

LCB File No. R084-04

**PROPOSED REGULATION OF THE STATE
ENVIRONMENTAL COMMISSION**

Petition: 2004-19

Brownfields Cleanup Revolving Loan Fund

EXPLANATION – Matter in *italics* is new; matter in brackets ~~[omitted material]~~ is material to be omitted

AUTHORITY: §§1-23, NRS 459.892

Section 1. Chapter 459 of NAC is hereby amended by adding thereto the provisions set forth as sections 2 to 23, inclusive, of this regulation.

Sec. 2. *As used in sections 2 to 23, inclusive, of this regulation, unless the context otherwise requires, the words and terms defined in sections 3 to 13, inclusive, of this regulation have the meanings ascribed to them in those sections.*

Sec. 3. *“Applicant” means any entity which has submitted an application on a form prescribed by the Division for financial assistance from the fund.*

Sec. 4. *“Brownfields site” has the meaning ascribed to it in 42 U.S.C. §9601.39.*

Sec. 5. *“Corrective action” means any action taken at a site pursuant to requirements in NAC 445A.226 to NAC 445A.22755.*

Sec. 6. *“Disadvantaged business” means a business owned or controlled by women or members of a racial or ethnic minority group.*

Sec. 7. *“Eligible entity” means any of the entities eligible to receive sub-grants from the fund listed in Section 17 (2).*

Sec. 8. *“Fund” means the Fund for Brownfields Projects created pursuant to NRS 459.878.*

Sec. 9. *“Hazardous substance” has the meaning ascribed to it in NRS 459.430.*

Sec. 10. *“Property” means real property located in this state that is clearly defined in an application for a loan or sub-grant from the fund.*

Sec. 11. *“Prospective purchaser” means a entity who is not a responsible party and who has entered into a contract, or holds an option, to purchase a property for its fair market value in a transaction at arm’s length and who satisfies the requirements set forth in NRS 459.930.*

Sec. 12. *“Recipient” means an entity that receives financial assistance from the fund.*

Sec. 13. *“Voluntary Cleanup Program” means the Program for Voluntary Cleanup of Hazardous Substances and Relief from Liability as created in NRS 459.610 to 459.658.*

Sec 14. Applicant Eligibility for loan program

1. An applicant is ineligible to receive a loan from the fund if the applicant

a) is subject to a pending investigation or ongoing enforcement action of the Federal Government pursuant to the Federal Resource Conservation and Recovery Act, 42 USC Sec. 6901 et seq., or the Comprehensive Environmental Response, Compensation, and Liability Act, 42 USC Sec. 9601 et seq.;

b) is subject to a pending investigation or ongoing enforcement action of the division with respect to the Property; or

c) was an owner or operator of the Property who caused or contributed to the release of the hazardous substance which is the subject of the cleanup using a loan from the fund.

2. If the applicant is not the property owner, the applicant must demonstrate

a) an option to purchase the Property, and the applicant must provide a copy of the written option to purchase; or

b) that the property owner agrees to use the Property as security interest for the loan.

3. If the applicant is a public entity, they must demonstrate that they have the legal authority to enter into a legally binding obligation to repay.

Section 15. Property Eligibility for loan program

1. Properties must contain the site of a release of a hazardous substance, pollutant, or petroleum product and must meet the definition of a Brownfield site under the federal “Small Business Liability Relief and Brownfields Revitalization Act”.

2. Properties which are listed, proposed for listing, or eligible for listing on the National Priorities List contained in Appendix B of Part 300 of Title 40 of the Code of Federal Regulations are not eligible for funding.

3. Disposal sites, as defined in NRS 444.460, may be eligible for funding as determined by the Division only if

a) the site poses a threat to human health or the environment due to the presence of hazardous substances and is determined by the Division to present a danger beyond physical hazards;

*b) the site was closed prior to the establishment of RCRA Subtitle D regulations; and
c) corrective action is not being required by the Division under the provisions of NAC 444.7481 to 444.7499.*

4. Properties which are eligible for funding under NAC 590.700 to 590.810 “Cleanup of Discharged Petroleum” or are otherwise subject to provisions contained in NAC 459.9921 to 459.999 “Storage Tanks” are not eligible for funding, unless

a) the loan received from the fund will be used for corrective action at the Property exclusively to address hazardous substance issues which are distinct from and not co-mingled with petroleum contamination eligible for reimbursement under NAC 590.700 to 590.810;

b) the Division determines that petroleum contamination at the Property from underground storage tank releases is not eligible for funding under NAC 590.700 to 590.810 and

*i) the applicant did not cause or contribute to the release of petroleum products, and
ii) the cleanup of the petroleum contamination would lead to the protection of human health and the environment and would result in site redevelopment; or*

c) the applicant can use the funds to continue remediation of a hazardous substance which had been co-mingled with petroleum contamination beyond the point where the petroleum issues have been mitigated.

Sec. 16. Application and loan awards

1. Any individual or eligible entity may submit an application for loan funding at any time. The application must be made in a format as prescribed by the Division.

2. Any application for loan funding must include:

a) documentation of appropriate security interest in the property and source of loan repayment;

b) an agreement that the owner of the property agrees to use the property as a security interest for the loan to secure financing necessary for the completion of the corrective action;

c) documentation that the planned future development of the property is consistent with the current and reasonably foreseeable future land uses in the area;

d) an accounting of the total debt against the property on which the corrective action will be undertaken;

e) an appraisal of the estimated value of the property after all necessary corrective actions are complete;

f) a copy of a Phase I and Phase II Environmental Site Assessment which is performed consistent with division requirements or the American Society of Testing and Materials; and

g) a detailed credit history of the applicant.

3. The applicant is responsible for sending three copies of the application for review by the division.

Sec. 17. Eligibility for sub-grants from the fund

1. The Division will use up to 40% of the funds available for the Brownfields Cleanup Revolving Loan Fund as sub-grants to eligible entities. The Division will take into consideration, when deciding to make grants available, the benefit of promoting the long-term availability of funds from a revolving loan fund for remediation at Brownfield sites.

2. Applicants eligible for sub-grants from the fund include

a) a general purpose unit of local government;

b) a land clearance authority or other quasi-governmental entity that operates under the supervision and control of or as an agent of a general purpose unit of local government;

c) a regional council or group of general purpose units of local government;

d) a redevelopment agency that is chartered or otherwise sanctioned by the State;

e) an Indian Tribe; or

f) a non-profit organization.

3. Applicants ineligible for loan funding as outlined in Section 14 (1) shall be found to be ineligible for sub-grant funding.

4. In order for a Property to be eligible for sub-grant funding:

a) the Property must be owned or held in trust by the applicant, and

b) the Property must meet all eligibility requirements as outlined in Section 15 for the loan program.

Sec. 18. Grant application and award of funding

1. An eligible entity may submit an application for a sub-grant from the fund at any time.

2. An application for a sub-grant under the fund must be made in the format approved by the Division and must include the following information:

a) a demonstration that the applicant is an eligible entity;

b) a detailed description of the intended redevelopment of the project and its projected benefits; and

c) a statement of whether there is an intention to transfer ownership of the property after the corrective action is completed.

3. The Division will consider the following criteria when judging an application for the disbursement of funding as a sub-grant:

a) the extent to which a grant will facilitate the creation of, preservation of, or addition to a park, a greenway, undeveloped property, recreational property, or other property used for non-profit purposes;

b) the extent to which a grant will meet the needs of a community that has an inability to draw on other sources of funding for environmental remediation and subsequent redevelopment of the area in which a Brownfield site is located because of the small population or low income of the community; and

c) the extent to which a grant will facilitate the use or reuse of existing infrastructure.

4. The applicant shall be responsible for submitting two copies of the application for sub-grant funding for review by the Division.

Sec. 19. RLF and Brownfields liability

1. A bona-fide prospective purchaser or innocent landowner under NRS 459.930 shall not be found to be liable for response actions or cleanup at a site by the act of applying for a loan or sub-grant from the fund.

2. It may be determined by the Division that the cleanup of a property using the sub-grant from the fund is subject to the 'windfall' lien provisions of NRS 459.930 if the following conditions are met:

a) the recipient intends to dispose of the property for private development upon completion of the environmental cleanup; and

b) the Division determines it is in the best interest of the continued operation of the fund.

3. All funds recovered through the payment of a windfall lien shall be deposited in the fund for use as future sub-grants.

Sec. 20. Payment of Award, conditions of repayment, and fee for award of financial assistance

1. A fixed amount of financial assistance will be provided to a recipient to help offset costs of environmental cleanups on Brownfields properties.

2. The recipient may request payment of the entire allowance for the preparation of corrective action plans or any other eligible activities as soon as the agreement for financial assistance is signed and the money is available.

3. Conditions of financial assistance and of any repayment of such assistance must be set forth in the agreement for financial assistance between the Division and the recipient and are subject to any requirements and limitations imposed by the United States Environmental Protection Agency.

4. The recipient shall be responsible for a 20% match of the amount received either as a loan or sub-grant from the fund. The recipient will need to demonstrate through their project accounting that the match requirement is being met.

Sec. 21. Eligible uses of funds

1. A recipient may not use the funds received for any of these purposes:

a) the payment of the application fee into the State's Voluntary Cleanup program as required in NAC 459.9739;

b) the recovery of costs incurred by the Division under the Voluntary Cleanup program as required in NAC 459.9742;

c) pre-cleanup environmental response activities, such as site assessment, identification, and characterization;

d) site development and construction activities that are not corrective actions;

e) monitoring and data collection necessary to apply for, or comply with, environmental permits under other State and Federal laws, unless such a permit is a required component of the corrective action; or

f) payment of a penalty or fine.

2. A recipient may use the funds received for the preparation of a corrective action plan pursuant to NAC 445A.2271 or 445A.2273 or a remedial agreement pursuant to NRS 459.636 as long as the characterization data to support those plans were developed without the use of monies received from the fund.

3. A recipient may use funds to perform environmental cleanups conducted at a Property pursuant to the State's Voluntary Cleanup Program under NRS 459.610 or corrective actions required pursuant to NAC 445A.226 to 445A.22755 "Action Levels for Contaminated Sites".

4. Recipients shall not use the funds received to pay for any of their administrative costs related to the management of a loan or sub-grant received from the fund, though those activities which are determined to be allowable costs may be used to meet the match requirement outlined in Section 20 (4). The Division shall determine that an administrative cost is an allowable cost if it directly involves the design and monitoring of performance of a corrective action.

5. Recipients of a sub-grant from the fund shall not purchase any equipment which is greater than \$5,000. Any equipment greater than \$5,000 in cost which is necessary to conduct corrective actions at the Property shall be rented or leased by the recipient for the period necessary to complete the corrective actions.

Sec. 22. Cleanup requirements

1. A prospective purchaser who has enrolled in the Voluntary Cleanup Program and who receives a loan or sub-grant from the fund, must comply with all provisions of NRS 459.610 to 459.656 and NAC 459.973 to 459.9743.

2. Recipients undertaking cleanups with funding, either partially or fully, from the fund who are not enrolled in the Voluntary Cleanup Program must comply with all provisions outlined in NAC 445A.226 to 445A.22755 "Action Levels for Contaminated Sites".

3. Before approving a corrective action plan, submitted pursuant to NAC 445A.2271 or NAC 445A.2273, the administrator shall:

a) publish a notice and brief summary of the agreement in a newspaper of general circulation in the county where the site is located;

b) provide an electronic version of the full document available for download on the State webpage;

c) make reasonable efforts to provide personal notice to all owners and residents of property within 500 yards of the outer boundary of the property on which the work is to be performed; and

d) provide 30 days for the submission of written comments.

4. The Division may withdraw funding if it is determined that the recipient is not meeting the requirements outlined in the Voluntary Cleanup Program or NAC 445A.226 to 445A.22755.

Sec. 23. Requirements on fund recipients

1. Before a contract for financial assistance is transmitted to it for signature, a recipient must certify that it has complied and will comply with all requirements of federal law that are determined by the United States Environmental Protection Agency to apply to the operation of the fund.

2. A recipient shall:

a) establish an official file, containing an adequate record of all significant actions relating to the project;

b) establish accounts that accurately and adequately show all amounts of money:

i) received as financial assistance from the fund,

ii) received and spent on the project, and

iii) used to satisfy matching requirements under the fund;

c) establish a system of accounting which ensures that the final total costs of the project, including all direct and indirect costs, are recorded accurately;

d) establish and maintain such other accounts and records as are required by the division to comply with requirements for reporting established by the Federal Government; and

e) retain all records relating to the project for at least 3 years after final repayment of financial assistance has been made or for any longer period required by the Division.

3. Any records of a recipient relating to the project must be made available at any reasonable time for inspection or copying by any authorized representative of the division.

4. Whenever an audit is required by federal law or by an agency of the Federal Government, or whenever it determines that an audit is necessary to ensure the integrity of the fund, the division may require that an audit be performed of financial records relating to a project.

a) Any audit required must be performed at the expense of the recipient by a certified public accountant who is independent of the recipient.

b) A report of the audit must be prepared by the auditor in the form prescribed by the division.

5. Before awarding any contract for remedial services relating to a project, an applicant for financial assistance shall submit to the division, in the form prescribed by it, a request for approval of the award.

a) The division may approve the award of the contract only to the lowest responsive, responsible bidder. The division shall also review the request for approval to ensure that the applicant, his consultants, and his contractors have complied with the positive effort policies relating to disadvantaged businesses.

b) The division shall not participate in the resolution of any dispute relating to bidding. The resolution of any such dispute is the sole responsibility of the applicant. A request for approval must not be granted until any such dispute has been resolved.

6. A recipient of financial assistance shall comply with the provisions of the Davis-Bacon Act, 40 USC Sec 276a et seq., if they apply, and the provisions of NRS 338.010 to 338.090, inclusive.

a) The division shall review the final contract documents to verify that the proper federal and state wage determinations have been included.

b) The recipient is responsible for assuring compliance with all applicable labor laws.

7. An recipient of financial assistance shall comply with the requirements of federal law concerning the participation of disadvantaged businesses.

a) Each recipient of financial assistance shall attempt to comply with the fair share percentages established annually for disadvantaged businesses by the division and the United States Environmental Protection Agency. Any recipient not meeting these goals shall submit evidence of compliance with the affirmative steps identified in NAC 445A.796.

b) An applicant for financial assistance shall submit with his request for approval of an award a report, in the form prescribed by the division, of participation by disadvantaged businesses. If the low bidder on any remediation contract does not meet the fair share requirements for disadvantaged businesses, the applicant shall submit to the division evidence of compliance by the bidder with the affirmative steps identified in NAC 445A.796.

8. If the contractor for a project awards any subcontracts relating to the project, he shall take affirmative steps to ensure that disadvantaged businesses are used to the extent possible as sources of supplies, equipment, materials, and services. These affirmative steps must include:

- a) including such businesses on solicitation lists;*
- b) assuring that such businesses are solicited if they are potential sources;*
- c) dividing total requirements, if economically feasible, into small tasks or quantities to permit maximum participation by disadvantaged businesses; and*
- d) using the services of Nevada Economic Development Company and the Nevada Office of Small Business to locate disadvantaged businesses capable of performing the work to be subcontracted.*

9. During the implementation of corrective actions or post-corrective action monitoring, the recipient shall permit any authorized representative of the Division to enter onto the site of the project at any reasonable time.

10. A copy of each executed change order must be submitted to the Division.

11. Recipients of a loan or sub-grant from the fund must comply with the requirements of NAC 459.970 to 459.9729 the “Certification of Certain Consultants and Contractors.”