

PROPOSED REGULATION OF THE STATE
ENVIRONMENTAL COMMISSION

LCB File No. R084-04

June 9, 2004

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

AUTHORITY: §§1 and 2, NRS 445A.425 and 459.892; §§3-33, NRS 459.892.

A REGULATION relating to brownfield sites; establishing procedures for applying for financial assistance from the Fund for Brownfield Projects; setting forth eligibility requirements to receive such financial assistance; providing for the repayment to the Fund of unused money by a recipient of such financial assistance under certain circumstances; setting forth allowable expenditures of financial assistance from the Fund; requiring recipients of financial assistance from the Fund to keep certain accounts relating to the financial assistance; requiring the Division of Environmental Protection of the State Department of Conservation and Natural Resources to approve certain contracts for remedial services awarded by a recipient of financial assistance; conditioning the use of financial assistance on compliance by a recipient with certain statutes and regulations related to labor and the cleanup of the brownfield; and providing other matters properly relating thereto.

Section 1. NAC 445A.2271 is hereby amended to read as follows:

445A.2271 An owner or operator who is required to take corrective action pursuant to NAC 445A.227 shall submit to the Division a plan and schedule for completing the corrective action. Except as otherwise provided in NAC 445A.22715, the owner or operator shall not take any corrective action until the plan and schedule are approved by the Division. *If the owner or operator has applied for, or is receiving, financial assistance from the Fund for Brownfield Projects pursuant to NRS 459.860 to 459.892, inclusive, and sections 4 to 33, inclusive, of this regulation, the Division shall not approve the plan and schedule for completing the corrective*

action submitted pursuant to this section until the Division has complied with the requirements of subsection 2 of section 30 of this regulation.

Sec. 2. NAC 445A.2273 is hereby amended to read as follows:

445A.2273 An owner or operator who is required to take corrective action pursuant to NAC 445A.22725 shall submit to the Division a plan and schedule for completing the corrective action. The owner or operator shall not take any corrective action until the plan and schedule are approved by the Division. *If the owner or operator has applied for, or is receiving, financial assistance from the Fund for Brownfield Projects pursuant to NRS 459.860 to 459.892, inclusive, and sections 4 to 33, inclusive, of this regulation, the Division shall not approve the plan and schedule for completing the corrective action submitted pursuant to this section until the Division has complied with the requirements of subsection 2 of section 30 of this regulation.*

Sec. 3. Chapter 459 of NAC is hereby amended by adding thereto the provisions set forth as sections 4 to 33, inclusive, of this regulation.

Sec. 4. *As used in sections 4 to 33, inclusive, of this regulation, unless the context otherwise requires, the words and terms defined in sections 5 to 17, inclusive, of this regulation have the meanings ascribed to them in those sections.*

Sec. 5. *“Applicant” means any person who has submitted an application to the Division for financial assistance from the Fund.*

Sec. 6. *“Brownfield site” has the meaning ascribed to it in NRS 459.866.*

Sec. 7. *“Corrective action” means any action taken at a brownfield site pursuant to the requirements of NAC 445A.226 to 445A.22755, inclusive.*

Sec. 8. *“Disadvantaged business” means a business owned or controlled by women or members of a racial or ethnic minority group.*

Sec. 9. *“Division” means the Division of Environmental Protection of the State Department of Conservation and Natural Resources.*

Sec. 10. *“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; or

(c) Any person who is otherwise ineligible to receive a loan from the Fund pursuant to section 18 of this regulation.

Sec. 11. *“Financial assistance” means a loan or subgrant from the Fund.*

Sec. 12. *“Fund” means the Fund for Brownfield Projects created by NRS 459.878.*

Sec. 13. *“Hazardous substance” has the meaning ascribed to it in NRS 459.429.*

Sec. 14. *“Person” includes a government, governmental agency or political subdivision of a government.*

Sec. 15. *“Program for voluntary cleanup” means the program established in NRS 459.610 to 459.658, inclusive.*

Sec. 16. *“Property” means real property located in this State where a brownfield site is located.*

Sec. 17. *“Recipient” means a person, including an eligible entity, who receives financial assistance from the Fund.*

Sec. 18. *A person is ineligible to receive a loan from the Fund with respect to a property if the person:*

1. Is subject to a pending investigation or ongoing enforcement action of the Federal Government pursuant to the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901 et seq., or the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601 et seq.;

2. Is subject to a pending investigation or ongoing enforcement action of the Division with respect to the property; or

3. Was an owner or operator of the property who caused or contributed to the release of the hazardous substance which would be the subject of the cleanup using a loan from the Fund.

Sec. 19. *1. If an applicant for a loan from the Fund is not the property owner of the brownfield site, the applicant must submit with the application a copy of a written option that entitles the applicant to purchase the property.*

2. If the applicant is a governmental entity, the applicant must demonstrate that it has the legal authority to enter into a legally binding obligation to repay the loan.

Sec. 20. *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 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 590.700 to 590.790, 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 590.700 to 590.790, inclusive;

(b) The Division determines that the applicant is not eligible for funding pursuant to NAC 590.700 to 590.790, 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. 21. 1. *A person may submit an application for a loan from the Fund at any time. The application must be submitted on a form prescribed by the Division.*

2. An application for a loan from the Fund must include:

- (a) An accurate description of the property;*
- (b) Documentation of a source of loan repayment;*
- (c) An agreement that the applicant or, if the applicant does not own the property, the owner of the property will, if required pursuant to section 22 of this regulation, grant a security interest in the property to the Division to secure the financing necessary for the completion of the corrective action;*
- (d) Documentation that the planned future development of the property is consistent with the current and reasonably foreseeable future land uses in the area;*
- (e) An accounting of the total debt against the property;*
- (f) An appraisal of the estimated value of the property after all necessary corrective actions are complete;*
- (g) A copy of a phase I and phase II environmental assessment of the site which is performed in a manner consistent with the requirements established by the Division or ASTM International; and*
- (h) A detailed credit history of the applicant.*

3. *In addition to the original application, the applicant must provide two copies of the application for review by the Division.*

Sec. 22. *The Division may require an applicant for a loan from the Fund to provide collateral in an amount that is equal to the amount of the loan. The required collateral may include, without limitation, the granting to the Division of a security interest in the property for which the loan is being sought.*

Sec. 23. 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:*
(a) *The property is owned or held in trust by the applicant; and*
(b) *The property is of a type described in section 20 of this regulation with respect to which an applicant may be eligible for a loan from the Fund.*

Sec. 24. 1. *An eligible entity may submit an application for a subgrant from the Fund with respect to a property at any time.*

2. *The application must be submitted on a form prescribed by the Division and include:*
(a) *A demonstration that the applicant is an eligible entity;*
(b) *A detailed description of the intended redevelopment of the property and its projected benefits; and*
(c) *A statement as to whether there is an intention to transfer ownership of the property after the corrective action is completed.*

3. *In determining whether to approve an application for a subgrant from the Fund, the Division shall consider:*

(a) The extent to which the subgrant will facilitate the creation of, preservation of or addition to a park, greenway, undeveloped property, recreational property or other property used for nonprofit purposes;

(b) The extent to which the subgrant 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 the subgrant will facilitate the use or reuse of existing infrastructure in the community.

4. *In addition to the original application, the applicant must provide one copy of the application for review by the Division.*

Sec. 25. *Upon completion of the cleanup of a brownfield site 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 as of the date established by the Division for closing the account.*

Sec. 26. 1. *A person who, as a bona fide prospective purchaser or an innocent purchaser, is not liable for response actions or cleanup of a site pursuant to NRS 459.930 does not become liable for response actions or cleanup at the site solely because the person applied for or received financial assistance from the Fund.*

2. The Division may, pursuant to subsection 4 of NRS 459.930, seek to recover costs relating to a response action or cleanup that are incurred and unrecovered by the State of Nevada with respect to a brownfield site for which a subgrant has been made to a bona fide prospective purchaser of the brownfield site if:

(a) The bona fide prospective purchaser intends to dispose of the property for private development upon completion of the environmental cleanup; and

(b) The Division determines that the recovery of such costs is in the best interest of the continued operation of the Fund.

3. All money recovered pursuant to subsection 2 must be deposited in the Fund.

4. For the purposes of this section:

(a) “Bona fide prospective purchaser” has the meaning ascribed to it in NRS 459.930.

(b) “Innocent purchaser” has the meaning ascribed to it in NRS 459.930.

Sec. 27. 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 a condition of receiving financial assistance from the Fund, a recipient must agree to provide matching money equal to at least 20 percent of the amount received as financial

assistance from the Fund. The recipient must demonstrate through its project accounting that the requirement concerning matching money is being met.

Sec. 28. 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) 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; or

(f) 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 set forth in subsection 3 of section 27 of this*

regulation. 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. 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 at the property must be rented or leased by the recipient for the period necessary to complete the corrective actions.

Sec. 29. *1. Any cleanup of a brownfield site financed with money from the Fund by a recipient who is enrolled in the program for voluntary cleanup must be done in compliance with NRS 459.610 to 459.658, inclusive, and NAC 459.973 to 459.9743, inclusive.*

2. The Division may withdraw financial assistance paid to a recipient if the Division determines that the recipient is not complying with the requirements set forth in NRS 459.610 to 459.658, inclusive, and NAC 459.973 to 459.9743, inclusive.

Sec. 30. *1. Any cleanup of a brownfield site financed with money from the Fund by a recipient who is not enrolled in the program for voluntary cleanup must be done in compliance with NAC 445A.226 to 445A.22755, inclusive.*

2. Before approving a plan and schedule for completing the corrective action that is submitted by the recipient pursuant to NAC 445A.2271 or 445A.2273, the Division must:

(a) Publish a notice and brief summary of the plan and schedule in a newspaper of general circulation in the county where the brownfield site is located;

(b) Make an electronic version of the entire plan and schedule available on its Internet website;

(c) Make reasonable efforts to provide personal notice to all owners and residents of property located within 500 yards of the outer boundary of the property on which the corrective action is to be performed; and

(d) Provide 30 days for the submission of written comments by the public.

3. The Division may withdraw financial assistance paid to a recipient if the Division determines that the recipient is not complying with the requirements set forth in NAC 445A.226 to 445A.22755, inclusive.

Sec. 31. 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;

(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;

(c) Establish a system of accounting which ensures that the final total costs relating to the cleanup of the brownfield site, 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. 32. Before a recipient may contract for remedial services relating to a brownfield site 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 section 33 of this regulation 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. 33. 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 request for approval of a contract for remedial services a report, in the form prescribed by the Division, of participation by disadvantaged businesses. If the low bidder on a 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, 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 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 must be submitted to the Division.

8. A recipient shall comply with the requirements of NAC 459.970 to 459.9729, inclusive.