

Dated: October 31, 2008.

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## ENVIRONMENTAL PROTECTION AGENCY

[FRL-8742-3]

### **Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) or Superfund, Section 128(a); Notice of Grant Funding Guidance for State and Tribal Response Programs**

**AGENCY:** Environmental Protection  
Agency.

**ACTION:** Notice.

**SUMMARY:** The Environmental Protection Agency (EPA) will begin to accept requests, from December 1, 2008 through January 31, 2009, for grants to supplement State and Tribal Response Programs. This notice provides guidance on eligibility for funding, use of funding, grant mechanisms and process for awarding funding, the allocation system for distribution of funding, and terms and reporting under these grants. EPA has consulted with state and tribal officials in developing this guidance.

The primary goal of this funding is to ensure that state and tribal response programs include, or are taking reasonable steps to include, certain elements and a public record. Another goal 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 response capacity.

For fiscal year 2009, EPA will consider funding requests up to a maximum of \$1.5 million per state or tribe. Subject to the availability of funds, EPA regional personnel will be available to provide technical assistance to states and tribes as they apply for and carry out these grants.

**DATES:** This action is effective as of December 1, 2008. EPA expects to make non-competitive grant awards to states and tribes which apply during fiscal year 2009.

**ADDRESSES:** Mailing addresses for U.S. EPA Regional Offices and U.S. EPA Headquarters can be located at <http://www.epa.gov/brownfields>.

**FOR FURTHER INFORMATION CONTACT:** The U.S. EPA's Office of Solid Waste and Emergency Response, Office of Brownfields and Land Revitalization, (202) 566-2777.

**SUPPLEMENTARY INFORMATION:** Section 128(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended, authorizes a noncompetitive \$50 million grant program to establish and enhance state<sup>1</sup> and tribal<sup>2</sup> response programs. Generally, these response programs address the assessment, cleanup, and redevelopment of brownfields sites and other sites with actual or perceived contamination. Section 128(a) cooperative agreements are awarded and administered by the U.S. Environmental Protection Agency (EPA) regional offices. This document provides guidance that will enable states and tribes to apply for and use Fiscal Year 2009 Section 128(a) funds.

Requests for funding will be accepted from December 1, 2008 through January 31, 2009. Information required to be submitted with the funding request is on pages 13-15. States or tribes that fail to submit the request in the appropriate manner may forfeit their ability to request funds. First time requestors are strongly encouraged to contact their Regional Brownfields Coordinator (see page 19) prior to submitting their funding request.

Requests submitted by the January 31, 2009 request deadline are preliminary; final cooperative agreement work plans and budgets will be negotiated with the regional offices once final allocation determinations are made. As in prior years, EPA will place special emphasis on reviewing a cooperative agreement recipients' use of prior 128(a) funding in making allocation decisions.

States and tribes requesting funds are required to provide a Dun and Bradstreet Data Universal Numbering System (DUNS) number with their final cooperative agreement package. For more information, please go to [www.grants.gov](http://www.grants.gov).

The Catalogue of Federal Domestic Assistance entry for the Section 128(a) State and Tribal Response Program cooperative agreements is 66.817. This grant program is eligible to be included in state and tribal Performance Partnership Grants.

<sup>1</sup> The term "state" is defined in this document as defined in CERCLA Section 101(27).

<sup>2</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, No. 4, 2002, are also eligible for funding under CERCLA 128(a).

## Background

State and tribal response programs oversee assessment and cleanup activities at the majority of brownfields sites across the country. The depth and breadth of state and tribal response programs vary. Some focus on CERCLA related activities, while others are multi-faceted, for example, addressing sites regulated by both CERCLA and the Resource Conservation and Recovery Act (RCRA). Many state programs also offer accompanying financial incentive programs to spur cleanup and redevelopment. In passing Section 128(a),<sup>3</sup> Congress recognized the accomplishments of state and tribal response programs in cleaning up and redeveloping brownfields sites. Section 128(a) also provides EPA with an opportunity to strengthen its partnership with states and tribes.

The primary goal of this funding is to ensure that state and tribal response programs include, or are taking reasonable steps to include, certain elements and a "public record." The secondary goal 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 response program's capacity.

Subject to the availability of funds, EPA regional personnel will be available to provide technical assistance to states and tribes as they apply for and carry out Section 128(a) cooperative agreements.

## Eligibility for Funding

To be eligible for funding under CERCLA Section 128(a), a state or tribe must:

Demonstrate that its response program includes, or is taking reasonable steps to include, the four elements of a response program, described below; or (b) be a party to voluntary response program Memorandum of Agreement (VRP MOA)<sup>4</sup> with EPA;

*And*

Maintain and make available to the public a record of sites at which

<sup>3</sup> Section 128(a) was added to CERCLA in 2002 by the Small Business Liability Relief and Brownfields Revitalization Act (Brownfield Amendments).

<sup>4</sup> The legislative history of the Brownfields Amendments indicates that Congress intended to encourage states and tribes to enter into MOAs for their voluntary response programs. States or tribes that are parties to VRP MOAs and that maintain and make available a public record are automatically eligible for Section 128(a) funding.

response actions have been completed in the previous year and are planned to be addressed in the upcoming year, see CERCLA § 128(b)(1)(C).

#### Matching Funds/Cost-Share

States and tribes are *not* required to provide matching funds for cooperative agreements awarded under Section 128(a), with the exception of the Section 128(a) funds a state or tribe uses to capitalize a Brownfields Revolving Loan Fund under CERCLA 104(k)(3).

#### The Four Elements—Section 128(a)

Section 128(a) recipients that do not have a VRP MOA with EPA must demonstrate that their response program includes, or is taking reasonable steps to include, the four elements.

Achievement of the four elements should be viewed as a priority. Section 128(a) authorizes funding for activities necessary to establish and enhance the four elements and to establish and maintain the public record requirement.

Generally, the four elements are:

*Timely survey and inventory of brownfields sites in state or tribal land.* EPA's goal in funding activities under this element is to enable the state or 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 sites in their state or tribal lands.

EPA recognizes the varied scope of state and tribal response programs and will not require states and tribes to develop a "list" of brownfields sites. However, at a minimum, the state or tribe should develop and/or maintain a system or process that can provide a reasonable estimate of the number, likely location, and general characteristics of brownfields sites within their state or tribal lands.

Given funding limitations, EPA will negotiate work plans with states and tribes to achieve this goal efficiently and effectively, and within a realistic time frame. For example, many of EPA's Brownfields Assessment cooperative agreement recipients conduct inventories of brownfields sites in their communities or jurisdictions. EPA encourages states and tribes to work with these cooperative agreement recipients to obtain the information that they have gathered and include it in their survey and inventory.

*Oversight and enforcement authorities or other mechanisms and resources.* EPA's goal in funding activities under this element is to have state and tribal response programs that include 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; and

The necessary response activities are completed if the person conducting the response activities fails to complete the necessary response activities (this includes operation and maintenance or long-term monitoring activities).

*Mechanisms and resources to provide meaningful opportunities for public participation.*<sup>5</sup> EPA's goal in funding activities under this element is to have states and tribes include in their response program mechanisms and resources for public participation, including, at a minimum:

Public access to documents and related materials that a state, 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 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.

*Mechanisms for approval of a cleanup plan and verification and certification that cleanup is complete.* EPA's goal in funding activities under this element is to have states and tribes include in their response program mechanisms to approve cleanup plans and to verify that response actions are complete, including a requirement for certification or similar documentation from the state, the tribe, or a licensed site professional to the person conducting the response action that the response action is complete. Written approval by a state or tribal response program official of a proposed cleanup plan is an example of an approval mechanism.

#### Public Record Requirement

In order to be eligible for Section 128(a) funding, states and tribes (including those with MOAs) must establish and maintain a public record system, described below, in order to receive funds. Specifically, under

Section 128(b)(1)(C), states and 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 the requirements discussed above.

*Distinguishing the "survey and inventory" element from the "public record."* It is important to note that the public record requirement differs from the "timely survey and inventory" element described in the "Four Elements" section 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 brownfields sites.

*Making the public record easily accessible.* EPA's goal is to enable states and tribes to make the public record and other information, such as information from the "survey and inventory" element, easily accessible. For this reason, EPA will allow states and tribes to use Section 128(a) funding to make the public record, as well as other information, such as information from the "survey and inventory" element, available to the public via the internet or other means. For example, the Agency would support funding 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>

In an effort to reduce cooperative agreement reporting requirements and increase public access to the public record, EPA encourages states and tribes to place their public record on the internet. If a state or tribe places the

<sup>5</sup> States and 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>.

<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).

public record on the internet, maintains the substantive requirements of the public record, and provides EPA with the link to that site, EPA will, for purposes of cooperative agreement funding only, deem the public record reporting requirement met.

*Long-term maintenance of the public record.* EPA encourages states and 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, including information on institutional controls, in their work plans.<sup>7</sup>

### Use of Funding

#### Overview

Section 128(a)(1)(B) describes the eligible uses of cooperative agreement funds by states and tribes. In general, a state or tribe may use a cooperative agreement to “establish or enhance” their response programs, including elements of the response program that include activities related to responses at brownfields sites with petroleum contamination. Eligible activities include, but are not limited to, the following:

- Develop legislation, regulations, procedures, ordinances, guidance, etc. that would establish or enhance the administrative and legal structure of their response programs;

- Establish and maintain the required public record described above. EPA considers activities related to maintaining and monitoring institutional controls to be eligible costs under Section 128(a);

- Conduct limited site-specific activities, such as assessment or cleanup, provided such activities establish and/or enhance the response program and are tied to the four elements. EPA will not provide Section 128(a) funds solely for assessment or cleanup of specific brownfields sites; site specific activities must be an incidental part of an overall Section 128(a) work plan that includes funding for other activities that establish or enhance the four elements;

- 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 cooperative agreement

terms and conditions applicable to RLFs awarded under Section 104(k)(3). Requirements include a 20 percent match on the amount of Section 128(a) funds used for the RLF, a prohibition on using EPA cooperative agreement 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; or Purchase environmental insurance or develop a risk-sharing pool, indemnity pool, or insurance mechanism to provide financing for response actions under a state or tribal response program.

#### *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 example, a state or tribal response program may use Section 128(a) funds to develop regulations, ordinances, procedures, or guidance. 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 exact “enhancement” uses that may be allowable depend upon the work plan negotiated between the EPA regional office and the state or 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. It may also include developing better coordination and understanding of other state response programs, e.g., RCRA or USTs. Other “enhancement” uses may be allowable as well.

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

States and 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, but are not limited to, site-specific activities such as:

- Conducting assessments or cleanups at *brownfields* sites (see next section for additional information);

- Oversight of response action;

- Technical assistance to federal brownfields cooperative agreement recipients;

- Development and/or review of site-specific quality assurance project plans (QAPPs);

- Preparation and submission of Property Profile Forms; and

- Auditing site cleanups to verify the completion of the cleanup.

#### *Uses Related to Site-Specific Assessment and Cleanup Activities*

Site-specific assessment and cleanup activities should establish and/or enhance the response program and be tied to the four elements. EPA will not provide Section 128(a) funds solely for assessment or cleanup of specific brownfields sites; site specific activities must be an incidental part of an overall Section 128(a) work plan that includes funding for other activities that establish or enhance the four elements. Site-specific assessments and cleanups must comply with all applicable federal and state laws and are subject to the following restrictions:

- Section 128(a) funds can only be used for assessments or cleanups at sites that meet the definition of a brownfields site at CERCLA 101(39).

- Absent EPA approval, no more than \$200,000 per site can be funded for assessments with Section 128(a) funds, and no more than \$200,000 per site can be funded for cleanups with Section 128(a) funds.

- Absent EPA approval, the state/tribe may not use funds awarded under this agreement to assess and clean up sites owned or operated by the recipient.

- Assessments and cleanups cannot be conducted at sites where the state/tribe is a potentially responsible party pursuant to CERCLA Section 107, except:

- At brownfields sites contaminated by a controlled substance as defined in CERCLA Section 101(39)(D)(ii)(I); or
- When the recipient would satisfy all of the elements set forth in CERCLA section 101(40) to qualify as a bona fide prospective purchaser except that the date of acquisition of the property was on or before January 11, 2002.

- Subgrants cannot be provided to entities that may be potentially responsible parties (pursuant to CERCLA Section 107) at the site for

<sup>7</sup> States and 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>.

which the assessment or cleanup activities are proposed to be conducted, except:

At brownfields sites contaminated by a controlled substance as defined in CERCLA Section 101(39)(D)(ii)(I); or

When the recipient would satisfy all of the elements set forth in CERCLA section 101(40) to qualify as a bona fide prospective purchaser except that the date of acquisition of the property was on or before January 11, 2002.

#### *Costs Incurred for Activities at "Non-brownfields" Sites*

Costs incurred for activities at non-brownfields sites, e.g., oversight, may be eligible and allowable if such activities are included in the state's or tribe's work plan. For example, auditing completed site cleanups in jurisdictions where states or tribes 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 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 tribe. *However, assessment and cleanup activities may only be conducted on eligible brownfields sites, as defined in CERCLA 101(39).*

#### *Uses Related to Site-Specific Activities at Petroleum Brownfields Sites*

States and 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 site-specific activities, such as site assessments or cleanup at petroleum contaminated brownfields sites, defined at CERCLA § 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 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 the CERCLA § 104(k)(3) RLF.

#### **General Programmatic Guidelines for 128(a) Grant Funding Requests**

Funding authorized under CERCLA Section 128(a) is awarded through a cooperative agreement<sup>8</sup> with a state or

tribe. The program is administered under the general EPA grant and cooperative agreement regulations for states, tribes, and local governments found in the Code of Federal Regulations at 40 CFR Part 31. Under these regulations, the cooperative agreement recipient for Section 128(a) grant program is the government to which a cooperative agreement is awarded and which is accountable for the use of the funds provided. The cooperative agreement recipient is the entire legal entity even if only a particular component of the entity is designated in the cooperative agreement award document.

*One application per state or tribe.* Subject to the availability of funds, EPA regional offices will negotiate and enter into Section 128(a) cooperative agreements with eligible and interested states or tribes. *EPA will accept only one application from each eligible state or tribe.*

*Define the State or Tribal Response Program.* States and tribes must define in their work plan the "Section 128(a) response program(s)" to which the funds will be applied, 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.

*Separate cooperative agreements for the capitalization of RLFs using Section 128(a) funds.* If a portion of the 128(a) grant funds requested will be used to capitalize a revolving loan fund for cleanup, pursuant to 104(k)(3), two separate cooperative agreements must be awarded, i.e., one for the RLF and one for non-RLF uses. States and tribes may, however, submit one initial request for funding, delineating the RLF as a proposed use. Section 128(a) funds used to capitalize an RLF are not eligible for inclusion into a Performance Partnership Grant (PPG).

*Authority To Manage a Revolving Loan Fund Program.* If a state or tribe chooses to use its 128(a) funds to capitalize a revolving loan fund program, the state or tribe must have the authority to manage the program, e.g., issue loans. If the agency/department listed as the point of contact for the

128(a) cooperative agreement does not have this authority, it must be able to demonstrate that another state or tribal agency does have the authority to manage the RLF and is willing to do so.

*Section 128(a) cooperative agreements are eligible for inclusion in the Performance Partnership Grant (PPG).* States and tribes may include Section 128(a) cooperative agreements in their PPG. 69 Fed. Reg. 51,756 (2004). Section 128(a) funds used to capitalize an RLF are not eligible for inclusion in the PPG.

*Project Period.* EPA regional offices will determine the project period for each cooperative agreement. These may be for multiple years depending on the regional office's cooperative agreement policies. Each cooperative agreement must have an annual budget period tied to an annual work plan.

*Demonstrating the Four Elements.* As part of the annual work plan negotiation process, states or tribes that do not have VRP 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.

*Establishing and Maintaining the Public Record.* Prior to funding a state's or tribe's annual work plan, EPA regional offices will verify and document that a public record, as described above, exists and is being maintained.<sup>9</sup>

- *States or tribes that received initial funding in FY03, FY04, FY05, FY06 or FY07:* Requests for FY09 funds will not be accepted from states or tribes that fail to demonstrate, by the January 31, 2009 request deadline, that they established and are maintaining a public record. (Note, this would potentially impact any state or tribe that had a term and condition placed on their FY08 cooperative agreement that prohibited drawdown of FY08 funds prior to meeting public record requirement.) States or tribes in this situation will not be prevented from drawing down their prior year funds, once the public record requirement is met, but will be restricted from applying for FY09 funding.

<sup>8</sup> A cooperative agreement is an assistance agreement to a state or a tribe that includes substantial involvement of EPA regional enforcement and program staff during performance of activities described in the cooperative agreement

work plan. Examples of this involvement include technical assistance and collaboration on program development and site-specific activities.

<sup>9</sup> For purposes of cooperative agreement funding, the state's or tribe's response program(s) that utilized the Section 128(a) funding.

• *States or Tribes that received initial funding in FY08:* By the time of the actual FY09 award, the state or tribe must demonstrate that they established and maintained the public record (those states and tribes that do not meet this requirement will have a term and condition placed on their FY09 cooperative agreement that prevents the drawdown of FY09 funds until the public record requirement is met).

• *Recipients receiving funds for the first time in FY09:* These recipients have one year to meet this requirement and may utilize the 128(a) cooperative agreement funds to do so.

#### *Demonstration of Significant Utilization of Prior Years' Funding*

During the allocation process, EPA headquarters places significant emphasis on the utilization of prior years' funding. When submitting your request for FY09 funds, the following information must be submitted:

• For those states and tribes with Superfund VCP Core or Targeted Brownfields Assessment cooperative agreements awarded under CERCLA 104(d), you must provide, by agreement number, the amount of funds that have not been requested for reimbursement (i.e., those funds that remain in EPA's Financial Data Warehouse) and must provide a detailed explanation and justification for why such funds should not be considered in the funding allocation process.

• For those states and tribes that received FY03, FY04, FY05, FY06 and/or FY07 Section 128 funds, you must provide the amount of FY03, FY04, FY05, FY06 and/or FY07 funds that have not been requested for reimbursement (i.e., those funds that remain in EPA's Financial Data Warehouse) and must provide a detailed explanation and justification for why such funds should not be considered in the funding allocation process.

**Note:** EPA Regional staff will review EPA's Financial Database Warehouse to confirm the amount of outstanding funds reported. *It is strongly recommended that you work with your regional counterpart to determine the amount of funds "outstanding." In making this determination, EPA will take into account those funds that have been*

*committed through an appropriate state or tribal contract, inter-agency agreement, or similar type of binding agreement, but have not been requested for reimbursement, i.e., that are not showing as "drawn down" in EPA's Data Warehouse.*

*Demonstration of Need to Receive Funds above the FY08 Funding Distribution.* Due to the limited amount of funding available, recipients must demonstrate a specific need when requesting an amount above the amount allocated to the state or tribe in FY08.

#### *Allocation System and Process for Distribution of Fund*

EPA regional offices will work with interested states and tribes to develop their preliminary work plans and funding requests. Final cooperative agreement work plans and budgets will be negotiated with the regional office once final allocation determinations are made.

For Fiscal Year 2009, EPA will consider funding requests up to a maximum of \$1.5 million per state or tribe. This limit may be changed in future years based on appropriation amounts and demand for funding.

EPA will target funding of at least \$3 million per year for tribal response programs. If this funding is not used, it will be carried over and added to at least \$3 million in the next fiscal year. It is expected that the funding demand from tribes will increase through the life of this cooperative agreement program and this funding allocation system should ensure that adequate funding for tribal response programs is available in future years.

After the January 31, 2009 request deadline, regional offices will submit summaries of state and tribal requests to EPA headquarters. Before submitting requests to EPA headquarters, regional offices may take into account additional factors when determining recommended allocation amounts. Such factors include, but are not limited to, the depth and breadth of the state or tribal program; scope of the perceived need for the funding, e.g., size of state or tribal jurisdiction or the proposed work plan balanced against capacity of the program, amount of prior funding, and funds remaining from prior years, etc.

After receipt of the regional recommendations, EPA headquarters will consolidate requests and allocate funds accordingly.

#### *Information To Be Submitted With the Funding Request*

States and tribes requesting 128(a) FY09 funds *must submit the following information*, as applicable, to their regional contact on or before January 31, 2009 (regions may request additional information, as needed):

• For those states and tribes with prior Superfund VCP Core or Targeted Brownfields Assessment funding awarded under CERCLA 104(d), provide, by agreement number, the amount of funds that have not been requested for reimbursement (i.e., those funds that remain in EPA's Financial Data Warehouse) and a detailed explanation and justification for why such funds should not be considered in the funding allocation process. *EPA will take into account those funds that have been committed through an appropriate state or tribal contract, interagency agreement, or similar type of binding agreement.*

• For those states and tribes that received an allocation of FY03, '04, '05, '06 and/or '07 128(a) funds, provide the amount of FY03, '04, '05, '06 and/or '07 funds that have not been requested for reimbursement (i.e., those funds that remain in EPA's Financial Data Warehouse) and a detailed explanation and justification for why such funds should not be considered in the funding allocation process. *EPA will take into account those funds that have been committed through an appropriate state or tribal contract, interagency agreement, or similar type of binding agreement.*

• For those states and tribes requesting amounts above their FY08 allocation, provide an explanation of the specific need(s) that triggered the request for increased funding.

• All states and tribes requesting FY09 funds must submit a summary of the planned use of the funds with associated dollar amounts. Please provide it in the following format:

Funding use	Requested amount	Summary of intended use
Establish or Enhance the four elements: 1. Timely survey and inventory of brownfields sites; 2. Oversight and enforcement authorities or other mechanisms; 3. Mechanisms and resources to provide meaningful opportunities for public participation; and 4. Mechanisms or approval of a cleanup plan and verification and certification that cleanup is complete.	\$XX,XXX	<p>(EXAMPLE USES)</p> <ul style="list-style-type: none"> <li>• inventory and prioritize brownfields sites.</li> <li>• develop a community involvement process.</li> <li>• fund an outreach coordinator.</li> <li>• develop/enhance ordinances, regulations, procedures for response programs.</li> <li>• issue public notices of site activities.</li> <li>• review cleanup plans and verify completed actions.</li> </ul>

Funding use	Requested amount	Summary of intended use
Establish and Maintain the Public Record .....	XX,XXX	(EXAMPLE USES) <ul style="list-style-type: none"> <li>• maintain public record.</li> <li>• create web site for public record.</li> <li>• disseminate public information on how to access the public record.</li> </ul>
Enhance the Response Program .....	XX,XXX	(EXAMPLE USES) <ul style="list-style-type: none"> <li>• provide oversight of site assessments and cleanups.</li> <li>• attend training and conferences on brownfields cleanup technologies &amp; other brownfields topics.</li> <li>• update and enhance program management activities.</li> <li>• negotiate/oversee contracts for response programs.</li> <li>• enhance program management &amp; tracking systems.</li> <li>• prepare Property Profile Forms/input data into ACRES database.</li> </ul>
Site-specific Activities ..... (amount requested should be incidental to the workplan, e.g., less than half of the total funding requested).	XX,XXX	(EXAMPLE USES) <ul style="list-style-type: none"> <li>• develop QAPPs.</li> <li>• perform site assessments and cleanups.</li> <li>• prepare Property Profile Forms/input data into ACRES database for these sites.</li> </ul>
Environmental Insurance .....	XX,XXX	(EXAMPLE USES) <ul style="list-style-type: none"> <li>• review potential uses of environmental insurance.</li> </ul>
Revolving Loan Fund .....	XX,XXX	(EXAMPLE USES) <ul style="list-style-type: none"> <li>• create a cleanup revolving loan fund.</li> </ul>
Total Funding Requested .....	XXX,XXX	

### Reporting of Program Activity Levels

States and tribes must report, by January 31, 2009, a summary of the previous federal fiscal year's work (October 1, 2007 through September 30, 2008). The following information must be submitted to your regional project officer (if no activity occurred in the particular category, indicate "N/A"):

- Number of properties enrolled in the response program supported by the CERCLA 128(a) funding.
- Number of properties that received a No Further Action (NFA) documentation or a Certificate of Completion (COC) or equivalent, AND have all required institutional controls in place.
- Number of properties that received an NFA or COC or equivalent and do NOT have all required institutional controls in place.
- Total number of acres associated with properties in the second bullet above.
- (OPTIONAL) Number of properties where assistance was provided, but the property was NOT enrolled in the response program.

### 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.

**Progress Reports.** In accordance with 40 CFR 31.40, state and tribes must

provide progress reports as provided in the 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) cooperative agreement. As a minimum, state or tribal progress reports must include both a narrative discussion and performance data relating to the state's or tribe's accomplishments and environmental outputs associated with the approved budget and workplan and should provide an accounting of 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 or, if already established, maintaining the public record.

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

*Information related to the public record.* All recipients must report information related to establishing or, if already established, maintaining the public record, described above. States and tribes can refer to an already existing public record, e.g., Web site or other public database to meet this requirement.

For the purposes of cooperative agreement funding only, and depending upon the activities included in the state or tribe's work plan, this *may* include:

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

- Date the response action was completed.
- Site name.
- Name of owner at time of cleanup, if known.
- Location of the site (street address, and latitude and longitude).
- Whether an institutional control is in place.
- Explain the type of institutional control in place (e.g., deed restriction, zoning restriction, local ordinance, state registries of contaminated property, deed notices, advisories, etc.).
- Nature of the contamination at the site (e.g., hazardous substances, contaminants, or pollutants, petroleum contamination, etc.).
- Size of the site in acres.

A list of sites planned to be addressed by the state or tribal response program including:

- Site name and the name of owner at time of cleanup, if known.
- Location of the site (street address, and latitude and longitude).
- To the extent known, whether an institutional control is in place.
- Explain the type of the institutional control in place (e.g., deed restriction, zoning restriction, local ordinance, state registries of contaminated property, deed notices, advisories, etc.).
- To the extent known, the nature of the contamination at the site (e.g., hazardous substances, contaminants, or pollutants, petroleum contamination, etc.).
- Size of the site in acres.

**Reporting environmental insurance.** Recipients with work plans that include

funding for *environmental insurance* must report:

- Number and description of insurance policies purchased (e.g., type of coverage provided; dollar limits of coverage; any buffers or deductibles; category and identity of insured persons; premium; first dollar or umbrella; site specific or blanket; occurrence or claims made, etc.).
- The number of sites covered by the insurance.
- The amount of funds spent on environmental insurance (e.g., amount dedicated to insurance program, or to insurance premiums).
- The amount of claims paid by insurers to policy holders.

*Reporting for site-specific assessment or cleanup activities.* Recipients with work plans that include funding for *brownfields site assessment or cleanup* must provide information required by the OMB-approved Property Profile Form for input into the Assessment Cleanup and Redevelopment Exchange System (ACRES) database for each site assessment and cleanup.

*Reporting for other site-specific activities.* Recipients with work plans that include funding for *other site-specific related activities* must include a description of the site-specific activities and the number of sites at which the activity was conducted. For example:

- Number and frequency of oversight audits of licensed site professional certified cleanups.
- Number and frequency of state/tribal oversight audits conducted.
- Number of sites where staff conducted audits, provided technical

assistance, or conducted other oversight activities.

- Number of staff conducting oversight audits, providing technical assistance, or conducting other oversight activities.

*Reporting for RLF uses.* Recipients with work plans that include funding for Revolving Loan Fund (RLF) must include the information required by the terms and conditions for progress reporting under CERCLA section 104(k)(3) RLF cooperative agreements.

*Reporting for Non-MOA states and tribes.* All recipients *without* a VRP MOA must report activities related to establishing or enhancing the four elements of the state's or tribe's response program. For each element state/tribes must report how they are maintaining the element or how they are taking reasonable steps to establish or enhance the element as negotiated in individual state/tribal work plans. For example, pursuant to CERCLA Section 128(a)(2)(B), reports on the oversight and enforcement authorities/mechanisms element may include:

- A narrative description and copies of applicable documents developed or under development to enable the response program to conduct enforcement and oversight at sites. For example:
  - Legal authorities and mechanisms (e.g., statutes, regulations, orders, agreements);
  - Policies and procedures to implement legal authorities; and other mechanisms;
  - A description of the resources and staff allocated/to be allocated to the

response program to conduct oversight and enforcement at sites as a result of the cooperative agreement;

- A narrative description of how these authorities or other mechanisms, and resources, 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; and if the person conducting the response action fails to complete the necessary response activities, including operation and maintenance or long-term monitoring activities, the necessary response activities are completed; and

- A narrative description and copy of appropriate documents demonstrating the exercise of oversight and enforcement authorities by the response program at a brownfields site.

Where applicable, EPA may require states/tribes to report specific performance measures related to the four elements which can be aggregated for national reporting to Congress.

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 tribes.

#### REGIONAL BROWNFIELDS COORDINATORS

Region	States	Address & phone number
EPA Region 1, Diane Kelley .....	CT, ME, MA, NH, RI, VT .....	One Congress Street, Suite 1100, Boston, MA 02114-2023, Phone (617) 918-1424, Fax (617) 918-1291.
EPA Region 2, Ramon Torres .....	NJ, NY, PR, VI .....	290 Broadway, 18th Floor, New York, NY 10007, Phone (212) 637-4309, Fax (212) 637-4360.
EPA Region 3, Tom Stolle .....	DE, DC, MD, PA, VA, WV .....	1650 Arch Street, Mail Code 3HS51, Philadelphia, Pennsylvania 19103, Phone (215) 814-3129, Fax (215) 814-5518.
EPA Region 4, Mike Norman .....	AL, FL, GA, KY, MS, NC, SC, TN .....	Atlanta Federal Center, 61 Forsyth Street, SW., 10th fl, Atlanta, GA 30303-8960, Phone (404) 562-8792, Fax (404) 562-8439.
EPA Region 5, Deborah Orr .....	IL, IN, MI, MN, OH, WI .....	77 West Jackson Boulevard, Mail Code SE-4J, Chicago, Illinois 60604-3507, Phone (312) 886-7576, Fax (312) 886-7190.
EPA Region 6, Monica Chapa Smith .....	AR, LA, NM, OK, TX .....	First Interstate Bank Tower at Fountain Place, 1445 Ross Avenue, Suite 1200, (6SF-VB), Dallas, Texas 75202-2733, Phone (214) 665-6780, Fax (214) 665-6660.
EPA Region 7, Susan Klein .....	IA, KS, MO, NE .....	901 N. 5th Street, Kansas City, Kansas 66101, Phone (913) 551-7786, Fax (913) 551-8688.
EPA Region 8, Dan Heffernan .....	CO, MT, ND, SD, UT, WY .....	1595 Wynkoop Street (EPR-B), Denver, CO 80202-1129, Phone (303) 312-7074, Fax (303) 312-6065.
EPA Region 9, Debbie Schechter .....	AZ, CA, HI, NV, AS, GU .....	75 Hawthorne Street, SFD 9-1, San Francisco, California 94105, Phone (415) 972-3093, Fax (415) 947-3520.



## REGIONAL BROWNFIELDS COORDINATORS—Continued

Region	States	Address & phone number
EPA Region 10, Susan Morales .....	AK, ID, OR, WA .....	1200 Sixth Avenue, Suite 900, Mailstop: ECL-112, Seattle, Washington 98101, Phone (206) 553-7299, Fax (206) 553-0124.

*Statutory and Executive Order Reviews:* Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a “significant regulatory action” and is therefore not subject to OMB review. Because this grant action is not subject to notice and comment requirements under the Administrative Procedures Act or any other statute, it is not subject to the Regulatory Flexibility Act (5 U.S.C. Section 601 et.) or Sections 202 and 205 of the Unfunded Mandates Reform Act of 1999 (UMRA) (Pub. L. 104-4). In addition, this action does not significantly or uniquely affect small governments. Although this action does not generally create new binding legal requirements, where it does, such requirements do not substantially and directly affect Tribes under Executive Order 13175 (63 FR 67249, November 9, 2000). Although this grant action does not have significant Federalism implications under Executive Order 13132 (64 FR 43255, August 10, 1999), EPA consulted with states in the development of these grant guidelines. This action is not subject to Executive Order 13211, “Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use” (66 FR 28355, May 22, 2001), because it is not a significant regulatory action under Executive Order 12866. This action does not involve technical standards; thus, the requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. Section 272 note) do not apply. This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Section 3501 *et seq.*). The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before certain actions may take effect, the agency promulgating the action must submit a report, which includes a copy of the action, to each House of the Congress and to the Comptroller General of the United States. Since this grant action, when finalized, will contain legally binding requirements, it is subject to the Congressional Review Act, and EPA will submit its final action in its report to Congress under the Act.

Dated: November 12, 2008.

**David R. Lloyd,**

*Director, Office of Brownfields and Land Revitalization, Office of Solid Waste and Emergency Response.*

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**BILLING CODE 6560-50-P**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA-HQ-OPP-2008-0650; FRL-8386-4]**

### Petition for Rulemaking Requesting EPA Regulate Nanoscale Silver Products as Pesticides; Notice of Availability

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** This notice makes available for public review and comment a petition for rulemaking and collateral relief filed by the International Center for Technology Assessment (ICTA) and others. In general, the petition requests that the Agency classify nanoscale silver as a pesticide, require formal pesticide registration of all products containing nanoscale silver, analyze the potential human health and environmental risks of nanoscale silver, take regulatory actions under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) against existing products that contain nanoscale silver, and take other regulatory actions under FIFRA as appropriate for nanoscale silver products. The Agency has determined that the petition raises issues that potentially affect private and public sector stakeholders. Through this notice, EPA is asking for public comment on the petition.

**DATES:** Comments must be received on or before January 20, 2009.

**ADDRESSES:** Submit your comments, identified by docket identification (ID) number EPA-HQ-OPP-2008-0650, by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.

- *Mail:* Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001.

- *Delivery:* OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S-4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility’s normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305-5805.

*Instructions:* Direct your comments to docket ID number EPA-HQ-OPP-2008-0650. EPA’s policy is that all comments received will be included in the docket without change and may be made available on-line at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through [regulations.gov](http://www.regulations.gov) or e-mail. The [regulations.gov](http://www.regulations.gov) website is an “anonymous access” system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through [regulations.gov](http://www.regulations.gov), your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

*Docket:* All documents in the docket are listed in the docket index available at <http://www.regulations.gov>. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material,