



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OCT 20 2006

OFFICE OF
SOLID WASTE AND
EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Clarification on Uses of CERCLA Section 128(a) Funding and Brownfields Sites

FROM: David R. Lloyd, Director
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Office of Superfund Remediation and Technology Innovation

TO: Superfund National Policy Managers Regions 1 – 10

The purpose of this memorandum is to provide additional information and clarification regarding the allocation and use of funding provided to state response programs under CERCLA Section 128(a), Assistance to States. We expect that this information will help states and tribes appropriately acquire and use these funds to help establish and support their environmental cleanup programs.

A. Background and Discussion of Issues

CERCLA Section 128(a) authorizes EPA to award \$50 million in grants annually to “establish and enhance” state and tribal response programs that are comprised of four statutory elements, summarized below.

- Timely survey and inventory of brownfield sites in state or tribal land.
- Oversight and enforcement authorities or other mechanisms and resources that are adequate to ensure that response actions will protect human health and the environment and be conducted in accordance with applicable Federal and State law.
- Mechanisms and resources to provide meaningful opportunities for public participation, including a mechanism whereby a member of the public may request that a state or tribe conduct an assessment of a Brownfield site .
- Mechanisms for approval of a cleanup plan and verification and certification that cleanup is complete.

Congress has appropriated State and Tribal Grant (STAG) funding for the program since Fiscal Year 2003. EPA may only use STAG funds for purposes authorized by Section 128(a); the Agency cannot use these funds for other purposes including carrying out other provisions of CERCLA for which EPA receives Superfund appropriations. To date, over 100 entities, including all 50 states, have received funding through the program.

Annually, the Office of Brownfields Cleanup and Redevelopment (OBCR) publishes in the federal register, and distributes to Regions, states and tribes, a funding guidance document explaining the allocation process and appropriate uses of CERCLA Section 128(a) funds. As described in the guidance document, monies are awarded to States and Indian tribes through a non-competitive allocation process. The primary goals of the allocation process are to: 1) award funding in an equitable manner through a national process; 2) ensure accountability for the timely and appropriate use of funds; and 3) to support those grantees that use funding in a timely manner. States or tribes that are parties to a Voluntary Response Program Memorandum of Agreement (MOA), and that maintain and make available a public record, are automatically eligible for Section 128(a) funding. States and tribes without MOAs must demonstrate that their response program includes the statutory four elements described below, or that the state or tribe is taking reasonable steps to include those elements to be eligible for funding.

B. The Allocation Process

The allocation process has been developed through discussion and consultation between OBCR, the Regions and State and Tribal representatives. States and Tribes submit their requests for funding to their respective region at the beginning of each calendar year. Each region receives applicants' requests and discusses them with the state or tribe. The regions then submit those requests to OBCR, along with their funding recommendations. OBCR compiles all of the requests and prepares the recommended allocation for approval by the Assistant Administrator of OSWER. The allocation process focuses heavily on the use of prior years' grant funding, to ensure that the allocation process encourages timely use of funds. If, however, funds remain unexpended, they are "rolled over" into the next year's grant awards.

In FY06, \$49.3 million was available to OBCR for award. Ninety-five (95) requests, from 49 states, 42 tribes and two territories were received. The total amount requested was \$63.1 million. The allocation process starts with the amount requested as the funding basis for each entity. A dollar for dollar deduction is made for the amount of outstanding Superfund monies, originally provided under Section 104(d) for targeted Brownfield Assessments (TBA) and Voluntary Cleanup Program (VCP) development under the Superfund Core Program, and previous CERCLA 128(a) funding provided. A second across the board deduction is then made to align requests with available funds, with two exceptions: 1) no requestor would receive less than \$200,000; and 2) no requestor with a zero balance of prior year's funding would be funded below their previous year's funding level. Final adjustments are made based upon regional and

OBCR input. The total available amount of \$49.3 million in funding was distributed to 47 states, 41 tribes and two territories in FY06.

C. Relationship between the 128(a) Program and Superfund Activities

As indicated in the 128(a) annual funding guidance, the primary purpose of the CERCLA 128(a) grant program is to build the capacity of state and tribal response programs. States may use Section 128(a) funding to, among other things, develop legislation, regulations, procedures, ordinances and guidance that would establish or enhance the administrative and legal structure of their response programs. EPA funding may be used to build the capacity of a state response program that includes sites other than Brownfields sites. However, some activities are limited to brownfield sites only, such as surveying and inventorying as well as conducting site-specific assessments.

1. Public Record

In order to receive funding under Section 128(a), states must establish and maintain a public record of response actions as required by CERCLA 128(b)(1)(C). EPA has determined that the costs for establishing and maintaining the public record are eligible for Section 128(a) funding. States use of Section 128(a) funding is not limited to establishing and maintaining public records of responses at Brownfields sites. Rather, the public record may reflect all sites addressed by state response programs. In conjunction with this requirement, activities related to maintaining public records of institutional controls are considered by EPA to be eligible costs under Section 128(a). These activities would include development and maintenance of databases and information systems related to institutional controls.

2. Site-Specific Activities

Under the public participation element, CERCLA 128(a)(2)(C)(iii), a state may use Section 128(a) funds to respond to a request from the public asking the state to assess a Brownfields site. Site assessment activities may be conducted with Sec. 128(a) funds on a limited basis. The site assessment activities must be for "brownfield sites" as defined by CERCLA § 101(39). Section 128 funds cannot be used at sites that, do not meet, or subsequently do not meet, the definition of "brownfield site".

Sites where EPA is planning or conducting a removal action, or where the site has been proposed for listing on the NPL are not Brownfields sites.¹ Sec. 128(a) monies may be used up to the point where information indicates that the site being addressed no longer fits the definition of a brownfield site. At that point 128(a) funds may no longer be used and alternate funding sources must be utilized to complete assessment activities. A maximum of \$200,000 per site can be funded for assessments with Sec. 128(a) funds. EPA policy limits states to using no more than 50% of its Section 128 funds for assessment and cleanup activities at Brownfields sites.

D. Reporting Requirements

Grantees receiving funding pursuant to Section 128(a) are required to provide monthly reports that detail their progress in achieving the four elements cited above or that explain program enhancements being made. Grantees are also required to submit a Property Profile Form (PPF) for each site upon which they are expending Sec. 128(a) funding. The PPF details the location of the site, type and cost of work being performed, dates the assessments or cleanup were completed, types of contaminants encountered, size of the site, the site use anticipated, and other pertinent information. The PPF form is electronically updated as work at the site progresses.

If you have questions regarding this memorandum, please contact David R. Lloyd, at 202-566-2731, or Virginia Fornillo, at 202-566-2770. Should you have questions about institutional controls programs or site assessment activities in the Superfund program, please contact Barnes Johnson, at 703-603-8960, or Elizabeth Southerland, at 703-603-8855.

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¹ Please refer to CERCLA § 101(39)(B) for the full list of the types of sites that are excluded from the definition of "brownfield site."