

US EPA ARCHIVE DOCUMENT



# Grant Funding Guidance for State and Tribal Response Programs

## A. Introduction

The Small Business Liability Relief and Brownfields Revitalization Act (SBLRBRA) was signed into law on January 11, 2002. The Act amends the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended, by adding Section 128(a). Section 128(a) authorizes a \$50 million grant program<sup>1</sup> to establish and enhance state<sup>2</sup> and tribal<sup>3</sup> response programs. Generally, these response programs address the assessment, cleanup and redevelopment of brownfields sites and other contaminated sites. Section 128(a) grants will be awarded and administered by U.S. Environmental Protection Agency (EPA) regional offices. This document provides guidance that will enable states and tribes to apply for and use Section 128(a) funds in Fiscal Year 2003.

State and tribal response programs oversee cleanup at the majority of brownfield sites across the country. Many states have programs that also offer accompanying financial incentive programs to spur cleanup and redevelopment. In passing Section 128(a), Congress recognized the accomplishments of state response programs in cleaning up and redeveloping brownfield sites. Section 128(a) also provides EPA with an opportunity to strengthen its partnership with states and Indian tribes.

Since 1997, the EPA Brownfields program has been funding state and tribal response programs including Superfund Core funding for state and tribal voluntary cleanup programs and pre-remedial site assessment funding for state- and tribal-conducted Targeted Brownfields Assessments (TBA). Both activities were financed with Superfund appropriations and funded under CERCLA Section 104(d) cooperative agreement authority. Through Section 128(a), Congress built upon these activities and provided EPA with expanded authority to fund other activities that build capacity for state and tribal response programs as well as authority to grant funds to states and Indian tribes to capitalize revolving loan funds and support insurance

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<sup>1</sup> EPA is in the process of developing a Catalogue of Federal Domestic Assistance entry for the Section 128(a) State and Tribal Response Programs grant program.

<sup>2</sup> "The term "state" is defined in this document as defined in CERCLA Section 101(27).

<sup>3</sup> The term "Indian tribe" is defined in this document as it is defined in CERCLA Section 101(36). Intertribal consortia, as defined in the Federal Register Notice at 67 FR 67181, are also eligible for funding under CERCLA 128(a).

mechanisms. One goal of this funding is to ensure that state and tribal response programs include, or are taking reasonable steps to include, certain elements and another is to provide funding for other activities that increase the number of response actions conducted or overseen, by a state or tribal response program. This funding is not intended to supplant current state or tribal funding for their response programs. Instead, it is to supplement their funding to increase their cleanup capacity.

As partners in implementing SBLRBRA, state and tribal officials have been working closely with EPA since the law's passage in developing this guidance. It reflects comments made by state and tribal officials during legislation implementation meetings, including ongoing State and Tribal Funding Workgroup conference calls, a panel at the National Tribal Conference on Environmental Management on June 5, 2002, and EPA listening sessions. In addition, EPA received letters dated February 21, 2002 from the Association of State and Territorial Solid Waste Management Officials CERCLA Research Center and another dated May 6, 2002 from the Executive Director of the Tribal Association on Solid Waste and Emergency Response. These comments were taken into account when preparing the guidance.

Subject to the availability of funds, EPA regional enforcement and program staff will be available to provide technical assistance to states and Indian tribes as they apply for and carry out Section 128(a) grants.

## **B. Eligibility for Funding**

To be eligible to receive funding under CERCLA Section 128(a), a state or Indian tribe must demonstrate that their response program includes, or is taking reasonable steps to include, the four elements of a response program, described below. Congress also recognized the effectiveness and efficiencies of Memoranda of Agreement (MOAs) by making states or Indian tribes that are parties to voluntary response program MOAs<sup>4</sup> automatically eligible for Section 128(a) funding. Additionally, states and Indian tribes, including those with MOAs, must maintain and make available to the public a record of sites at which response actions have been completed in the previous year and are planned to be addressed in the upcoming year in order to qualify for Section 128(a) funding.

With the exception of the Section 128(a) funds a state or Indian tribe uses to capitalize a Brownfields Revolving Loan Fund under CERCLA 104(k)(3), states and Indian tribes are not required to provide matching funds for grants awarded under Section 128(a).

Section 128(a) authorizes funding for activities necessary to establish and enhance the four elements and to meet the public record requirement.

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<sup>4</sup> The legislative history of SBLRBRA indicates that Congress intended to encourage states and Indian tribes to enter into MOAs for their voluntary response programs. Currently the following states have MOAs for their voluntary response programs: Arkansas, Colorado, Delaware, Florida, Illinois, Indiana, Kansas, Maryland, Michigan, Minnesota, Missouri, New Mexico, Ohio, Oklahoma, Rhode Island, Texas, Virginia, Wisconsin, and Wyoming.

## 1. The Four Elements - Section 128(a)

- a. ***Timely survey and inventory of brownfield sites in the state or in the tribal land.*** States and Indian tribes must include, or be taking reasonable steps to include, in their response programs a system or process to identify the universe of brownfield sites in their state or tribal land. EPA's goal in funding activities under this element is to enable the state or Indian tribe to establish or enhance a system or process that will provide a reasonable estimate of the number, likely locations, and the general characteristics of brownfields in their jurisdictions. Given funding limitations, EPA will negotiate work plans with states and Indian tribes to achieve this goal efficiently, effectively and within a realistic time frame. For example, many of EPA's Brownfields Assessment grantees conduct inventories of brownfield sites in their communities or jurisdictions. States and Indian tribes are encouraged to work with these grantees to obtain the information that they have gathered and include it in their survey and inventory.
- b. ***Oversight and enforcement authorities or other mechanisms and resources.*** States and Indian tribes must include, or be taking reasonable steps to include, in their response programs oversight and enforcement authorities or other mechanisms, and resources that are adequate to ensure that a response action will protect human health and the environment and be conducted in accordance with applicable federal and state law. In addition, states and Indian tribes must include, or be taking reasonable steps to include, in their response programs oversight and enforcement authorities or other mechanisms, and resources that are adequate to ensure that the necessary response activities are completed if the person conducting the response activities, including operation and maintenance or long-term monitoring activities, fails to complete the activity (such as enforcement, funding, or other programmatic resources, including staff).
- c. ***Mechanisms and resources to provide meaningful opportunities for public participation.***<sup>5</sup> States and Indian tribes must include, or be taking reasonable steps to include, in their response programs mechanisms and resources for public participation, including, as a minimum:
- Public access to documents and related materials that a state, Indian tribe, or party conducting the cleanup is relying on or developing in making cleanup decisions or conducting site activities;
  - Prior notice and opportunity for public comment on cleanup plans and site activity; and
  - A mechanism by which a person who is, or may be, affected by a release or

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<sup>5</sup> States and Indian tribes establishing this element may find useful information on public participation on EPA's community involvement web site at <http://www.epa.gov/superfund/action/community/index.htm>.

threatened release of a hazardous substance, pollutant, or contaminant at a brownfields site located in the community in which the person works or resides may request that a site assessment be conducted. The appropriate state or tribal official must consider this request and appropriately respond.

- d. ***Mechanisms for approval of a cleanup plan and verification and certification that cleanup is complete.*** States and Indian tribes must include, or be taking reasonable steps to include, in their response programs mechanisms to approve cleanup plans. In addition states and Indian tribes must include, or be taking reasonable steps to include, in their response programs a requirement for verification by and certification or similar documentation from the state, the Indian tribe, or a licensed site professional to the person conducting a response action indicating that the response action is complete.

## 2. Public Record Requirement

States and Indian tribes (including states with MOAs) that receive funding under Section 128(a) must establish a public record system during the grant funding period unless a public record system that meets the following requirements is already established. Specifically, under Section 128(b)(1)(C), states and Indian tribes must:

- Maintain and update, at least annually or more often as appropriate, a record of sites that includes the name and location of sites at which response actions have been completed during the previous year;
- Maintain and update, at least annually or more often as appropriate, a record of sites that includes the name and location of sites at which response actions are planned to be addressed in the next year; and
- Identify in the public record whether or not the site, upon completion of the response action, will be suitable for unrestricted use. If not, the public record must identify the institutional controls relied on in the remedy.

Section 128(a) funds may be used to maintain and make available a public record system that meets these requirements.

It is important to note that the public record requirement differs from the "timely survey and inventory" element described above. The public record addresses sites at which response actions have been completed in the previous year and are planned to be addressed in the upcoming year. In contrast, the "timely survey and inventory" element described above, refers to a general approach to identifying brownfield sites.

EPA's goal is to enable states and Indian tribes to make the public record easily accessible. For this reason, EPA will allow states and Indian tribes to use Section 128(a) funding to make information on sites in their response programs available to the public on the Internet or other means that ensures that the information is readily accessible to the public. For example, the

Agency will fund state and tribal efforts to include detailed location information in the public record such as the street address and latitude and longitude information for each site.<sup>6</sup> EPA encourages states and Indian tribes to maintain public record information, including data on institutional controls, on a long term basis (more than one year) for sites at which a response action has been completed. Subject to EPA regional office approval, states or tribes may include development and operation of systems that ensure long term maintenance of the public record in their work plans.<sup>7</sup>

## C. Use of Funding

### General Uses

Section 128(a)(1)(B) describes the eligible uses of grants funding by states and Indian tribes. In general, a state or Indian tribe may use a grant to "establish or enhance" their response programs, including elements of the response program that include activities related to responses at brownfield sites with petroleum contamination. States and Indian tribes may use Section 128(a) funding to develop legislation, regulations, procedures, guidance, etc. that would establish or enhance the administrative and legal structure of their response programs. In addition, states and Indian tribes may use grant funding to:

Capitalize a revolving loan fund (RLF) for brownfields cleanup under CERCLA Section 104(k)(3). These RLFs are subject to the same statutory requirements and grant terms and conditions applicable to RLFs awarded under Section 104(k)(3). Requirements include a 20% match on the amount of Section 128(a) funds used for the RLF, a prohibition on using EPA grant funds for administrative costs relating to the RLF, and a prohibition on using RLF loans or subgrants for response costs at a site for which the recipient may be potentially liable under Section 107 of CERCLA. Other prohibitions contained in CERCLA Section 104(k)(4) also apply.

Purchasing environmental insurance or developing a risk-sharing pool, indemnity pool, or insurance mechanism to provide financing for response actions under a state or tribal response program.

In addition, a state or Indian tribe may use Section 128(a) funding to establish and maintain the required public record described in Section B above. EPA considers activities related to maintaining and monitoring institutional controls to be eligible costs under Section 128(a).

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<sup>6</sup> For further information on latitude and longitude information, please see EPA's data standards web site available at [http://oaspub.epa.gov/edr/epastd\\$.startup](http://oaspub.epa.gov/edr/epastd$.startup).

<sup>7</sup> States and Indian tribes may find useful information on institutional controls on EPA's institutional controls web site at <http://www.epa.gov/superfund/action/ic/index.htm>.

### **Uses Related to Establishing a State or Tribal Response Program**

Under CERCLA Section 128(a), "establish" includes activities necessary to build the foundation for the four elements of a state or tribal response program and the public record requirement. For more developed state or tribal response programs, establish may also include activities that keep their program at a level that meets the four elements and maintains a public record required as a condition of funding under CERCLA Section 128(b)(1)(C).

### **Uses Related to Enhancing a State or Tribal Response Program**

Under CERCLA Section 128(a), "enhance" is related to activities that add to or improve a state or tribal response program or increase the number of sites at which response actions are conducted under a state or tribal response program. The legislative history of the provision also makes this clear:

The vast majority of contaminated sites across the nation will not be cleaned up by the Superfund program. Instead, most sites will be cleaned up under State authority. . . . In recognition of this fact, and the need to create and improve State cleanup capacity, new [Section 128(a)] provides financial assistance to States and Indian tribes to establish or enhance voluntary response programs.

Senate Report 107-2, March 12, 2001, p. 15 (emphasis added).

The exact enhancement@uses that may be allowable depend upon the work plan negotiated between the EPA regional office and the state or Indian tribe. For example, regional offices and states or tribes may agree that Section 128(a) funds may be used for outreach and training directly related to increasing awareness of its response program, and improving the skills of program staff. Other enhancement@uses may be allowable as well.

### **Uses Related to Site-Specific Activities**

States and Indian tribes may use Section 128(a) funds for activities that improve state or tribal capacity to increase the number of sites at which response actions are conducted under the state or tribal response program. Eligible uses of funds include site-specific related activities such as conducting assessments at selected brownfields sites. Section 128(a) funds cannot be used for assessments at sites that do not meet the definition of brownfields site at CERCLA 101(39).

Costs incurred for oversight of cleanups at other than brownfields sites may be eligible and allowable costs if such activities are included in the state's or Indian tribe's work plan. For example, auditing of completed site cleanups in states or tribes that use licensed site professionals to verify that sites have been properly cleaned up may be an eligible cost under Section 128(a). These costs need not be incurred in connection with a brownfields site to be eligible, but must be authorized under the state's or Indian tribe's work plan to be allowable. Other uses may be eligible and allowable as well, depending upon the work plan negotiated between the EPA regional office and the state or Indian tribe.

## Uses Related to Petroleum Response Programs and Site-Specific Activities at Petroleum Sites

Many state response programs do not distinguish between sites contaminated with hazardous substances, contaminants or pollutants and sites contaminated with petroleum. Therefore, states and Indian tribes may use Section 128(a) funds for activities that establish and enhance their response programs, even if their response programs address petroleum contamination. Also, the costs of conducting site assessments at petroleum contaminated brownfield sites, as defined at CERCLA Section 101(39)(D)(ii)(II), are eligible and are allowable if the activity is included in the work plan negotiated between the EPA regional office and the state or Indian tribe. Section 128(a) funds used to capitalize a Brownfields RLF may be used at brownfields sites contaminated by petroleum to the extent allowed under CERCLA Section 104(k)(3).

### D. Grant Mechanism and Process for Awarding Funding

Funding authorized under CERCLA Section 128(a) will be awarded through a cooperative agreement<sup>8</sup> with a state or Indian tribe. The program will be administered under the general EPA grant and cooperative agreement regulations for states, Indian tribes, and local governments found in the Code of Federal Regulations at 40 CFR Part 31. Under these regulations, the grantee for Section 128(a) grant program is:

*the government to which a grant is awarded and which is accountable for the use of the funds provided. The grantee is the entire legal entity even if only a particular component of the entity is designated in the grant award document.*

40 CFR 31.3 Grantee

Subject to the availability of funds, EPA regional offices will negotiate and enter into new Section 128(a) cooperative agreements with eligible and interested states or Indian tribes. EPA will accept only one application, and negotiate only one work plan, with each eligible state or Indian tribe. States and tribes must define the Section 128(a) response program, and may designate a component of the state or tribe that will be EPA's primary point of contact for negotiations on their proposed work plan. When EPA funds the Section 128(a) cooperative agreement, states and tribes may distribute these funds among the appropriate state and tribal agencies that are part of the Section 128(a) response program. This distribution must be clearly outlined in their annual work plan.

EPA regional offices will determine the project period for each cooperative agreement. These may

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<sup>8</sup> A cooperative agreement is a grant to a state or a Indian tribe that includes substantial involvement of EPA during performance of activities described in cooperative agreement work plan. Examples of this involvement include technical assistance and collaboration on program development and site-specific activities.



be for multiple years depending on the regional office's grants policies. Each cooperative agreement must have an annual budget period tied to an annual work plan.

As part of the annual work plan negotiation process, states or Indian tribes that do not have MOAs must demonstrate that their program includes, or is taking reasonable steps to include, the four elements described above. EPA will not fund, in future years, state or tribal response program annual work plans if EPA determines that these requirements are not met or reasonable progress is not being made. EPA may base this determination on the information the state or tribe provides to support its work plan, or on EPA's review of the state or tribal response program.

Prior to funding a state's or Indian tribe's annual work plan, EPA regional offices will verify that a public record as described above exists, and is being maintained.

#### **E. Allocation System for Distribution of Funding**

EPA regional offices will work with interested states and Indian tribes to develop their annual work plans and funding requests. For Fiscal Year 2003, EPA will consider funding requests up to a maximum of \$1.5 million per state or Indian tribe. This limit may be changed in future years based on appropriation amounts and demand for funding. The EPA regional offices will forward each of the funding request amounts and a short summary of the work plan activities to EPA Headquarters. EPA Headquarters will compile the requested amounts and develop the annual allocation based on state and tribal response program needs described in the work plan summaries.

When EPA Regions negotiate individual state and tribal work plans, it is anticipated that funding will be prioritized as follows.

1. Funding for program development activities to establish or enhance the four elements of a state or tribal response program and to enable states and Indian tribes to comply with the public record requirement, including activities related to institutional controls. States with MOA's will not be prejudiced in funding distributions if their work plan does not include tasks related to establishing or enhancing the four elements. Similarly, states and Indian tribes that have established one or more of the four elements will not be prejudiced in funding distributions if their work plan includes activities that enhance the four elements.
2. Funding for other program development activities to enhance the cleanup capacity of a state or tribal response program.
3. Funding for site-specific activities that enhance the cleanup capacity of a state or tribal response program, including targeted brownfields site assessments.
4. Funding for environmental insurance mechanisms.
5. Funding to capitalize brownfields cleanup revolving loan funds.

States and Indian tribes must break their work plans down into these prioritization categories.

EPA will target funding of at least \$1 million per year for tribal response programs. If this funding is not used, it will be carried over and added to at least \$1 million in the next fiscal year. It is expected that the funding demand from Indian tribes will increase through the life of this grant program (authorized by Congress through FY2006), and this funding allocation system should ensure that adequate funding for tribal response programs is available in future years.

## **F. Terms and Reporting**

Cooperative agreements for state and tribal response programs will include programmatic and administrative terms and conditions. These terms and conditions will describe EPA's substantial involvement including technical assistance and collaboration on program development and site-specific activities.

States and Indian tribes will provide progress reports under 40 CFR 31.40, in accordance with terms and conditions of the cooperative agreement negotiated with EPA regional offices. State and tribal costs for complying with reporting requirements are an eligible expense under the Section 128(a) grant. As a minimum, state or tribal progress reports must include both a narrative discussion and performance data relating to the state's or Indian tribe's accomplishments with Section 128(a) funding. If applicable, the state or tribe must include information on activities related to establishing or enhancing the four elements of the state's or tribe's response program. All recipients must provide information relating to establishing and maintaining the public record.

Depending upon the activities included in the state's or Indian tribe's work plan, an EPA regional office may request that a progress report include:

A list of sites at which response actions have been completed including:

- S Date the response action was completed
- S Site name
- S Location of the site (street address and latitude and longitude)
- S Size of the site in acres
- S An indication if the site is suitable for unrestricted use or if institutional controls were relied on in the remedy.
- S Nature of the contamination at the site.

A list of sites currently being addressed by the state or tribal response program including:

- S Site name
- S Location of the site (street address and latitude and longitude)

Data regarding the result of the state's or tribe's mechanism for verification by, or certification by the state or tribe, or similar documentation, indicating that the response action is complete. For example, the state or tribe may provide data regarding cleanup

completion certificates issued and revoked.

If the state or Indian tribe is using Section 128(a) funding to capitalize a revolving loan fund for brownfields cleanup under CERCLA Section 104(k)(3), they must include the information required by the terms and conditions for progress reporting under CERCLA Section 104(k)(3) RLF grants.

If the state or Indian tribe is using Section 128(a) funding for environmental insurance, they must include in their progress report information on the number of policies purchased, the number of sites covered, and the amount of money spent.

If the state or Indian tribe is using Section 128(a) funding to conduct brownfields site assessments, they must include in their progress report a list of sites at which site assessments have been completed that includes:

- S Site name
- S Location of the site (street address and latitude and longitude)
- S Size of the site in acres
- S Date site assessment was completed
- S Nature of contamination at the site (e.g., hazardous substances, contaminants, or pollutants, petroleum contamination, etc...)

If the state or Indian tribe is using Section 128(a) funding to perform other site-specific related activities (e.g., oversight audits of licensed site professional certified cleanups, etc...), they must include a description of the site-specific activities and the number of sites at which the activity was conducted.

The regional offices may also request other information be added to the progress reports, as appropriate, to properly document activities described by the cooperative agreement work plan.

EPA regions may allow states or tribes to provide performance data in appropriate electronic format.

The regional offices will forward progress reports to EPA Headquarters, if requested. This information may be used to develop national reports on the outcomes of CERCLA Section 128(a) funding to states and Indian tribes.