

US EPA ARCHIVE DOCUMENT

# BCRLF Terms and Conditions

## I. GENERAL FEDERAL REQUIREMENTS

### A. Definitions

1. For the purposes of this cooperative agreement, the following definitions apply:
  - a. **Borrower.** A borrower is a public or private entity that uses BCRLF funds for cleanup and cleanup-related activities, and agrees to the terms of a loan agreement between itself and the cooperative agreement recipient.
    - (1) **Nonprofit Borrower**  
Organizations which meet the definition of a nonprofit entity in Paragraph 4 of OMB Circular A-122. Exceptions may be made for colleges and universities and nonprofit hospitals on a case by case basis.
    - (2) **Governmental Borrower**  
Includes States, tribes and political divisions. Governmental units are defined at 40 CFR 35.6015, Indian Tribes are defined at 40 CFR 35.6015(a)(23); political subdivisions are defined at 40 CFR 35.6015(a)(31); and, states are defined at 40 CFR 35.6015(a)(44).
  - c. **Cooperative Agreement Recipient (CA recipient or “pilot”)**
  - e. **Loan Capitalization.** Capitalization of the loan fund refers to the obligation of EPA assistance funds as “seed capital” for the CA recipient’s loan program. A loan program “revolves” when it uses loan repayments (principal, plus interest, and fees) to make new loans for the same authorized purposes.
  - f. **Loan Discount.** A decision by the CA recipient to allow a borrower to repay less than the full amount of a loan, subject to certain restrictions. These restrictions include a 30% discount of the amount to be repaid by nonprofit borrowers and 20% discount for governmental borrowers. Additionally, the discounted amount must be expended under the same conditions as the loan itself (including compliance with CERCLA the NCP, and other statutory obligations).

### B. Federal Policy and Guidance

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

### C. Cross-Cutting Federal Requirements

3. ***Environmental:*** The cooperative agreement recipient is responsible for complying with all applicable environmental cross-cutting requirements. Cross-cutting requirements are those which are applicable to the BCRLF by operation of statutes, executive orders, and regulations other than CERCLA and associated administrative authorities. Federal environmental requirements will be identified and applied on a site-by-site basis as part of the BCRLF response selection process. Therefore, environmental statutes, executive orders, and regulations have not been included in the list of applicable cross-cutting requirements (see the BCRLF Administrative Manual Section IX.B., Applicable Cross-Cutters) except as they relate to specific social or economic issues. See the BCRLF Administrative Manual Section V.B.2.(c) Requirements of other environmental laws (i.e., ARARs) for a discussion on the application of environmental laws to BCRLF response actions.
4. ***Social and Economic:*** The cooperative agreement recipient is responsible for complying with all applicable social and economic cross-cutting requirements. EPA has developed a list of cross-cutting requirements that may apply to the BCRLF (see the BCRLF Administrative Manual Section IX.B.2., Social and Economic Cross-cutters for a list of cross-cutting requirements). Additionally, other cross-cutting requirements are referenced in Standard Form 424B, entitled “Assurances Non-Construction Programs.” The cross-cutting list and Standard Form 424B may not, however, identify all cross-cutting requirements, and the cooperative agreement recipient is not relieved from responsibility for complying with a cross-cutting requirement because it is not included on the cross-cutting list or Standard Form 424B. The EPA will provide additional guidance on the applicability of specific cross-cutting requirements if requested to do so by the cooperative agreement recipient.
5. Cooperative agreement recipients also are responsible for ensuring that borrowers, including borrowers receiving non-BCRLF loans guaranteed with BCRLF cooperative agreement funds, comply with all applicable cross-cutting requirements. A term, condition or other legally binding provision relating to cross-cutting requirements shall be included in all loan or financial assistance agreements entered into with funds provided under a BCRLF cooperative agreement. The cross-cutting list and Standard Form 424B identify cross-cutting requirements that may be applicable to borrowers. The cross-cutting list and Standard Form 424B may not, however, identify all cross-cutting requirements, and the cooperative agreement recipient is not relieved from responsibility for ensuring that borrowers comply with a cross-cutting requirement because it is not included on the cross-cutting list or Standard Form 424B.
6. Cross-cutting requirements apply to loans that are funded under this cooperative agreement in combination with non-Federal sources of funds, and to loans awarded as a result of BCRLF loan guarantees, to the extent of the Federal participation in the loan. Cross-cutters apply not only to the initial loans made with Federal funds but also to subsequent loans made with program income derived from Federal participation in the fund. Within 90 days of the date of award (i.e., the cooperative agreement start date), the cooperative agreement recipient shall advise the U.S. EPA Project Officer of the approach

for ensuring compliance with cross-cutting requirements applicable to this cooperative agreement.

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

#### **D. State Agreements**

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

## **II. GENERAL COOPERATIVE AGREEMENT ADMINISTRATIVE REQUIREMENTS**

#### **A. Substantial EPA Involvement**

9. The U.S. EPA expects to be substantially involved in overseeing and monitoring the BCRLF program. Substantial involvement by the U.S. EPA generally covers such administrative activities as: monitoring; review and approval of procedures for site and loan recipient selection; review of project phases; approval of substantive terms included in contracts; and ensuring that costs incurred by the cooperative agreement recipient are eligible expenses under CERCLA, the NCP and Subpart O. Substantial involvement also includes reviewing financial and environmental status reports, approving site-specific Community Relations Plans and Quality Assurance Project Plans and monitoring BCRLF pilots' fulfillment of all reporting, record keeping, and other program requirements. EPA's review or approval of any project phase or deliverable shall not prevent EPA from taking additional actions in the future under CERCLA or any other federal environmental statute. Although EPA may be substantially involved in the BCRLF Program, this involvement does not effect the cooperative agreement recipients' responsibilities under this cooperative agreement as lead agency nor relieve the recipient of responsibility for incurring only costs allowable under OMB Circular A-87. The cooperative agreement recipient remains responsible for insuring that all response actions implemented are protective of human health and the environment and meets all requirements of the BCRLF Program including consistency with the NCP.

#### **B. Insurance Coverage for the Cleanup**

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

11. The cooperative agreement recipient may allow borrowers to purchase insurance, including environmental insurance, if the expense is incidental to, and associated with BCRLF costs it incurs for site-specific cleanup activities (e.g. workers compensation). Incidental insurance purchased by a borrower is not counted against the borrower's ten percent limit on administrative costs.
12. With U.S. EPA approval, BCRLF funds may be used to purchase environmental insurance as a non-administrative cost 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.

### **C. Cooperative Agreement Recipient Roles and Responsibilities**

13. The cooperative agreement recipient is the "lead agency" as defined in the NCP. The lead agency is responsible for ensuring that BCRLF response actions are conducted in conformance with CERCLA, the NCP, and the terms and conditions of this cooperative agreement. As the lead agency, the cooperative agreement recipient is also responsible for designating a qualified government employee as a "brownfields site manager" to coordinate, direct, and oversee BCRLF response actions at a particular site. The brownfields site manager is an on-scene coordinator (OSC) and is responsible for carrying out the OSC duties described in the NCP. The cooperative agreement recipient may acquire or otherwise engage the services of other entities that have experience with overseeing and carrying out environmental response actions to assist it in its capacity as lead agency; however, the role of "lead agency" cannot be assigned or delegated to any entity other than the cooperative agreement recipient.
14. The cooperative agreement recipient shall act as or enlist the services of a "fund manager." Fund management responsibilities include those related to financial management of the cooperative agreement recipient's loan program. The cooperative agreement recipient may acquire or otherwise engage the services of other entities that have experience with fund management activities to assist the cooperative agreement recipient with fulfilling its fund management responsibilities; however, the cooperative agreement recipient remains accountable to EPA for the proper expenditure of cooperative agreement funds.
15. The cooperative agreement recipient shall ensure that BCRLF borrowers comply with all federal and state requirements as well as the intent of the BCRLF program. The cooperative agreement recipient shall ensure that all parties (e.g. the lead agency, the brownfields site manager, and the fund manager) consult with each other prior to any final loan decisions and as loan agreements are developed to ensure that all BCRLF environmental response requirements will be met and that BCRLF funds are used only for authorized activities.
16. The cooperative agreement recipient shall enter into legally authorized written commitments (see Section II.D. Written Commitments) to obtain the services of other qualified agencies, organizations, or individuals. Notwithstanding any such written commitment, the cooperative agreement recipient, remains legally responsible for carrying

out all the terms and conditions of the cooperative agreement and complying with CERCLA and the NCP.

#### **D. Written Commitments for Fulfillment of Cooperative Agreement Terms**

17. Any transaction involving the transfer of cooperative agreement funds (with the exception of loans) to acquire goods and services must comply with 40 C.F.R. §35.6550 through §35.6610. Cooperative agreement recipients may use contracts or, when appropriate, intergovernmental agreements as defined by 40 C.F.R. §35.6015 (a) to obtain necessary goods and services. See also 40 C.F.R. §35.6550 (a)(11). Recipients may also use BCRLF funds to provide non profit organizations with financial assistance as defined by 40 CFR 31.3 “Subgrant”. This financial assistance must be in the form of a sub-cooperative agreement to support the organization’s participation in the BCRLF program as opposed to a non-competitive acquisition of goods or services. See OMB Circular A-133, \_\_\_.210. Cooperative agreement recipients may enter into Memoranda of Understanding or other agreements which do not transfer funds to any appropriate entity.
18. The start of work shall be delayed until EPA approves the substantive terms of any agreements (including non-financial Memoranda of Understanding) between the cooperative agreement recipient and entity selected as fund manager and any entity which provides services that the recipient will rely on as the lead agency.

#### **E. Quarterly Progress Reports**

19. The recipient is required to submit progress reports on a quarterly basis to the EPA Project Officer and to James L. Maas, Office of Solid Waste and Emergency Response, USEPA, 1200 Pennsylvania Avenue, Northwest, Mail Code 5105, Washington, DC 20460.

Quarterly progress reports will clearly identify which activities performed during the reporting period were undertaken with EPA funds, and will relate EPA-funded activities to the objectives and milestones agreed upon in the pilot work plan. Recipients are also encouraged to report activities undertaken during the reporting period that were not funded by EPA, including leveraged activities, if they occurred as part of the pilot’s broader Brownfields redevelopment and reuse efforts. These activities must be clearly identified separately from any activities directly supported by EPA funds. As part of the report, recipients shall also submit a Budget Recap Summary with the following headings: Current Approved Budget; Costs Incurred this Quarter; Cost Incurred to Date; and Total Remaining Funds.

In describing the work accomplished during the reporting period, recipients are required to provide at a minimum, information on the following Key Measures for the Brownfields Cleanup Revolving Loan Fund (BCRLF) Pilots:

- \* Number of Properties with Cleanup Activities Started using BCRLF Funds;
- \* Number of Properties with Cleanup Activities Completed using BCRLF Funds;
- \* Number of BCRLF Loans Made;
- \* Amount of BCRLF Funds Loaned; and
- \* BCRLF Loan Applications Recieved.

### III. FINANCIAL ADMINISTRATION REQUIREMENTS

#### A. Eligible Fund Uses

20. BCRLF funds shall be used for non-time critical removal activities only (as defined in CERCLA §101(23) and described in 40 C.F.R. §300.415).
21. At least 70% of the funds must be used by the cooperative agreement recipient to provide loans.
22. **Loan Discount.** The CA recipient may, but is not required to, allow nonprofit borrowers to forego repayment of up to 30% of the loan amount. The CA recipient may also allow governmental borrowers to forego repayment of up to 20% of the loan amount. A loan discount is not a “subgrant”.
  - (a) The loan repayment amount that has been discounted may only be used by the borrower to carry out allowable clean up activities in compliance with terms of loan agreement such as compliance with CERCLA, the NCP, the Davis-Bacon Act and cross-cutting requirements applicable to the loan.
  - (b) The CA recipient remains accountable for the proper expenditure of cooperative agreement funds, including ensuring that the borrower carries out the cleanup in accordance with CERCLA and the NCP.
23. **Direct Financial Assistance.** The cooperative agreement recipient may use up to 20% of the remaining cooperative agreement funds for costs incurred for site-specific activities necessary to carry out the responsibilities as the lead agency. Funds may only be expended for lead agency activities, as described in (b) below, directly related to the cleanup of a site where the cleanup is being financed, all or in part, with a loan with funds.

All costs charged as site-specific direct financial assistance must finance lead agency activities (including brownfields site manager responsibilities) that are necessary for the lead agency to carry out its responsibilities under Section 104 of CERCLA and the NCP. Examples of these activities include:

- a. determining whether BCRLF cleanup activities at a particular site are authorized by CERCLA and the NCP based on site evaluation (described in the NCP at 40 C.F.R. § 300.410) and on current site conditions;
- b. ensuring that a BCRLF cleanup meets applicable or relevant and appropriate requirements under Federal and State environmental laws, as required by 40 C.F.R. § 300.415(j);
- c. ensuring that the NCP public participation requirements (see, 40 C.F.R. § 300.415(n)) are met. This includes ensuring the availability of documents, providing adequate public comment periods, and designating a spokesperson to inform the community of actions taken, respond to inquiries, and provide information;

- d. establishing an administrative record for each site, as required by 40 C.F.R. § 300.800(a);
- e. working with the BCRLF Fund Manager, as loan agreements are developed, to ensure that all environmental response requirements will be met and that BCRLF funds are used only for authorized activities;
- f. ensuring the adequacy of each BCRLF cleanup as it is implemented, including confirmation sampling (development of the Quality Assurance Project Plan (QAPP) and actual sampling.)
- g. ensuring that a site is secure and that it poses no immediate threat to human health or the environment, if a borrower is unable or unwilling to complete a BCRLF cleanup.
- h. preparing an EE/CA or its equivalent.

All transactions involving the acquisition of products and services (including consulting services) with direct financial assistance must be conducted in accordance with the procurement requirements of 40 CFR Part 35, Subpart O and other applicable provisions of the cooperative agreement.

## **B. Ineligible Fund Uses**

- 24. BCRLF funds shall not be used for any of the following activities:
  - a. Pre-cleanup environmental response activities, such as site assessment, identification, and characterization.
  - b. Cleanup of a naturally occurring substance; cleanup of 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 cleanup of public or private drinking water supplies that have deteriorated through ordinary use. Exceptions to this policy may be made on a case-by-case basis.
  - c. Monitoring and data collection necessary to apply for, or comply with, environmental permits under other state and Federal laws, unless such a permit is required as a component of the cleanup action.
  - d. Development activities that are not removal actions (e.g., construction of a new facility or marketing of property).
  - e. Award funds shall not be used to support job training.
- 25. BCRLF funds may not be used at any sites:
  - a. Listed, or proposed for listing, on the National Priorities List;

- b. At which a removal action must be taken within six months (i.e., time critical removal action);
- c. Where a Federal or state agency is planning or conducting a response or enforcement action; or
- d. Contaminated by petroleum products except to address a non-petroleum hazardous substance (e.g., co-mingled waste).

### **C. Non-Cleanup Related Restrictions**

- 26. A cooperative agreement recipient shall not use award funds to meet a cost sharing or matching requirement for another Federal grant unless there is specific statutory authority for the arrangement. CERCLA does not provide such authority.

### **D. Borrower Eligibility**

- 27. The cooperative agreement recipient may lend to another agency or a component of the cooperative agreement recipient. However, prior EPA approval is required for such arrangements.
- 28. The cooperative agreement recipient shall ensure that 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.
- 29. The cooperative agreement recipient 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 EPA could use its enforcement discretion to not pursue the party in question under CERCLA, as described by EPA guidance. In addition, eligible borrowers may include an owner/operator of contaminated brownfields properties who acquired the property after the time of disposal or placement of hazardous substances if the lead agency determines that the owner/ operator has not caused, contributed to, permitted, or exacerbated the release of a hazardous substance on, or emanating from that property. The initial findings made by the lead agency, however, by no means limit the enforcement discretion or authority of the Federal or State government. The lead agency shall maintain documentation demonstrating the eligibility of the owner/operator.
- 30. 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.
- 31. 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.
- 32. An entity that has been suspended, debarred, or otherwise declared ineligible cannot be a borrower.

### **E. Use of Program Income**

33. For BCRLF purposes, program income shall be defined as 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). In accordance with 40 C.F.R. §31.25(g)(2), the recipient is authorized to add program income to the funds awarded by the EPA and use the program income under the terms and conditions of this agreement, including eligible administrative costs and BCRLF environmental response requirements.
34. Program income shall include 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. 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 shall be treated as program income and shall be placed in the BCRLF for lending purposes or to cover administrative costs.
35. The cooperative agreement recipient shall maintain a fund for future borrowing needs within the eligible lending area (as designated by the cooperative agreement recipient). To determine the appropriate amount of program income to use for administrative expenses, fund managers shall 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.
36. Up to 20% of the program income received from fees, loan repayments and interest on loans and other sources received by the cooperative agreement recipient may be used for site-specific lead agency costs. Up to 10% of the program income may be used for administrative costs. The remaining 70% or more of program income must be used for making new loans, which may include discounted repayment mechanism for nonprofit and governmental borrowers.
37. In accordance with 40 C.F.R. §31.25(h), program income earned after the end of the award period shall be used in accordance with Section VII.G., Post Cooperative Agreement Program Income, below. Pursuant to 40 C.F.R. §31.42(c)(3), recipients must maintain records relating to such program income.
38. The cooperative agreement recipient that elects to use program income to cover all or part of a BCRLF's administrative costs shall maintain adequate accounting records and source documentation to substantiate the amount and percent of program income expended for eligible BCRLF administrative costs, and comply with applicable OMB cost principles when charging costs against program income. For any costs determined by the EPA to have been an ineligible use of program income, the recipient shall reimburse the BCRLF or the EPA. EPA will notify the recipient of the time period allowed for reimbursement.

## **F. Administrative Costs**

39. No more than 10% of the funds may be used by the Cooperative Agreement recipient for general (non- site-specific) direct administrative costs that are allowable under CERCLA §104, 40 CFR Part 31, 40 CFR Part 35, Subpart O and OMB Circular A-87. For example, the recipient may use these funds for establishing administrative infrastructure of the revolving loan program. This may include costs related to processing loan applications, conducting credit checks, outreach to potential borrowers, loan processing and administration, audits, professional services.
40. The cooperative agreement recipient shall allow borrowers to use no more than ten percent of borrowed funds for administrative costs. The cooperative agreement recipient (fund manager) shall negotiate with the borrower a limit of up to ten percent of the total loan to cover both administrative and cleanup response planning costs.

#### **G. Method of Payment**

41. The cooperative agreement recipient must request reimbursement or advances, using Standard Form 270, "Request for Advancement or Reimbursement" for award of loans to borrowers or for administrative expenditures. The SF270 should be submitted quarterly, but no more frequently than monthly. The request should be submitted to:

\* (NAME ADDRESS)

In addition to the SF270, the recipient shall provide sufficient documentation to provide adequate explanation of the incurred costs. Such documentation may include invoices, receipts, narrative or other types of itemization. Provide a copy of Form 270 and supporting documentation to the EPA Project Officer.

42. If the Automated Clearing House (ACH) Vendor Payment System is used, the following terms & conditions apply:
  - a. To comply with the Debt Collection Improvement Act of 1996, the cooperative agreement recipient shall complete and return the "Payment Information Form ACH Vendor Payment System" (U.S. Treasury Form 3881) with the signed assistance agreement.
  - b. The cooperative agreement recipient shall make positive assertions regarding its fund management capabilities and provide necessary certifications prior to any receipt of cooperative agreement funds. In particular, the cooperative agreement recipient shall certify that its accounting system is adequate to identify, safeguard, and account for all BCRLF funds, including BCRLF program income. The cooperative agreement recipient also shall certify that BCRLF loan documents necessary for lending are in place and that these documents have been reviewed by the recipient's legal counsel for compliance with applicable state and local law and compliance with all other terms and conditions of the award.

#### **H. Future Funding**

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

#### **I. Interest-Bearing Accounts**

44. With respect to interest earned on advances, cooperative agreement recipients are subject to the provisions of 40 C.F.R. §31.21(i) and §35.6280(a)(2).

### **IV. BCRLF ENVIRONMENTAL RESPONSE REQUIREMENTS**

#### **A. Applicable Authority**

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

#### **B. Authorized BCRLF Response Actions**

46. BCRLF funds shall only be used to carry out non-time critical removal activities authorized by CERCLA and the NCP (for the purposes of this document the term “BCRLF response” is equivalent to “non-time critical removal action.”). The cooperative agreement recipient shall also consider guidance described in the most current version of the BCRLF Administrative Manual.
47. BCRLF funds may only be used to conduct response actions at brownfields sites, and the cooperative agreement recipient shall consider whether cleanup of a particular site will significantly contribute to local community revitalization.
48. The cooperative agreement recipient’s findings and decisions with respect to whether a BCRLF response action is authorized at a particular site and what response action is appropriate shall be documented in writing, as described in the most current version of the BCRLF Administrative Manual.
49. The cooperative agreement recipient shall ensure that loan decisions and/or agreements do not preclude the ability of the cooperative agreement recipient to change a BCRLF response, or any portion of response, based on comments from the public or on any new information acquired.

#### **C. Sampling and Analysis**

50. If environmental samples are to be collected as part of the BCRLF response action (e.g., cleanup verification sampling, post-cleanup confirmation sampling), the cooperative agreement recipient shall, in accordance with 40 C.F.R. 300.415(b)(4)(ii), develop sampling and analysis plans that provide a process for obtaining data of sufficient quality

and quantity to satisfy data needs. In accordance with 40 C.F.R. Part 35, Subpart O, field work may not begin until EPA has approved the cooperative agreement recipient's quality assurance project plan and sampling plan. EPA approval is needed regardless of the source of funds used to pay for the collection and analysis of this data.

These requirements do not apply to other environmental samples collected without BCRLF monies and prior to the BCRLF response (e.g., Phase II sampling data submitted by a borrower supporting a loan application). However, if the cooperative agreement recipient relies on this data to support a determination that a BCRLF response is authorized and/or to support the selection of a BCRLF response, the cooperative agreement recipient shall ensure that such data is adequate and reliable.

#### **D. Community Relations and Public Involvement in BCRLF Response Actions**

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

#### **E. Administrative Record**

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

#### **F. Implementation of BCRLF Response Actions**

53. The cooperative agreement recipient shall ensure the adequacy of each BCRLF response as it is implemented. Each loan agreement shall contain terms and conditions which allow the cooperative agreement recipient to change response activities as necessary.
54. If the selected response action will not fully address threats posed by a release at a site, or a borrower is unable or unwilling to complete the BCRLF response, the Cooperative Agreement recipient shall ensure that the site is secure and poses no immediate threat to human health or the environment. The Cooperative Agreement recipient shall notify the appropriate state agency and the U.S. EPA to ensure an orderly transition to other appropriate response activities.

#### **G. Completion of BCRLF Response**

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

## H. State Voluntary Cleanup Programs

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

## V. REVOLVING LOAN FUND REQUIREMENTS

### A. Prudent Lending Practices

57. The cooperative agreement recipient shall not incur costs under this cooperative agreement related to loans until a BCRLF pilot work plan has been submitted to and approved by U.S. EPA. The cooperative agreement recipient shall ensure that the overall objectives of the fund are met through its or the fund manager's selection and structuring of individual loans and lending practices. These activities shall include, but not be limited to the following:
- a. Establishing appropriate project selection criteria consistent with Federal and state requirements, the intent of the BCRLF program, and the cooperative agreement entered into with EPA.
  - b. Establishing threshold eligibility requirements whereby only potential borrowers are eligible to receive BCRLF financing.
  - c. Developing a formal protocol for potential borrowers to demonstrate eligibility, based on the procedures described in the initial BCRLF application proposal and cooperative agreement application. Such a protocol shall include descriptions of projects that will be funded, how loan monies will be used, and qualifications of the borrower to make legitimate use of the funds. Additionally, cooperative agreement recipients shall ask borrowers for an explanation of how a project, if selected, would be consistent with BCRLF program objectives.
  - d. Requiring that borrowers submit information describing the borrower's environmental compliance history. The cooperative agreement recipient shall consider this history in an analysis of the borrower as a cleanup and business risk.
  - e. Establishing procedures for handling the day-to-day management and processing of loans and repayments.
  - f. Establishing standardized procedures for the disbursement of funds to borrowers.

### B. Implementation Plan

58. Prior to approving any loans or within 90 days of the date of award (i.e., the cooperative agreement start date) which ever is earlier, the cooperative agreement recipient shall submit to the U.S. EPA Project Officer for review and approval, the Application Review/Loan Award/Loan Implementation Plan (the Plan). The Plan shall describe in

detail all the tasks that will be completed during each phase of the loan process and who will conduct those tasks. The Plan shall integrate the tasks required by CERCLA and the NCP with the application review, loan award, and loan implementation tasks through to project completion.

### **C. Inclusion of Special Terms and Conditions in BCRLF Loan Documents**

59. The cooperative agreement recipient shall ensure that the borrower meets the cleanup and other program requirements of the BCRLF pilots by including the following special terms and conditions in BCRLF loan agreements:
- a. Borrowers shall use funds only for eligible activities.
  - b. Borrowers shall document all funds used.
  - c. Borrowers shall maintain documentation for a minimum of ten years after the completion of the cleanup activity supported by the loan or for the length of the loan, whichever is longer. Borrowers shall obtain written approval from the lead agency prior to disposing of records.
  - d. Borrowers shall use no more than ten percent of the loan for allowable non-cleanup activities.
  - e. Borrowers shall certify that they are not currently, nor have they been, subject to any penalties resulting from environmental non-compliance at the site subject to the loan.
  - f. Borrowers shall conduct BCRLF response activities in accordance with the cooperative agreement and CERCLA and consistent with the NCP.
  - g. Borrowers shall modify response activities as required by the lead agency (see also Sections IV.B. and G. ).
  - h. Borrowers must comply with Section 104(g) of CERCLA by ensuring that laborers and mechanics employed by the borrower or its contractors or subcontractors in the performance of construction, alteration, or repair work are paid wages at rates not less than those prevailing on projects of a character similar in the locality as determined by the U.S. Department of Labor in accordance with the Davis Bacon Act.
  - i. Borrowers must comply with Uniform Relocation Act and other applicable Federal “cross cutting” requirements.

### **D. Default**

60. In the event of a loan default, the cooperative agreement recipient shall make reasonable efforts to enforce the terms of the loan agreement including proceeding against the assets pledged as collateral to cover losses to the loan. If the cleanup is not complete at the time of default, the cooperative agreement recipient is responsible for: (1) documenting the nexus between the amount

paid to the bank or other financial institution and the cleanup that took place prior to the default; and (2) securing the site (e.g., ensuring public safety) and informing the EPA Project Officer and the State.

#### **E. Conflict of Interest**

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

#### **F. Loan Guarantees**

62. If the cooperative agreement recipient chooses to use the BCRLF funds to support a loan guarantee approach, the following terms & conditions apply:
  - a. The cooperative agreement recipient shall: (1) document the relationship between the expenditure of CERCLA §104(d) funds and response actions; (2) maintain an escrow account expressly for the purpose of guaranteeing loans, by following the payment requirement described under the Escrow Requirements term and condition below; and (3) ensure that response actions guaranteed by BCRLF funds are carried out in accordance with CERCLA and consistent with the NCP.

##### ***Escrow Requirements***

- b. Payment of funds to a cooperative agreement recipient shall not be made until a guaranteed loan has been issued by a participating financial institution. Loans guaranteed with BCRLF funds shall be made available as needed for specified cleanup activities on a “actual expense” or “schedule” basis to the borrower (See Section VII. A, Methods of Disbursement). The cooperative agreement recipient’s escrow arrangement shall be structured to ensure that the CERCLA §104(d) funds are properly “disbursed” by the recipient for the purposes of the assistance agreement as required by 40 C.F.R. §31.20(b)(7) and §31.21(c). If the funds are not properly disbursed, the CERCLA §104(d) funds that the recipient places in an escrow account will be subject to the interest recovery provisions of 40 C.F.R. §31.21(i).
- c. To ensure that funds transferred to the cooperative agreement recipient are disbursements of assisted funds, the escrow account shall be structured to ensure that: (1) the recipient cannot retain the funds; (2) the recipient must not have access to the escrow funds on demand; (3) the funds remain in escrow unless there is a default of a guaranteed loan; (4) the organization holding the escrow (i.e., the escrow agency), shall be a bank or similar financial institution that is independent of the recipient; and (5) there must be an agreement with financial institutions participating in the guaranteed loan program which documents that the financial institution has made a guaranteed loan to clean up a brownfields site in exchange for access to funds held in escrow in the event of a default by the borrower.

##### ***Federal Obligation to the Loan Guarantee Program***

- d. Any obligations that the cooperative agreement recipient incurs for loan guarantees in excess of the amount awarded under the cooperative agreement are the

cooperative agreement recipient's responsibility. This limitation on the extent of the Federal Government's financial commitment to the cooperative agreement recipient's loan guarantee program shall be communicated to all participating banks and borrowers.

### ***Repayment of Guaranteed Loans***

- e. Upon repayment of a guaranteed loan and release of the escrow amount by the participating financial institution, the cooperative agreement recipient shall return the cooperative agreement funds placed in escrow to the U.S. Environmental Protection Agency. Alternatively, the cooperative agreement recipient may, with EPA approval, (1) guarantee additional loans under the terms and conditions of the agreement (2) or, amend the terms and conditions of the agreement to provide for another disposition of funds that will redirect the funds for other brownfields related activities.

## **VI. AUDITS**

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

## **VII. DISBURSEMENT, PAYMENT AND CLOSEOUT**

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

### **A. Methods of Disbursement**

65. The cooperative agreement recipient may choose to disburse funds to the borrower by means of 'actual expense' or 'schedule'
  - a. An 'actual expense' disbursement approach requires the cooperative agreement recipient to submit documentation of the borrower's expenditures (e.g., invoices) to EPA to request payment.
  - b. A 'schedule' disbursement is one in which all, or an agreed upon portion, of the obligated funds are disbursed to the borrower on the basis of an agreed upon schedule (e.g., progress payments) or upon execution of the loan. The cooperative agreement recipient shall submit documentation of disbursement schedules to EPA.

66. If the disbursement schedule of the loan agreement calls for disbursement of the entire amount of the loan upon execution, the cooperative agreement recipient shall demonstrate to U.S. EPA's Project Officer that this method of disbursement is necessary for purposes of cleaning up the site covered by the loan. Further, the cooperative agreement recipient shall include an appropriate provision in the loan agreement which ensures that the borrower uses loan funds promptly for costs incurred in connection with the cleanup and that interest accumulated on schedule disbursements is applied to the cleanup.

#### **B. Payment Schedule**

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

#### **C. Schedule for Closeout**

68. There are two fundamental criteria for closeout: (1) final payment of funds from EPA to the cooperative agreement recipient; and (2) completion of all cleanups funded by the amount of the award. To close out the cooperative agreement all payments to the cooperative agreement recipient must be complete. The first criterion of cooperative agreement closeout is met when the cooperative agreement recipient receives all payments from EPA. The second closeout criterion is met when all cleanups funded by the initial amount of the award are complete (all cleanups must be completed within 12 months from the date that on-site cleanup activity is initiated, unless EPA determines, consistent with CERCLA §104(c)(1) and the NCP at 40 C.F.R. §300.415(b)(5), that the response may continue.)
69. The recipient must provide evidence that it is making significant progress towards loaning the amount available under this cooperative agreement through its quarterly progress reports. If the loan funds are not used by the end of this agreement, and the term is not extended by EPA, the funds will be withdrawn.
70. During the period of the agreement, the cooperative agreement recipient shall submit financial and performance reports which include but are not limited to financial information quarterly (such as status of payment, obligation, and disbursement) and cleanup information (such as the cleanup completion dates). As part of closeout, the cooperative agreement recipient shall submit a final status report which includes but is not limited to financial information (such as status of payment, obligation, and disbursement) and cleanup information (such as the cleanup completion dates). If both the payment and cleanup closeout criterion are met before the five year period ends, the cooperative agreement recipient may request early closeout.

#### **D. Compliance with Closeout Schedule**

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

#### **E. Capital Utilization Standard**

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

#### **F. Recovery of BCRLF Assets**

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

#### **G. Post Cooperative Agreement Program Income**

74. After the end of the award period, the cooperative agreement recipient shall use program income in a manner consistent with the terms and conditions of the cooperative agreement affecting disposal of program income, eligible administrative costs, and environmental compliance in accordance with CERCLA and consistent with the NCP, as provided in Section III.E. Use of Program Income and Section IV. BCRLF Environmental Response Requirements of this agreement. In accordance with 40 C.F.R. §31.42(c)(3), the cooperative agreement recipient shall maintain appropriate records to document compliance with these requirements (i.e., records relating to the use of post-award program income.) EPA may request access to these records or may negotiate post-closeout reporting requirements to verify that post-award program income has been used in accordance with the terms and conditions of the original agreement.
75. When the cooperative agreement has been closed out (i.e., the cooperative agreement recipient has met all funds use and cleanup requirements), remaining funds not obligated by the cooperative agreement recipient via a loan agreement shall be returned to the Superfund Trust Fund, or the Region may choose to modify the award to allow the recipient to use funds for other activities consistent with brownfields cleanup.