Cross-cutting Federal Statutes, Executive Orders, and Regulations

A. INTRODUCTION

Cross-cutting requirements are those Federal requirements, in addition to CERCLA and associated administrative authorities, which are applicable to the BCRLF by operation of statutes, executive orders, and regulations. These cross-cutting Federal authorities apply by their own terms to projects and activities receiving Federal financial assistance, regardless of whether the statute authorizing the assistance mentions them specifically. BCRLF cross-cutters include social and economic policy authorities such as executive orders on equal employment opportunity and government-wide debarment and suspension rules.

Which cross-cutters apply to BCRLF cooperative agreement recipients?

Cooperative agreement recipients are responsible for complying with all applicable cross-cutting requirements. The U.S. EPA has developed a list of cross-cutting requirements that may apply to the BCRLF (see list below). Additional cross-cutting requirements are referenced in Standard Form 424B, entitled "Assurances Non-Construction Programs." However, the cross-cutting list and Standard Form 424 B may not identify all cross-cutting requirements, and cooperative agreement recipients are 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 U.S. EPA will provide additional guidance on the applicability of specific cross-cutting requirements if requested to do so by a cooperative agreement recipient.

Each cooperative agreement recipient is responsible for complying with all applicable Federal cross-cutting requirements, including ensuring that BCRLF funding is made available on a nondiscriminatory basis and that prospective borrowers are not denied funding on the basis of race, color, age, national origin, religion, handicap, or sex. Furthermore, cooperative agreement recipients should actively market the BCRLF program to prospective minority and women borrowers. Each cooperative agreement recipient is responsible for establishing procedures to ensure compliance with all applicable Federal laws, statutes, regulations, and executive orders to the extent of Federal participation in the program.

B. APPLICABLE CROSS-CUTTERS

1. Environmental

Federal environmental requirements will be identified and applied on a site-by-site basis as part of the BCRLF response selection process (see Section V.B., *Applicable Authority*). Therefore, environmental statutes and regulations have <u>not</u> been included in the list of applicable cross-cutting requirements (see below) except as they relate to specific social or economic issues.

2. Social and Economic Cross-cutters

Cooperative agreement recipients are responsible for complying with all applicable cross-cutting requirements. The U.S. EPA has developed a list of social and economic cross-cutting requirements that may apply to the BCRLF (see list below). Additional cross-cutting requirements are referenced in Standard Form 424B, entitled "Assurances Non-Construction Programs." However, the cross-cutting list and Standard Form 424B may not identify all cross-cutting requirements, and cooperative agreement recipients are 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.

Cooperative agreement recipients also are responsible for ensuring that borrowers, including borrowers receiving non-BCRLF loans that are awarded based on a BCRLF loan guarantee for which CERCLA funds are used, comply with all applicable cross-cutting requirements. A term, condition, or other legally binding provision relating to cross-cutting requirements should be included in all loan or financial assistance agreements entered into with funds provided under a BCRLF cooperative agreement. As noted for cooperative agreement recipients above, 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 recipients are 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

Following is a list of Federal laws and authorities sub-categorized as economic and socia l authorities that may ap ply to projects or activities receiving BCRLF assistance. While BCRLF cooperative agreement recipients an d borrowers should both be aware of the following Federal authorities, it is unlikely that every law or regulation will apply to a particular project unde r consideration. However, cooperative agreement recipients are responsible for ensurin g compliance with all applicable cross-cutting requirem ents. The U.S. EPA will provide additional guidance on the applicability of specific cross-cutting requirements if requested to do so by a cooperative agreement recipient.

In addition, cooperative agreement recipients must comply with the Davis Bacon Act, a s amended (40 U.S.C. 276a-276a-5 and 42 U.S.C. 3222). 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 tha t borrowers comply with the Davis Bacon Act should be included in all loan agreements made with BCRLF funds provided under this cooperative agreement.

Economic and Miscellaneous Authorities

- Debarment and Suspension, Executive Order 12549
- Demonstration Cities and Metropolitan Development Act of 1966, Pub. L. 89-754, a s amended, Executive Order 12372
- Procurement Prohibitions under Section 306 of the Clean Air Act and Section 508 of the Clean Water Act, including Executive Order 11738 , Administration of the Clean Air Act and the Federal Water Pollution Control Act with Respect to Federal Contracts, Grants, o r Loans
- Uniform Relocation and Real Property A cquisition Policies Act of 1970, Pub. L. 91-646, as amended

Social Policy Authorities

- Age Discrimination Act of 1975, Pub. L. 94-135
- Anti-Lobbying Provisions (40 C.F.R. Part 30)
- Title VI of the Civil Rights Act of 1964, Pub. L. 88-352
- Contract Work Hours and Safety Standards Act, as amended (40 U.S.C. 327-333) and the Anti-Kickback Acts, as amended (40 U.S.C. 276 c), (18 U.S.C. 874)
- Section 13 of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500 (the Clean Water Act)
- The Drug-Free Workp lace Act of 1988, Pub. L. 100-690 (applies only to the capitalization grant recipient)
- Equal Employment Opportunity, Executive Order 11246
- Section 504 of the R ehabilitation Act of 1973, Pub. L. 93-112 (including Executive Orders 11914 and 11250)
- Section 129 of the Small Busi ness Administration Reauthorization and Amendment Act of

C. ALTERNATIVE APPROACHES TO ENSURE COMPLIANCE

Cross-cutting requirements apply to loans funded under a 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. Cooperative agreement recipients may take one of the approaches listed below to ensure that cross-cutting requirements are met.

1) Include a term or condition in each loan agreement that will require

borrowers to maintain records which segregate expenditures from Federal and non-Federal sources. The cross-cutting requirements apply to the Federal expenditures. The Davis Bacon Act of 1931 (40 C.F.R. §276a) applies to all projects funded entirely or in part with CERCLA funds.

2) Use an *equivalency approach* by applying cross-cutting requirements in proportion to the amount of Federal funding included in the cooperative agreement recipient's loan pool. Each 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. The Davis Bacon Act of 1931 (40 C.F.R. §276a) applies to all projects funded entirely or in part with CERCLA funds.

What is the equivalency approach?

The equivalency approach is one of three alternatives cooperative agreement recipients may choose to ensure cross-cutting requirements are met. Under this approach, cross-cutting requirements are applied in proportion to the amount of Federal funding included in the cooperative agreement recipient's loan pool. Each 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. Davis Bacon applies to all projects funded entirely or in part with CERCLA funds.

3) Apply the cross-cutting requirements to all loans funded under the cooperative agreement regardless of whether Federal and non-Federal funding can be distinguished. The Davis Bacon Act of 1931 (40 C.F.R. §276a) applies to all projects funded entirely or in part with CERCLA funds.

Within 90 days of the date of award of a cooperative agreement, each cooperative agreement recipient must advise the U.S. EPA Project Officer of the approach that will be followed under this agreement.

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 sources to the extent of Federal participation in the fund. A cooperative agreement recipient should be consistent in its approach to ensure compliance with cross-cutting requirements.