



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[FRL-9954-44-OLEM]

Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) or Superfund, Section 128(a); Notice of Grant Funding Guidance for State and Tribal Response Programs for FY2017

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) will accept requests, from November 1, 2016 through December 31, 2016, for grants to establish and enhance 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 of a response program and establishing 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 2017, EPA will consider funding requests up to a maximum of \$1.0 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 November 1, 2016. EPA expects to make non-competitive grant awards to states and tribes which apply during fiscal year 2017.

ADDRESSES: Mailing addresses for EPA Regional Offices and EPA Headquarters can be found at www.epa.gov/brownfields and at the end of this Notice. Funding requests may be submitted electronically to the EPA Regional Offices.

FOR FURTHER INFORMATION CONTACT: EPA's Office of Solid Waste and Emergency Response, Office of Brownfields and Land Revitalization, (202) 566-2745 or the applicable EPA Regional Office listed at the end this Notice.

SUPPLEMENTARY INFORMATION:

I. GENERAL 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 state¹ and tribal² response programs. CERCLA section 128(a) response program grants are funded with categorical³ State and Tribal Assistance Grant (STAG) appropriations. Section 128(a) cooperative agreements are awarded and administered by the EPA regional offices. Generally, these response programs address the assessment, cleanup, and

¹The term "state" is defined in this document as defined in CERCLA section 101(27).

²The 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, Nov. 4, 2002, are also eligible for funding under CERCLA section 128(a).

³Categorical grants are issued by the U.S. Congress to fund state and local governments for narrowly defined purposes.

redevelopment of brownfields sites and other sites with actual or perceived contamination. This document provides guidance that will enable states and tribes to apply for and use Fiscal Year 2016 section 128(a) funds⁴.

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 under 40 CFR Part 35 Subparts A and B, with the exception of funds used to capitalize a revolving loan fund for brownfield remediation under section 104(k)(3); or purchase environmental insurance or developing a risk sharing pool, an indemnity pool, or insurance mechanism to provide financing for response actions under a State or Tribal response program.

Requests for funding will be accepted from November 1, 2016 through December 31, 2016. Requests EPA receives after December 31, 2016 will not be considered for FY2017 funding. Information that must be submitted with the funding request is listed in Section IX of this guidance. States or tribes that do not submit the request in the appropriate manner may forfeit their ability to receive funds. First time requestors are strongly encouraged to contact their Regional EPA Brownfields contacts, listed at the end of this guidance, prior to submitting their funding request. EPA will consider funding requests up to a maximum of \$1.0 million per state or tribe for FY2017.

Requests submitted by the December 31, 2016 request deadline are preliminary; final cooperative agreement work plans and budgets will be negotiated with the regional offices once final funding allocation determinations are made. As in previous years, EPA will place special emphasis on reviewing a cooperative agreement recipient's use of prior section 128(a) funding in

⁴ The Agency may waive any provision of this guidance that is not required by statute, regulation, Executive Order or overriding Agency policies.

making allocation decisions and unexpended balances are subject to 40 CFR 35.118 and 40 CFR 35.518 to the extent consistent with this guidance. Also, EPA will prioritize funding for recipients establishing their response programs.

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

II. BACKGROUND

State and tribal response programs oversee assessment and cleanup activities at brownfield sites across the country. The depth and breadth of these programs vary. Some focus on CERCLA related activities, while others are multi-faceted, addressing sites regulated by both CERCLA and the Resource Conservation and Recovery Act (RCRA). Many states also offer accompanying financial incentive programs to spur cleanup and redevelopment. In enacting CERCLA section 128(a)⁵, Congress recognized the value of state and tribal response programs in cleaning up and redeveloping brownfield sites. Section 128(a) strengthens EPA's partnerships with states and tribes, and recognizes the response programs' critical role in overseeing cleanups.

This funding is intended for those states and tribes that have the management and administrative capacity within their government required to administer a federal grant. 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 of an environmental response program and that the program establishes and maintains a public record of sites addressed.

⁵Section 128(a) was added to CERCLA in 2002 by the Small Business Liability Relief and Brownfields Revitalization Act (Brownfield Amendments).

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

III. ELIGIBILITY FOR FUNDING

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

1. demonstrate that its response program includes, or is taking reasonable steps to include, the four elements of a response program described in Section V of this guidance; **or** be a party to a voluntary response program Memorandum of Agreement (VRP MOA)⁶ with EPA; AND
2. 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 (see CERCLA section 128(b)(1)(C)).

IV. 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 section 128(a) funds a state or tribe uses to capitalize a Brownfields Revolving Loan Fund (RLF), for which there is a 20% cost share requirement. Section 128(a) funds uses to capitalize a RLF must be operated in accordance with CERCLA section 104(k)(3).

V. THE FOUR ELEMENTS - SECTION 128(a)(2)

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

⁶ 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.

described below. 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.

The four elements of a response program are described below:

1. *Timely survey and inventory of brownfield sites in state or tribal land.* The goal for 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 brownfield 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 brownfield sites within their state or tribal lands. Inventories should evolve to a prioritization of sites based on community needs, planning priorities, and protection of human health and the environment. Inventories should be developed in direct coordination with communities, and particular attention should focus on communities with limited capacity to compete for and manage a competitive brownfield assessment, revolving loan, or cleanup cooperative agreement.

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.

2. *Oversight and enforcement authorities or other mechanisms and resources.* The goal for this element is to have state and tribal response programs that include oversight and enforcement authorities or other mechanisms, and resources to ensure that:

- a. a response action will protect human health and the environment, and be conducted in accordance with applicable laws; and
- b. the state or tribe will complete the necessary response activities if the person conducting the response fails to complete them (this includes operation and maintenance and/or long-term monitoring activities).

3. *Mechanisms and resources to provide meaningful opportunities for public participation.*⁷

The goal for this element is to have states and tribes include in their response program mechanisms and resources for meaningful public participation, at the local level, including, at a minimum:

- a. public access to documents and related materials that a state, tribe, or party conducting the cleanup is relying on or developing to make cleanup decisions or conduct site activities;
- b. prior notice and opportunity for meaningful public comment on cleanup plans and site activities, including the input into the prioritization of sites; and
- c. 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 brownfield 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.

⁷States and tribes establishing this element may find useful information on public participation on EPA's community involvement web site at <https://www.epa.gov/superfund/superfund-community-involvement>.

4. *Mechanisms for approval of cleanup plans, and verification and certification that cleanup is complete.* The goal for 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 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.

VI. 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, as described below, to enable meaningful public participation (refer to Section V.3 above). Specifically, under section 128(b)(1)(C), states and tribes must:

1. maintain and update, at least annually or more often as appropriate, a public record that includes the name and location of sites at which response actions have been completed during the previous year;
2. maintain and update, at least annually or more often as appropriate, a public record that includes the name and location of sites at which response actions are planned in the next year; and
3. 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 and include relevant information concerning the entity responsible for oversight, monitoring, and/or maintenance of the institutional and engineering

controls; and how the responsible entity is implementing those activities (see Section VI.C). Section 128(a) funds may be used to maintain and make available a public record system that meets the requirements discussed above.

A. 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 or are planned in the upcoming year. In contrast, the "timely survey and inventory" element, described above, refers to identifying brownfield sites regardless of planned or completed actions.

B. 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 such information available to the public via the internet or other avenues. 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.⁸ States and tribes should ensure that all affected communities have appropriate access to the public record by making it available on-line, in print at libraries, or at other community gathering places.

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 public record on the internet, maintains the substantive

⁸For further information on data quality requirements for latitude and longitude information, please see EPA's data standards web site available at http://iaspub.epa.gov/sor_internet/registry/datastds/findadatastandard/epaapproved/latitudelongitude.

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.

C. 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 (such as ensuring the entity responsible for oversight, monitoring, and/or maintenance of the institutional and engineering controls is implementing those activities) in their work plans.⁹

VII. USE OF FUNDING

A. 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 funding to "establish or enhance" its response program. Specifically, a state or tribe may use cooperative agreement funds to build response programs that include the four elements outline in section 128(a)(2). Eligible activities include, but are not limited to, the following:

- developing legislation, regulations, procedures, ordinances, guidance, etc. that establish or enhance the administrative and legal structure of a response program;
- establishing and maintaining the required public record described in Section VI of this

⁹States and tribes may find useful information on institutional controls on the EPA's institutional controls web site at <http://www.epa.gov/superfund/policy/ic/index.htm>

guidance;

- operation, maintenance and long-term monitoring of institutional controls and engineering controls;
- conducting 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. In addition to the requirement under CERCLA section 128(a)(2)(C)(ii) to provide for public comment on cleanup plans and site activities, EPA strongly encourages states and tribes to seek public input regarding the priority of sites to be addressed-especially from local communities with health risks related to exposure to hazardous waste or other public health concerns, those in economically disadvantaged or remote areas, and those with limited experience working with government agencies. EPA will not provide section 128(a) funds solely for assessment or cleanup of specific brownfield sites; site-specific activities must be part of an overall section 128(a) work plan that includes funding for other activities that establish or enhance the four elements;
- capitalizing a revolving loan fund (RLF) for brownfields cleanup as authorized 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 (in the form of money, labor, material, or services from a non-federal source) 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 relevant to CERCLA section

104(k)(4) also apply; and

- 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.

B. 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, guidance, and a public record.

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 such programs.

The exact enhancement activities 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 Underground Storage Tanks (USTs)). As another example, states and tribal response program enhancement activities can also include outreach to local communities (e.g., distressed, environmental justice, rural, tribal, etc.) to increase awareness about brownfields, building a sustainable brownfields program, federal brownfields

technical assistance opportunities¹⁰ (e.g., holding workshops to assist communities to apply for federal Brownfields grant funding), and knowledge regarding the importance of monitoring engineering and institutional controls. Additionally, enhancement activities can include facilitating the participation of the state and local agencies (e.g., transportation, water, other infrastructure) in implementation of brownfields projects. States and tribes can also help local communities collaborate with local workforce development entities or Brownfields Environmental Workforce Development Job training recipients on the assessment and cleanup of brownfield sites.¹¹ Other enhancement uses may be allowable as well.

Note: EPA anticipates that states and tribes will work with their EPA Brownfields Area-Wide Planning, Assessment, Cleanup, and Revolving Loan Fund recipients to incorporate changing climate conditions in their reuse plans and clean up remedies, as appropriate.¹²

D. Uses related to site-specific activities

1. Eligible uses of funds for site-specific activities

Site-specific assessment and cleanup activities should establish and/or enhance the response program and be tied to the four elements. Site-specific assessments and cleanups can be both eligible and allowable if the activities is included in the work plan negotiated between the EPA regional office and the state or tribe, but activities must comply with all applicable laws and are subject to the following restrictions:

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

¹⁰ EPA expects states and tribes will familiarize themselves with US EPA's brownfields technical assistance opportunities for brownfields communities. For more information on technical assistance opportunities, please visit: <https://www.epa.gov/brownfields>

¹¹ For more information about EPA's Brownfields Environmental Workforce Development and Job Training Program, please visit: <https://www.epa.gov/brownfields/types-brownfields-grant-funding>

¹² For more information about EPA's Climate Adaptation Plan, please visit: <https://www.epa.gov/greeningepa/climate-change-adaptation-plans>

tribes to use site-specific funding to perform assessment (e.g., phase I, phase II, supplemental assessments and cleanup planning) and cleanup activities that will expedite the reuse and redevelopment of sites, particularly those located in distressed, environmental justice, rural or tribal communities. Furthermore, states and tribes that perform site-specific activities should plan to directly engage with and involve affected communities. For example, a Community Relations Plan (CRP) could be developed to provide reasonable notice about a planned cleanup, as well as opportunities for the public to comment on the cleanup. States and tribes should work towards securing additional funding for site-specific activities by leveraging resources from other sources such as businesses, non-profit organizations, education and training providers, and/or federal, state, tribal, and local governments;

- b. absent EPA approval, no more than \$200,000 per site assessment can be funded with section 128(a) funds, and no more than \$200,000 per site cleanup can be funded with section 128(a) funds;
- c. absent EPA approval, the state/tribe may not use funds awarded under this agreement to assess and/or clean up sites owned or operated by the recipient or held in trust by the United States Government for the recipient; and
- d. assessments and cleanups cannot be conducted at sites where the state/tribe is a potentially responsible party pursuant to CERCLA section 107, except:
 - at brownfield 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 in cases where the date of acquisition of the property was on or before January 11, 2002.

Subawards are defined at 2 CFR 200.92 and may not be awarded to for-profit organizations. If the recipient plans on making any subawards under the cooperative agreement then they become a pass-through entity. As the pass-through entity, the recipient must report on its subaward monitoring activities under 2 CFR 200.331(d). Additional reporting requirements for these activities will be included in the cooperative agreement. In addition, subawards cannot be provided to entities that may be potentially responsible parties (pursuant to CERCLA section 107) at the site for which the assessment or cleanup activities are proposed to be conducted, except:

1. at brownfields sites contaminated by a controlled substance as defined in CERCLA section 101(39)(D)(ii)(I); or
 2. 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 in cases where the date of acquisition of the property was on or before January 11, 2002.
2. Limitations on the amount of funds used for site-specific activities and waiver process

States and tribes may use section 128(a) funds for site-specific activities that improve state or tribal capacity but the amount recipients may request for site-specific assessments and cleanups may not exceed 50% of the total amount of funding.¹³ In order to exceed the 50% site-specific funding limit, a state or tribe must submit a waiver request. The total amount of the site-specific request may not exceed the recipient's total funding level for the previous year. The funding request must include a brief justification describing the reason(s) for spending more than 50% of an annual allocation on site-specific activities. An applicant, when requesting a waiver, must include the following information in the written justification:

¹³ Oversight of assessment and cleanup activities performed by responsible parties (other than the state or tribe) does not count toward the 50% limit.

- total amount requested for site-specific activities;
- percentage of the site-specific activities (assuming waiver is approved) in the total budget;
- site-specific activities that will be covered by this funding. If known, provide site specific information and describe how work on each site contributes to the development or enhancement of your state/tribal site response program. EPA recognizes the role of response programs to develop and provide capacity in distressed, environmental justice, rural or tribal communities, and encourages prioritization for site-specific activities in those communities. Further explain how the community will be (or has been) involved in prioritization of site work and especially those sites where there is a potential or known significant environmental impact to the community;
- an explanation of how this shift in funding will not negatively impact the core programmatic capacity (i.e., the ability to establish/enhance the four required elements of a response program) and how the core program activities will be maintained in spite of an increase in site-specific work. Recipients must demonstrate that they have adequate funding from other sources to effectively carry out work on the four elements for EPA to grant a waiver of the 50% limit on using 128(a) funds for site-specific activities; and
- an explanation as to whether the sites to be addressed are those for which the affected community(ies) has requested work be conducted (refer to Section VII.A Overview of Funding for more information).

EPA Headquarters will review waiver requests based on the information in the justification and other information available to the Agency. EPA will inform recipients whether the waiver is approved.

3. Uses related to site-specific activities at petroleum brownfield sites

States and tribes may use section 128(a) funds for activities that establish and enhance response programs addressing petroleum brownfield sites. Subject to the restrictions listed above (see Section VII.D.1) for all site-specific activities, the costs of site-specific assessments and cleanup activities at petroleum contaminated brownfield sites defined in CERCLA section 101(39)(D)(ii)(II), are both eligible and 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 brownfield sites contaminated by petroleum to the extent allowed under CERCLA section 104(k)(3).

4. Additional Examples of Eligible Site-Specific Activities

Other eligible uses of funds for site-specific related include, but are not limited to, the following activities:

- technical assistance to federal brownfields cooperative agreement recipients;
- development and/or review of quality assurance project plans (QAPPs); and
- entering data into the Assessment Cleanup and Redevelopment Exchange System (ACRES) database

E. Uses related to activities at “non-brownfield” sites

Other uses not specifically referenced in this guidance may also be eligible and allowable. Recipients should consult with their regional state or tribal contact for additional guidance. Costs incurred for activities at non-brownfield sites may be eligible and allowable if such activities are included in the state's or tribe's work plan. *Direct assessment and cleanup activities may only be conducted on eligible brownfield sites, as defined in CERCLA section 101(39).*

VIII. GENERAL PROGRAMMATIC GUIDELINES FOR 128(a) GRANT FUNDING REQUESTS

Funding authorized under CERCLA section 128(a) is awarded through a cooperative agreement¹⁴ between EPA and a state or a tribe. The program administers cooperative agreements under the Uniform Administrative Requirements, Cost Principles and Audit requirements for Federal Awards regulations for all entity types including states, tribes, and local governments found in the Code of Federal Regulations at 2 CFR Part 200 and any applicable EPA regulations in Title 2 CFR Subtitle B—Federal Agency Regulations for Grants and Agreements Chapter 15 as well as applicable provisions of 40 CFR Part 35 Subparts A and B. Under these regulations, the cooperative agreement recipient for a section 128(a) grant is the government to which a cooperative agreement is awarded and which is accountable for use of the funds provided. The cooperative agreement recipient is the legal entity even if only a particular component of the entity is designated in the cooperative agreement award document. Further, unexpended balances of cooperative agreement funds are subject to restrictions under 40 CFR 35.118 and 40 CFR 35.518. EPA allocates funds to state and tribal response programs consistent with 40 CFR 35.420 and 40 CFR 35.737.

A. 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.

B. Maximum funding request

For Fiscal Year 2017, EPA will consider funding requests up to a maximum of \$1.0

¹⁴A cooperative agreement is an agreement to a state/tribe that includes substantial involvement by EPA on activities described in the work plan which may include technical assistance, collaboration on program priorities, etc.

million per state or tribe. Please note the CERCLA 128(a) program's annual budget has remained relatively the same since 2003 while demand has increased over time. Due to the increasing number of entities requesting funding, it is likely that the FY17 states and tribal individual funding amounts will be less than the FY16 individual funding amounts.

C. 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. 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.

D. Separate cooperative agreements for the capitalization of RLFs using Section 128(a) funds

If a portion of the section 128(a) grant funds requested will be used to capitalize a revolving loan fund for cleanup, pursuant to section 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 must, 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).

E. Authority to manage a revolving loan fund program

If a state or tribe chooses to use its section 128(a) funds to capitalize a revolving loan fund program, the state or tribe must have the lead authority to manage the program (e.g., hold loans, make loans, enter into loan agreements, collect repayment, access and secure the site in event of an emergency or loan default). If the agency/department listed as the point of contact

for the section 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.

F. Section 128(a) cooperative agreements can be part of a Performance Partnership Grant (PPG)

States and tribes may include section 128(a) cooperative agreements in their PPG as described in 69 Fed. Reg. 51,756 (2004). Section 128(a) funds used to capitalize an RLF or purchase environmental insurance or develop a risk sharing pool, an indemnity pool, or insurance mechanism to provide financing for response actions under a state or tribal response program are not eligible for inclusion in the PPG.

G. 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. While not prohibited, pre-award costs are subject to 40 CFR 35.113 and 40 CFR 35.513.

H. 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 in Section V. EPA will not fund state or tribal response program annual work plans if EPA determines that these elements 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, on progress reports, or on EPA's review of the state or tribal response program.

I. 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 in Section VI and below, exists and is being maintained.¹⁵ Specifically for:

- states or tribes that received initial funding prior to FY16: Requests for FY17 funds will not be accepted from states or tribes that fail to demonstrate, by the December 31, 2016 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 FY16 cooperative agreement that prohibited drawdown of FY16 funds prior to meeting the 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; and
- states or tribes that received initial funding in FY16: By the time of the actual FY17 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 FY17 cooperative agreement that prohibits the drawdown of FY17 funds until the public record requirement is met).

J. Demonstration of significant utilization of prior years' funding

States and tribes should be aware that EPA and its Congressional appropriations committees place significant emphasis on the utilization of prior years' funding. Unused funds prior to FY16 will be considered in the allocation process. Existing balances of cooperative agreement funds as reflected in EPA's Financial Data Warehouse may result in an allocation amount below a recipient's request for funding or, if appropriate deobligation and reallocation by

¹⁵ For purposes of 128(a) funding, the state's or tribe's public record applies to that state's or tribe's response program(s) that utilized the section 128(a) funding.

EPA Regions as provided for in 40 CFR 35.118 and 40 CFR 35.518.

EPA Regional staff will review EPA’s Financial Database Warehouse to identify the amount of remaining prior year(s) funds. The requestor should work, as early as possible, with both their own finance department, and with their Regional Project Officer to reconcile any discrepancy between the amount of unspent funds showing in EPA’s system, and the amount reflected in the recipient’s records. The recipient should obtain concurrence from the Region on the amount of unspent funds requiring justification by the deadline for this request for funding.

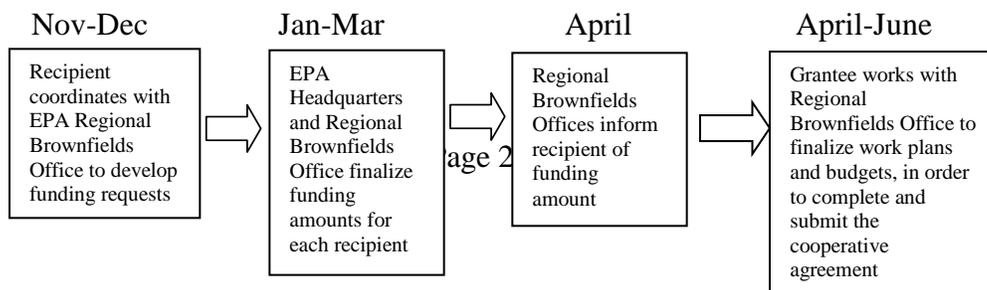
K. Allocation system and process for distribution of funds

After the December 31, 2016, request deadline, EPA’s Regional Offices will submit summaries of state and tribal requests to EPA Headquarters. Before doing so, 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, and scope of the perceived need for funding (e.g., size of state or tribal jurisdiction or the proposed work plan balanced against capacity of the program, amount of current year funding, funds remaining from prior years, etc).

After receipt of the regional recommendations, EPA Headquarters will consolidate requests and make decisions on the final funding allocations.

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.

Please refer to process flow chart below (dates are estimates and subject to change):



IX. INFORMATION TO BE SUBMITTED WITH THE FUNDING REQUEST

A. Summary of planned use of FY17 funding

All states and tribes requesting FY17 funds must submit (to their regional brownfields contact, shown on the last page of this guidance) a draft work plan of the funds with associated dollar amounts. Please contact your regional contact listed on page 29 or visit www.epa.gov/brownfields/brownfields-comprehensive-environmental-response-compensation-and-liability-act-cercla for a sample draft work plan

For entities which received CERCLA 128(a) funding in previous years, respond to the following:

1. Funding Request.

- a. Prepare a draft work plan and budget for your FY17 funding request. The funding requested should be reasonably spent in one year. The requestor should work, as early as possible, with their EPA regional program contact to ensure that the funding amount requested and related activities are reasonable.
- b. In your funding request, include the prior years' funding amount. Include any funds that you, the recipient, have not received in payments (i.e., funds EPA has obligated for grants that remain in EPA's Financial Data Warehouse). EPA will take into account these funds in the allocation process when

determining the recipient's programmatic needs. The recipient should include a detailed explanation and justification of prior year funds that remain in EPA's Financial Data Warehouse. The recipient should consult with the region regarding the amount of unspent funds which require explanation to ensure they have addressed the full amount of any remaining balance.

- c. If you do not have an MOA with EPA, demonstrate how your program includes, or is taking reasonable steps to include, the four elements described in Section VI.

For tribal entities which have never received CERCLA 128(a) funding, respond to the following:

1. Funding Request.

- a. Describe your plan to establish a response program, why it is a priority for your tribe, and why CERCLA 128(a) funding will be beneficial to your program. If your tribe is already supported by a tribal consortia receiving CERCLA 128(a) funding, explain why additional resources are necessary.
- b. Prepare a draft work plan and budget for your first funding year. The funding requested should be reasonably spent in one year. For budget planning purposes, it is recommended that you assume funding sufficient to support 0.5 staff to establish a response program and some travel to attend regional and national trainings or events.

2. Programmatic Capability.

- a. Describe the organizational structure you will utilize to ensure sound program management to guarantee or confirm timely and successful expenditure of funds, and completion of all technical, administrative and financial requirements of the program and cooperative agreement.
- b. Include a brief description of the key qualifications of staff to manage the response program and/or the process you will follow to hire staff to manage the response program. If key staff is already in place, include their roles, expertise, qualifications, and experience.
- c. Discuss how this response program fits into your current environmental program(s). If you don't have an environmental program, describe your process to develop, or interest to start one.
- d. Describe if you have had adverse audit findings. If you had problems with the administration of any grants or cooperative agreements, describe how you have corrected, or are correcting, the problems.

X. 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. Each of the subsections below summarizes the basic terms and conditions, and related reporting that will be incorporated into your cooperative agreement.

A. Progress reports

In accordance with 2 CFR 200.328 and any EPA specific regulations, state and tribes must provide progress reports meeting the terms and conditions of the cooperative agreement negotiated. 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 or tribe accomplishments and environmental outputs associated with the approved budget and work plan. Reports should also provide an accounting of 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 related to establishing or, if already established, maintaining the public record. Depending upon the activities included in the state's or tribe's work plan, the recipient may also need to report on the following:

1. *Interim and final progress reports.* Reports must prominently display the following information as reflected in the current EPA strategic plan: Strategic Plan Goal 3: Cleaning Up Communities and Advancing Sustainable Development; Strategic Plan Objective 3.1: Promote Sustainable and Livable Communities; and Work plan Commitments and Timeframes. EPA's strategic plan can be found on the internet at <http://www.epa.gov/planandbudget/strategicplan.html>.
2. *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); and
 - 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.

3. *Reporting for site-specific assessment or cleanup activities.* Recipients with work plans that include funding for *brownfields site assessment or cleanup* must input information required by the OMB-approved Property Profile Form into the ACRES database for each site

assessment and cleanup. In addition, recipients must report how they provide the affected community with prior notice and opportunity for meaningful participation as per CERCLA section 128(a)(2)(C)(ii), on proposed cleanup plans and site activities. For example, EPA strongly encourages states and tribes to seek public input regarding the priority of sites to be addressed and to solicit input from local communities, especially potential environmental justice communities, communities with a health risk related to exposure to hazardous waste or other public health concerns, economically disadvantaged or remote communities, and communities with limited experience working with government agencies.

4. *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; and
- number of staff conducting oversight audits, providing technical assistance, or conducting other oversight activities.

5. *Reporting required when using funding for an RLF.* Recipients with work plans that include funding for a revolving loan fund must include the information required by the terms and conditions for progress reporting under CERCLA section 104(k)(3) RLF cooperative agreements.

6. *Reporting environmental insurance.* Recipients with work plans that include funding for

environmental insurance must report:

- number and description of insurance policies purchased (e.g., name of insurer, type of coverage provided, dollar limits of coverage, any buffers or deductibles, category and identity of insured persons, premium, first dollar or umbrella, whether 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); and
- the amount of claims paid by insurers to policy holders.

The regional offices may also request that 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.

B. Reporting of program activity levels

States and tribes must report, by December 31, 2016, a summary of the *previous federal fiscal year's* work (October 1, 2015 through September 30, 2016). The following information must be submitted to your regional project officer:

- environmental programs where CERCLA section 128(a) funds are used to support capacity building (general program support, non-site-specific work). Indicate as appropriate from the

following:

Brownfields

Underground Storage Tanks/Leaking Underground Storage Tanks

Federal Facilities

Solid Waste

Superfund

Hazardous Waste Facilities

VCP (Voluntary Cleanup Program, Independent Cleanup Program, etc.)

Other _____;

- number of properties (or sites) enrolled in a response program during FY16;
- number of properties (or sites) where documentation indicates that cleanup work is complete and all required institutional controls (IC's) are in place, or not required;
- total number of acres associated with properties (or sites) in the previous bullet;
- number of properties where assistance was provided, but the property was not enrolled in the response program (OPTIONAL);
- date that the public record was last updated;
- Estimated total number of properties (or sites) in your brownfields inventory;
- Number of audits/inspections/reviews/other conducted to ensure engineering controls and institutional controls are still protective; and
- Did you develop or revise legislation, regulations, codes, guidance documents or policies related to establishing or enhancing your Voluntary Cleanup Program/Response Program during FY16? If yes, please indicate the type and whether it was new or revised.

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

C. Reporting of public record

All recipients must report, as specified in the terms and conditions of their cooperative agreement, and in Section VIII.I of this guidance, 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., website or other public database to meet the public record requirement. Recipients reporting may only be required to demonstrate that the public record a) exists and is up-to-date, and b) is adequate. A public record must, as appropriate, include the following information:

A list of sites at which response actions have been completed in the past year 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;
- type of institutional control(s) 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.); and
- size of the site in acres.

A list of sites planned to be addressed by the state or tribal response program in the coming year 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;
- type of the institutional control(s) 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.); and
- size of the site in acres

D. Award administration information

1. Subaward and executive compensation reporting

Applicants must ensure that they have the necessary processes and systems in place to comply with the subaward and executive total compensation reporting requirements established under OMB guidance at 2 CFR Part 170, unless they qualify for an exception from the requirements, should they be selected for funding.

2. System for Award Management (SAM) and Data Universal Numbering System (DUNS)

Requirements

Unless exempt from these requirements under OMB guidance at 2 CFR Part 25 (e.g., individuals), applicants must:

1. Be registered in SAM prior to submitting an application or proposal under this announcement. SAM information can be found at <https://www.sam.gov/portal/public/SAM/>;
2. Maintain an active SAM registration with current information at all times during which they have an active federal award or an application or proposal under consideration by an agency; and
3. Provide their DUNS number in each application or proposal submitted to the agency. Applicants can receive a DUNS number, at no cost, by calling the dedicated toll-free DUNS Number request line at 1-866-705-5711, or visiting the D&B website at: <http://www.dnb.com>.

If an applicant fails to comply with these requirements, it will affect their ability to receive the award.

Please note that the Central Contractor Registration (CCR) system has been replaced by the System for Award Management (SAM). To learn more about SAM, go to [SAM.gov](https://www.sam.gov/portal/public/SAM/) or <https://www.sam.gov/portal/public/SAM/>.

3. Submitting an application via Grants.gov

If funding is provided it will be provided through a cooperative agreement award. All cooperative agreement applications for non-competitive assistance agreements must be submitted using Grants.gov. Below is the information that the applicant will use to submit their State and Tribal Response Program Grant applications via Grants.gov:

CDFA number: 66.817

Funding Opportunity Number (FON): EPA-CEP-02

To learn more about the Grants.gov submission requirements, go to

http://www.epa.gov/ogd/grants_gov_submission_requirement.htm.

4. Use of funds

An applicant that receives an award under this announcement is expected to manage assistance agreement funds efficiently and effectively, and make sufficient progress towards completing the project activities described in the work-plan in a timely manner. The assistance agreement will include terms and conditions related to implementing this requirement.

REGIONAL STATE AND TRIBAL BROWNFIELDS CONTACTS

REGION	STATE	TRIBAL
1 CT, ME, MA, NH, RI, VT	James Byrne 5 Post Office Square, Suite 100 (OSRR07-2) Boston, MA 02109-3912 Phone (617) 918-1389 Fax (617) 918-1294	AmyJean McKeown 5 Post Office Square, Suite 100 (OSRR07-2) Boston, MA 02109-3912 Phone (617) 918-1248 Fax (617) 918-1294
2 NJ, NY, PR, VI	John Struble 290 Broadway, 18th Floor New York, NY 10007-1866 Phone (212) 637-4291 Fax (212) 637-3083	Phillip Clappin 290 Broadway, 18th Floor New York, NY 10007-1866 Phone (212) 637-4431 Fax (212) 637-3083
3 DE, DC, MD, PA, VA, WV	Michael Taurino 1650 Arch Street (3HS51) Philadelphia, PA 19103 Phone (215) 814-3371 Fax (215) 814-3274	
4 AL, FL, GA, KY, MS, NC, SC, TN	Nicole Comick Bates 61 Forsyth Street, S.W, 10TH FL (9T25) Atlanta, GA 30303-8960 Phone (404) 562-9966 Fax (404) 562-8788	Olga Perry 61 Forsyth Street, S.W, 10TH FL (9T25) Atlanta, GA 30303-8960 Phone (404) 562-8534 Fax (404) 562-8788
5 IL, IN, MI, MN, OH, WI	Jan Pels 77 West Jackson Boulevard (SB-7J) Chicago, IL 60604-3507 Phone (312) 886-3009 Fax (312) 692-2161	Rosita Clarke-Moreno 77 West Jackson Boulevard (SB-7J) Chicago, IL 60604-3507 Phone (312) 886-7215 Fax (312) 697-2075
6 AR, LA, NM, OK, TX	Amber Perry 1445 Ross Avenue, Suite 1200 (6SF) Dallas, TX 75202-2733 Phone (214) 665-3172 Fax (214) 665-6660	Amber Perry 1445 Ross Avenue, Suite 1200 (6SF) Dallas, TX 75202-2733 Phone (214) 665-3172 Fax (214) 665-6660
7 IA, KS, MO, NE	Susan Klein 11201 Renner Boulevard (SUPRSTAR) Lenexa KS 66219 Phone (913) 551-7786 Fax (913) 551-9786	Jennifer Morris 11201 Renner Boulevard (SUPRSTAR) Lenexa KS 66219 Phone (913) 551-7341 Fax (913) 551-9341
8 CO, MT, ND, SD, UT, WY	Christina Wilson 1595 Wynkoop Street (EPR-B) Denver, CO 80202-1129 Phone (303) 312-6706 Fax (303) 312-6065	Barbara Benoy 1595 Wynkoop Street (8EPR-SA) Denver, CO 80202-1129 Phone (303) 312-6760 Fax (303) 312-6962
9 AZ, CA, HI, NV, AS, GU, MP	Eugenia Chow 75 Hawthorne St. (SFD-6-1) San Francisco, CA 94105 Phone (415) 972-3160 Fax (415) 947-3520	Jose Garcia, Jr. 600 Wilshire Blvd, Suite 1460 Los Angeles, CA 90017 Phone (213) 244-1811 Fax (213) 244-1850
10 AK, ID, OR, WA	Mary K. Goolie 222 West 7th Avenue #19 (AOO) Anchorage, AK 99513 Phone ((907) 271-3414 Fax (907) 271-3424	Mary K. Goolie 222 West 7th Avenue #19 (AOO) Anchorage, AK 99513 Phone ((907) 271-3414 Fax (907) 271-3424

XI. 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 review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011). Because this 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. 601 et seq.) 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. This action does not create new binding legal requirements that substantially and directly affect Tribes under Executive Order 13175 (63 FR 67249, November 9, 2000). This action does not have significant Federalism implications under Executive Order 13132 (64 FR 43255, August 10, 1999). Because this action has been exempted from review under Executive Order 12866, this action is not subject to Executive Order 13211, entitled Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997). This action does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 et seq., nor does it require any special considerations under Executive Order 12898, entitled Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (59 FR 7629, February 16, 1994). 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. 272 note) do not apply. 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. Because this final action does not contain legally binding requirements, it is not subject to the Congressional Review Act.

Dated: October 13, 2016.

Gail Cooper,

Deputy Director, Office of Brownfields and Land Revitalization,

Office of Land and Emergency Management.

[FR Doc. 2016-25770 Filed: 10/24/2016 8:45 am; Publication Date: 10/25/2016]