

**CORRECTED ADOPTED REGULATION OF THE
STATE ENVIRONMENTAL COMMISSION**

LCB File No. R126-24

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

AUTHORITY: §§ 1-15, NRS 459.892.

A REGULATION relating to brownfield sites; revising the activities for which financial assistance from the Fund for Brownfield Projects may be used; revising the entities eligible to receive subgrants from the Fund; revising the requirements for a site to be eligible for financial assistance from the Fund; revising the maximum amount of money in the Fund that the Division of Environmental Protection of the State Department of Conservation and Natural Resources may use to make subgrants to eligible entities; authorizing a recipient of financial assistance from the Fund to satisfy a requirement to match such assistance by sharing costs through certain contributions to an activity; authorizing a recipient of financial assistance from the Fund to obtain an exemption from cost-sharing requirements under certain circumstances; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Existing law creates the Fund for Brownfield Projects and requires the Division of Environmental Protection of the State Department of Conservation and Natural Resources to administer the Fund. (NRS 459.878) Under existing law, money in the Fund must be used only to finance the cleanup of brownfield sites or provide other assistance to brownfield projects. (NRS 459.880) Existing law authorizes the State Environmental Commission to adopt regulations to carry out the provisions of existing law governing the Fund. (NRS 459.892)

Existing regulations establish two forms of financial assistance from the Fund: (1) a loan from the Fund; and (2) a subgrant from the Fund to an eligible entity. (NAC 459.99917, 459.9993) **Section 9** of this regulation removes a requirement that 40 percent of the money in the Fund is the maximum amount of money in the Fund that the Division may use to make subgrants, thereby authorizing the Division to establish the amount of money in the Fund that will be used to make subgrants, subject to any restrictions on grants received by the Division. (NAC 459.99929)

Under existing law and regulations: (1) a person, including, without limitation, certain private entities and governmental entities, is authorized to apply for a loan from the Fund with respect to a property that meets certain criteria; and (2) only an eligible entity is authorized to apply for a subgrant from the Fund with respect to such a property. (NRS 0.039; NAC 459.9992, 459.99926, 459.9993) **Section 7** of this regulation revises the eligible entities authorized to apply for a subgrant from the Fund by: (1) removing the exclusion of governmental entities created by a state legislature, thereby authorizing such entities to apply for a subgrant from the Fund; and

(2) prohibiting organizations exempt from taxation under section 501(c)(4) of the Internal Revenue Code that engage in certain lobbying activities with respect to the Federal Government from being eligible for a subgrant from the Fund. (NAC 459.99916) **Section 8** of this regulation revises the criteria for a property that was the site of a release of certain hazardous substances to be eligible for a loan or subgrant from the Fund.

Under existing regulations, to receive a subgrant from the Fund with respect to a property, an eligible entity is required to own the property or hold the property in trust. (NRS 459.99929) **Section 9** removes this requirement, and **section 5** of this regulation authorizes an eligible entity to obtain a loan or subgrant from the Fund before a property is acquired and use the loan or subgrant to pay for certain activities, including, without limitation, engaging in “community involvement,” as defined in **section 2** of this regulation, “site assessment,” as defined in **section 4** of this regulation, planning, research and training.

Existing regulations prohibit a recipient from using money received as a loan or subgrant from the Fund for the payment of certain costs. (NAC 459.99933) **Section 12** of this regulation revises the costs which a recipient is prohibited from paying with money received as a loan or subgrant from the Fund. **Section 5** establishes that the costs that may be paid using financial assistance from the Fund are “funded activities,” as defined in **section 3** of this regulation. **Sections 10 and 12-15** of this regulation make conforming changes to reflect the use of the term “funded activities” to describe those activities.

Existing regulations require a recipient of a loan or subgrant from the Fund to provide matching money equal to at least 20 percent of the amount received as financial assistance from the Fund. (NAC 459.99932) **Section 11** of this regulation authorizes a recipient to comply with this requirement by contributing money, labor, material or services from a non-federal source. **Section 11** further authorizes the Division to grant an exemption from this cost-sharing requirement if the Division finds that a hardship exists that makes such an exemption necessary.

Section 6 of this regulation makes the definitions in existing regulations governing financial assistance from the Fund applicable to the provisions adopted by this regulation, and also makes the definitions adopted in **sections 2-4** applicable to those existing regulations and the provisions adopted by this regulation.

Section 1. Chapter 459 of NAC is hereby amended by adding thereto the provisions set forth as sections 2 to 5, inclusive, of this regulation.

Sec. 2. *“Community involvement” means the process through which community members and stakeholders are engaged in the planning and decision-making process in determining the reuse and redevelopment goals of a brownfield site.*

Sec. 3. *“Funded activities” means activities performed by a recipient of financial assistance from the Fund, including, without limitation, identifying inventory, community*

involvement, site preparation, site assessment, corrective action, monitoring and any other activity approved by the Division for a brownfield site.

Sec. 4. *“Site assessment” means the collection and evaluation of data adequate to determine the presence or potential presence of a hazardous substance, pollutant or contaminant at a property.*

Sec. 5. 1. *The Division will provide financial assistance to eligible entities for funded activities on brownfield sites in accordance with NRS 459.880 and the terms and conditions of any federal grant received to capitalize the Fund.*

2. An eligible entity may apply for financial assistance through the Fund before a property is acquired to support and conduct any activities necessary to determine the feasibility and benefit of a qualified brownfield site for the proposed plan of redevelopment and to gain due diligence liability protections. Funded activities permitted before such an acquisition include, without limitation, community involvement, planning, research, site assessment and training.

Sec. 6. NAC 459.9991 is hereby amended to read as follows:

459.9991 As used in NAC 459.9991 to 459.99939, inclusive, *and sections 2 to 5, inclusive, of this regulation*, unless the context otherwise requires, the words and terms defined in NAC 459.99911 to 459.99923, inclusive, *and sections 2, 3 and 4* have the meanings ascribed to them in those sections.

Sec. 7. NAC 459.99916 is hereby amended to read as follows:

459.99916 “Eligible entity” has the meaning ascribed to it in 42 U.S.C. § 9604(k)(1), except that the term:

1. Includes a nonprofit organization; and

2. Does not include:

(a) ~~A government entity created by a state legislature;~~

~~(b)~~ An Alaska Native Regional Corporation or an Alaska Native Village Corporation, as defined in the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 et seq., or the Metlakatla Indian Community; ~~for~~

~~(e)~~ (b) Any person who is otherwise ineligible to receive a loan from the Fund pursuant to NAC 459.99924 ~~for~~; or

(c) Any organization exempt from taxation under section 501(c)(4) of the Internal Revenue Code that engages in any lobbying activity, as defined in 2 U.S.C. § 1602.

Sec. 8. NAC 459.99925 is hereby amended to read as follows:

459.99925 1. Except as otherwise provided in this section, for an applicant to be eligible for a loan from the Fund with respect to a property, the property must contain the site of a release of a hazardous substance, pollutant or ~~petroleum product~~ *contaminant* and qualify as a brownfield site.

2. An applicant may be eligible for a loan from the Fund with respect to a disposal site only if the Division determines that:

(a) The disposal site poses a threat to human health or the environment because of the presence of a hazardous substance and presents a danger to human health beyond any physical hazards that may be present at the disposal site;

(b) The disposal site was closed before the enactment of the Hazardous and Solid Waste Amendments of 1984, 42 U.S.C. §§ 6901 et seq.; and

(c) Corrective action is not required by the Division pursuant to NAC 444.7481 to 444.7499, inclusive.

3. An applicant is not eligible for a loan from the Fund with respect to a property which is eligible for funding pursuant to NAC 445C.200 to 445C.320, inclusive, or is otherwise subject to NAC 459.9921 to 459.999, inclusive, unless:

(a) The loan will be used for corrective action on the property exclusively to address a hazardous substance which is distinct from, and not commingled with, petroleum contamination that is eligible for reimbursement pursuant to NAC 445C.200 to 445C.320, inclusive;

(b) The Division determines that the applicant is not eligible for funding pursuant to NAC 445C.200 to 445C.320, inclusive, for petroleum contamination on the property and:

(1) The applicant did not cause or contribute to the release of petroleum products; and

(2) The cleanup of the petroleum contamination would protect human health and the environment and result in the redevelopment of the site; or

(c) The loan will be used to continue the remediation of a hazardous substance commingled with petroleum contamination after the issues relating to the petroleum contamination have been mitigated.

4. As used in this section, “disposal site” has the meaning ascribed to it in NRS 444.460.

Sec. 9. NAC 459.99929 is hereby amended to read as follows:

459.99929 1. ~~{The Division may use not more than 40 percent of the money in the Fund to make subgrants to eligible entities.}~~ In determining whether to make a subgrant, the Division shall consider the benefit of promoting the long-term availability of money from the Fund for remediation at brownfield sites.

2. An applicant may be eligible for a subgrant from the Fund with respect to a property if ~~1. (a) The property is owned or held in trust by the applicant; and~~

~~—(b) The~~ *the* property is of a type described in NAC 459.99925 with respect to which an applicant may be eligible for a loan from the Fund.

Sec. 10. NAC 459.99931 is hereby amended to read as follows:

459.99931 Upon completion of ~~{the cleanup of a brownfield site}~~ *all funded activities* with respect to which a subgrant has been made, the eligible entity that received the subgrant shall close out the account for the subgrant in the manner required by the Division. The eligible entity shall promptly remit to the Division for deposit in the Fund all money from the subgrant which has not been expended or committed for expenditure for ~~{the cleanup of the brownfield site}~~ *funded activities* as of the date established by the Division for closing the account.

Sec. 11. NAC 459.99932 is hereby amended to read as follows:

459.99932 1. As soon as an agreement for financial assistance between the Division and a recipient is signed and the money is available, the entire amount of the financial assistance will be paid to the recipient.

2. Conditions for the payment and any repayment of financial assistance from the Fund:

(a) Must be set forth in the agreement for financial assistance between the Division and the recipient; and

(b) Are subject to any requirements and limitations that may be imposed by the United States Environmental Protection Agency.

3. ~~{As}~~ *Except as otherwise provided in subsection 4, as* a condition of receiving financial assistance from the Fund, a recipient must agree to ~~{provide matching money}~~ *cost sharing* equal to at least 20 percent of the amount received as financial assistance from the Fund. *The cost sharing may be in the form of a contribution of money, labor, material or services from a non-*

federal source. The recipient must demonstrate through its project accounting that the requirement concerning ~~{matching money}~~ *cost sharing* is being met.

4. A recipient of financial assistance from the Fund may request an exemption from the requirements of subsection 3 on the basis of hardship. Any such request must include, without limitation, an explanation of the reason that the hardship makes the exemption necessary. The Division may grant such an exemption if the Division finds that a hardship exists that makes the exemption necessary.

Sec. 12. NAC 459.99933 is hereby amended to read as follows:

459.99933 1. A recipient may not use money received as financial assistance for the payment of:

- (a) The application fee for the program for voluntary cleanup;
- (b) The recovery by the Division of costs incurred by the Division under the program for voluntary cleanup;
- (c) ~~{Costs for precleanup environmental response activities, such as site assessment, identification and characterization;~~
- ~~—(d)} Costs for activities related to site development and construction that are not ~~{corrective actions;~~~~
- ~~—(e)} *funded activities;*~~
- (d)* Costs for monitoring and data collection that are necessary to apply for, or comply with, environmental permits required by other state or federal laws unless such a permit is a required component of the ~~{corrective action;}~~ *funded activities;* or
- ~~{(f)}~~ *(e)* A penalty or fine.

2. ~~{A recipient may use money received as financial assistance for the preparation of a plan for corrective action pursuant to NAC 445A.2271 or 445A.2273 or a remedial agreement pursuant to NRS 459.636 if the characterization data needed to support such a plan or agreement was developed without the use of the financial assistance.}~~

~~—3.}~~ A recipient shall not use money received as financial assistance to pay any of its administrative costs related to the management of the financial assistance. An administrative cost for an activity that is determined by the Division to be an allowable cost may be used to meet the requirement of ~~{matching money}~~ *cost sharing* set forth in subsection 3 NAC 459.99932. The Division shall determine an administrative cost to be an allowable cost if the administrative cost directly involves the design and monitoring of performance of a corrective action.

~~{4.}~~ 3. A recipient of a subgrant shall not use money from the subgrant to purchase any equipment which costs more than \$5,000. Any such equipment which is necessary to conduct ~~{corrective actions}~~ *funded activities* at the property must be rented or leased by the recipient for the period necessary to complete the ~~{corrective actions.}~~ *funded activities.*

Sec. 13. NAC 459.99936 is hereby amended to read as follows:

459.99936 1. Before a contract for financial assistance is transmitted to a recipient for signature, the recipient must certify that it has complied and will continue to comply with all requirements of federal law that apply to the operation of the Fund.

2. A recipient shall:

(a) Establish an official file that contains an adequate record of all significant actions relating to the ~~{brownfield site.}~~ *funded activities;*

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

(1) Received as financial assistance from the Fund;

- (2) Spent on the brownfield site; and
- (3) Used to comply with requirements concerning ~~{matching money;}~~ *cost sharing;*
- (c) Establish a system of accounting which ensures that the final total costs relating to the ~~{cleanup of the brownfield site;}~~ *funded activities*, 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 brownfield site for:
 - (1) At least 3 years after the final repayment of financial assistance or the date on which the account for the subgrant is closed out by the Division, as appropriate; or
 - (2) Such longer period as required by the Division.
- 3. All records of a recipient relating to the brownfield site must be made available at any reasonable time for inspection or copying by any authorized representative of the Division.
- 4. If an audit is required by federal law or by an agency of the Federal Government, or if the Division determines that an audit is necessary to ensure the integrity of the Fund, the Division may require an audit of the financial records of a recipient relating to a brownfield site. Such an audit must be performed at the expense of the recipient by a certified public accountant who is independent of the recipient. A report of the audit must be prepared by the auditor in the form prescribed by the Division.

Sec. 14. NAC 459.99937 is hereby amended to read as follows:

459.99937 Before a recipient may contract for ~~{remedial}~~ services relating to a ~~{brownfield site}~~ *funded activity* which involves money from the Fund, the recipient must submit to the Division, in the form prescribed by the Division, a request for approval of the contract. The

Division may approve the contract only if the contract is being awarded to the lowest responsive, responsible bidder. The Division shall review the request for approval to ensure that the recipient, its consultants and its contractors have complied with the requirements set forth in NAC 459.99938 relating to disadvantaged businesses. The Division shall not participate in the resolution of any dispute concerning bidding relating to the contract . ~~{for remedial services.}~~ The resolution of any such dispute is the sole responsibility of the recipient. The Division shall not approve a request for the approval of a contract ~~{for remedial services}~~ until all such disputes have been resolved.

Sec. 15. NAC 459.99938 is hereby amended to read as follows:

459.99938 1. A recipient shall comply with all applicable provisions of the Davis-Bacon Act, 40 U.S.C. §§ 3141 et seq., and NRS 338.010 to 338.090, inclusive. The Division shall review the final contract documents to verify that the proper determinations of wages pursuant to federal and state law have been included. The recipient is responsible for ensuring compliance with all applicable labor laws.

2. An applicant for and recipient of financial assistance shall comply with the requirements of federal law concerning the participation of disadvantaged businesses.

3. A 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 who does not meet these goals shall submit evidence of compliance with the affirmative steps set forth in subsection 5.

4. A recipient of financial assistance shall submit with his or her request for approval of a contract for ~~{remedial}~~ services *to perform funded activities* a report, in the form prescribed by the Division, of participation by disadvantaged businesses. If the low bidder on ~~{a}~~ *the* contract

~~{for remedial services}~~ does not meet the fair share requirements for disadvantaged businesses, the recipient shall submit to the Division evidence of compliance by the bidder with the affirmative steps set forth in subsection 5.

5. If the recipient awards a contract for ~~{remedial}~~ services ~~{,}~~ *to perform funded activities*, the recipient 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, without limitation:

- (a) Including such businesses on solicitation lists;
- (b) Ensuring that such businesses are solicited if they are potential sources; and
- (c) Dividing total requirements, if economically feasible, into small tasks or quantities to permit maximum participation by disadvantaged businesses.

6. During the implementation of ~~{corrective actions or the monitoring of the corrective actions}~~ *funded activities or* after they have been completed, the recipient shall permit any authorized representative of the Division to enter onto the site of the project at any reasonable time.

7. A copy of each executed change order relating to a contract for ~~{remedial services}~~ *funded activities* must be submitted to the Division.

8. A recipient shall comply with the requirements of NAC 459.970 to 459.97295, inclusive.