

	<p align="center"><b>U.S. ENVIRONMENTAL PROTECTION AGENCY</b></p> <p align="center"><b>Cooperative Agreement</b></p>		<b>GRANT NUMBER (FAIN):</b> 02J16401 <b>MODIFICATION NUMBER:</b> 0 <b>PROGRAM CODE:</b> BF	<b>DATE OF AWARD</b> 09/26/2022	
			<b>TYPE OF ACTION</b> New		<b>MAILING DATE</b> 09/29/2022
			<b>PAYMENT METHOD:</b> ASAP		<b>ACH#</b> X0782
			<b>RECIPIENT TYPE:</b> Municipal		
<b>RECIPIENT:</b> City of Chiloquin 127 S. First Avenue Chiloquin, OR 97624-6111 <b>EIN:</b> 93-6002137			<b>PAYEE:</b> City of Chiloquin 127 S First Avenue PO Box 196 Chiloquin, OR 97624-6111		
<b>PROJECT MANAGER</b> Teresa Foreman 127 S First Avenue PO Box 196 Chiloquin, OR 97624-6111 <b>Email:</b> chicityhall@gmail.com <b>Phone:</b> 541-783-2717		<b>EPA PROJECT OFFICER</b> Terri Griffith 1200 Sixth Avenue, Suite 155, 12-D12-1 Seattle, WA 98101 <b>Email:</b> Griffith.Terri@epa.gov <b>Phone:</b> 206-553-8511		<b>EPA GRANT SPECIALIST</b> Felicia Thomas GIAB, 17-C04 1200 Sixth Avenue, Suite 155 Seattle, WA 98101 <b>Email:</b> thomas.felicia@epa.gov <b>Phone:</b> 206-553-0249	
<b>PROJECT TITLE AND DESCRIPTION</b> City of Chiloquin Brownfield Cleanup FY2022 Cooperative Agreement - Markwardt Garage Property  Brownfields are real property, the expansion, development or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant. This agreement will provide funding to the City of Chiloquin to conduct remediation activities as authorized by CERCLA 104(k)(3) in Chiloquin, Oregon. Specifically, this agreement will provide funding to the City of Chiloquin to clean up a brownfield site. Additionally, the recipient will competitively procure (as needed) and direct a Qualified Environmental Professional to conduct environmental site activities, will create a community involvement plan and administrative record for the site(s), and will report on interim progress and final accomplishments by completing and submitting relevant portions of the Property Profile Form using EPA's Assessment, Cleanup and Redevelopment Exchange System (ACRES). The City of Chiloquin will remediate 1 brownfield site and anticipates holding 4 community meetings, finalizing 1 Analysis of Brownfield Cleanup Alternatives, and submitting 11 quarterly reports. Work conducted under this agreement will benefit the residents, business owners, and stakeholders in and near Chiloquin, Oregon. No subawards are included in this assistance agreement.					
<b>BUDGET PERIOD</b> 10/01/2022 - 09/30/2025	<b>PROJECT PERIOD</b> 10/01/2022 - 09/30/2025	<b>TOTAL BUDGET PERIOD COST</b> \$402,500.00	<b>TOTAL PROJECT PERIOD COST</b> \$402,500.00		
<p><b>NOTICE OF AWARD</b></p> <p>Based on your Application dated 11/30/2021 including all modifications and amendments, the United States acting by and through the US Environmental Protection Agency (EPA) hereby awards \$402,500.00. EPA agrees to cost-share 100.00% of all approved budget period costs incurred, up to and not exceeding total federal funding of \$402,500.00. Recipient's signature is not required on this agreement. The recipient demonstrates its commitment to carry out this award by either: 1) drawing down funds within 21 days after the EPA award or amendment mailing date; or 2) not filing a notice of disagreement with the award terms and conditions within 21 days after the EPA award or amendment mailing date. If the recipient disagrees with the terms and conditions specified in this award, the authorized representative of the recipient must furnish a notice of disagreement to the EPA Award Official within 21 days after the EPA award or amendment mailing date. In case of disagreement, and until the disagreement is resolved, the recipient should not draw down on the funds provided by this award/amendment, and any costs incurred by the recipient are at its own risk. This agreement is subject to applicable EPA regulatory and statutory provisions, all terms and conditions of this agreement and any attachments.</p>					
<b>ISSUING OFFICE (GRANTS MANAGEMENT OFFICE)</b>			<b>AWARD APPROVAL OFFICE</b>		
<b>ORGANIZATION / ADDRESS</b> U.S. EPA, Region 10 , EPA Region 10 Mail Code: 17-C04, 1200 Sixth Avenue, Suite 155 Seattle, WA 98101			<b>ORGANIZATION / ADDRESS</b> U.S. EPA, Region 10, Land, Chemicals, and Redevelopment Division R10 - Region 10 1200 Sixth Avenue, Suite 155 Seattle, WA 98101		
<p><b>THE UNITED STATES OF AMERICA BY THE U.S. ENVIRONMENTAL PROTECTION AGENCY</b></p>					
Digitally signed by Alan Lee - Grants Management Officer Digitally signed by PeggyD Johnson - Chief, Grants & Interagency Agreements Branch				<b>DATE</b> 09/26/2022	

## EPA Funding Information

FUNDS	FORMER AWARD	THIS ACTION	AMENDED TOTAL
EPA Amount This Action	\$0	\$402,500	\$402,500
EPA In-Kind Amount	\$0	\$0	\$0
Unexpended Prior Year Balance	\$0	\$0	\$0
Other Federal Funds	\$0	\$0	\$0
Recipient Contribution	\$0	\$0	\$0
State Contribution	\$0	\$0	\$0
Local Contribution	\$0	\$0	\$0
Other Contribution	\$0	\$0	\$0
<b>Allowable Project Cost</b>	<b>\$0</b>	<b>\$402,500</b>	<b>\$402,500</b>

Assistance Program (CFDA)	Statutory Authority	Regulatory Authority
66.818 - Brownfields Multipurpose, Assessment, Revolving Loan Fund, and Cleanup Cooperative Agreements	CERCLA: Secs. 104(k)(3) & 104(k)(5)(E) & 104(k)(10)(B)(iii)	2 CFR 200, 2 CFR 1500, 40 CFR 33 and 40 CFR 40

Fiscal									
Site Name	Req No	FY	Approp. Code	Budget Organization	PRC	Object Class	Site/Project	Cost Organization	Obligation / Deobligation
-	2210BDG126	22	E4	10L3AG7	000D79	4114	-	-	\$402,500
									\$402,500

## Budget Summary Page

Table A - Object Class Category (Non-Construction)	Total Approved Allowable Budget Period Cost
1. Personnel	\$0
2. Fringe Benefits	\$0
3. Travel	\$2,300
4. Equipment	\$0
5. Supplies	\$500
6. Contractual	\$398,500
7. Construction	\$0
8. Other	\$1,200
9. Total Direct Charges	\$402,500
10. Indirect Costs: 0.00 % Base	\$0
11. Total (Share: Recipient <u>0.00</u> % Federal <u>100.00</u> %)	\$402,500
12. Total Approved Assistance Amount	\$402,500
13. Program Income	\$0
14. Total EPA Amount Awarded This Action	\$402,500
15. Total EPA Amount Awarded To Date	\$402,500

## **Administrative Conditions**

### **General Terms and Conditions**

The recipient agrees to comply with the current EPA general terms and conditions available at:  
<https://www.epa.gov/grants/epa-general-terms-and-conditions-effective-october-1-2021-or-later>.

These terms and conditions are in addition to the assurances and certifications made as a part of the award and the terms, conditions, or restrictions cited throughout the award.

The EPA repository for the general terms and conditions by year can be found at:  
<https://www.epa.gov/grants/grant-terms-and-conditions#general>.

### **A. Correspondence Condition**

The terms and conditions of this agreement require the submittal of reports, specific requests for approval, or notifications to EPA. Unless otherwise noted, all such correspondence should be sent to the following email addresses:

- Federal Financial Reports (SF-425): [rtpfc-grants@epa.gov](mailto:rtpfc-grants@epa.gov)
- MBE/WBE reports (EPA Form 5700-52A): [bennett.andrea@epa.gov](mailto:bennett.andrea@epa.gov)
- All other forms/certifications/assurances, Indirect Cost Rate Agreements, updates to recipient information (including email addresses, changes in contact information or changes in authorized representatives) and other notifications: [wasson.wendy@epa.gov](mailto:wasson.wendy@epa.gov)
- Administrative questions and issues: [thomas.felicia@epa.gov](mailto:thomas.felicia@epa.gov)
- Quality Assurance documents, Requests for Extensions of the Budget and Project Period, Amendment Requests, Requests for other Prior Approvals, workplan revisions, equipment lists, programmatic reports and deliverables: [griffith.terri@epa.gov](mailto:griffith.terri@epa.gov)

## **Programmatic Conditions**

### **EPA Region 10**

### **FY2022 Brownfield Cleanup Cooperative Agreement**

### **Terms and Conditions**

Please note that these Terms and Conditions (T&Cs) apply to Brownfield Cleanup Cooperative Agreements awarded under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) § 104(k).

### **I. GENERAL FEDERAL REQUIREMENTS**

#### **A. Federal Policy and Guidance**

1. Cooperative Agreement Recipients: By awarding this cooperative agreement, the Environmental Protection Agency (EPA) has approved the application for the Cooperative Agreement Recipient (CAR) submitted in the Fiscal Year 2022 competition for Brownfield Cleanup cooperative agreements.

2. In implementing this agreement, the CAR shall ensure that work done with cooperative agreement funds complies with the requirements of CERCLA § 104(k). The CAR shall also ensure that cleanup activities supported with cooperative agreement funding comply with all applicable federal and state laws and regulations. The CAR must ensure cleanups are protective of human health and the environment.

3. The CAR must consider whether it is required to conduct cleanups through a State or Tribal response program. If the CAR chooses not to participate in a State or Tribal response program, then the CAR is required to consult with the EPA Project Officer to ensure the proposed cleanup is protective of human health and the environment.

If the State or Tribe does not have a promulgated Response Program, then the CAR is required to consult with the EPA Project Officer to ensure the protectiveness of human health and the environment.

4. A term and condition or other legally binding provision shall be included in all subawards entered into with the funds awarded under this agreement, or when funds awarded under this agreement are used in combination with non-federal sources of funds, to ensure that the CAR complies with all applicable federal and state laws and requirements. In addition to CERCLA § 104(k), federal applicable laws and requirements include 2 CFR Part 200.

5. The CAR must comply with federal cross-cutting requirements. These requirements include, but are not limited to, DBE requirements found at 40 CFR Part 33; OSHA Worker Health & Safety Standard 29 CFR § 1910.120; Uniform Relocation Act (40 USC § 61); National Historic Preservation Act (16 USC § 470); Endangered Species Act (P.L. 93-205); Permits required by Section 404 of the Clean Water Act; Executive Order 11246, Equal Employment Opportunity, and implementing regulations at 41 CFR § 60-4; Contract Work Hours and Safety Standards Act, as amended (40 USC §§ 327-333); the Anti-Kickback Act (40 USC § 276c); and Section 504 of the Rehabilitation Act of 1973 as implemented by Executive Orders 11914 and 11250. For additional information on cross-cutting requirements visit <https://www.epa.gov/grants/epa-subaward-cross-cutter-requirements>.

6. The CAR must comply with Davis-Bacon Act prevailing wage requirements and associated U.S. Department of Labor (DOL) regulations for all construction, alteration, and repair contracts and subcontracts awarded with funds provided under this agreement by operation of CERCLA § 104(g). For more detailed information on complying with Davis-Bacon, please see the Davis-Bacon Addendum to these terms and conditions.

7. Refer to the General Term & Conditions for Buy America Sourcing requirements under the Build America, Buy America provisions of the Infrastructure Investment and Jobs Act (IIJA) (P.L. 117-58, §§70911-70917).

## II. SITE OWNERSHIP/RECIPIENT ELIGIBILITY REQUIREMENTS

### A. Site Ownership

1. The CAR may only clean up the site(s) it solely owns that is specified in the workplan for this cooperative agreement. The CAR must retain ownership of the site(s) while Brownfield Cleanup Grant funds are disbursed for the cleanup of the site(s) and must consult with the EPA Project Officer prior to transferring title or otherwise conveying the real property comprising the site(s). For the purposes of this agreement, the term "owns" means fee simple title unless EPA previously approved a different ownership arrangement.

## B. Continuing Obligations for CARs

1. EPA awarded this cooperative agreement to the CAR based on information indicating that the CAR would not use cooperative agreement funds to pay for a response cost at the site for which the CAR was potentially liable under CERCLA § 107. The CAR must demonstrate that it meets the requirements for one of the Landowner Liability Protections as either a Bona Fide Prospective Purchaser (BFPP), Contiguous Property Owner (CPO), or Innocent Landowner (ILO). These requirements include certain threshold criteria and continuing obligations that must be met in order for the CAR to maintain its status. If the CAR fails to meet these obligations, EPA may disallow the costs incurred under this cooperative agreement for cleaning up the site under CERCLA § 104(k)(8)(C). The Landowner Liability Protection requirements include:

- a. Performing "all appropriate inquiries" into the previous ownership and uses of the property before acquiring the property.
- b. Not being potentially liable or affiliated with any other person who is potentially liable for response costs at the facility through any direct or indirect familial relationship, any contractual, corporate, or financial relationship, or through the result of a reorganized business entity that was potentially liable.

While not necessary to obtain ILO protection, the CAR must still establish by a preponderance of the evidence that the act or omission that caused the release or threat of release of hazardous substances and any resulting damages were caused by a third party with whom the person does not have an employment, agency, or contractual relationship.

- c. Demonstrating that no disposal of hazardous substances occurred at the facility after acquisition by the landowner (does not specifically apply for the CPO protection).
- d. Taking "reasonable steps" with respect to hazardous substance releases by stopping any continuing releases, preventing any threatened future releases, and preventing or limiting human, environmental, or natural resource exposure to any previously released hazardous substance.
- e. Complying with any land use restrictions established or relied on in connection with the response action at the site and not impeding the effectiveness or integrity of institutional controls employed in connection with the response action.
- f. Providing full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration at the site from which there has been a release or threatened release.
- g. Complying with information requests and administrative subpoenas (does not specifically apply for the ILO protection).
- h. Providing all legally required notices with respect to the discovery or release of any hazardous substances at the site (does not specifically apply for the ILO protection).

Notwithstanding the CAR's continuing obligations under this agreement, the CAR is subject to the applicable liability provisions of CERCLA governing its status as a BFPP, CPO, or ILO. CERCLA requires additional obligations to maintain the liability limitations for BFPP, CPO, and ILO; the relevant provisions for these obligations include §§ 101(35), 101(40), 107(b), 107(q) and 107(r).

CARs that are exempt from CERCLA liability or do not have to meet the requirements for asserting an affirmative defense to CERCLA liability must also comply with continuing obligation items c.-h.

#### C. Site Substitution and Cleanup Method Changes

1. The CAR must use funds provided by this agreement to clean up the brownfield site(s) in the EPA-approved workplan. The CAR shall not substitute a different brownfield site.
2. The CAR shall not make substantial changes to the cleanup method described in the workplan, including changes to the expected cleanup based on public comment or other reasons, without prior EPA approval.

### III. GENERAL COOPERATIVE AGREEMENT ADMINISTRATIVE REQUIREMENTS

#### A. Sufficient Progress

1. This condition supplements the requirements of the Termination and Sufficient Progress Conditions in the General Terms and Conditions. EPA's Project Officer will assess whether the recipient is making sufficient progress in implementing its cooperative agreement 18 months from the date of award. If EPA determines that the CAR has not made sufficient progress in implementing its cooperative agreement, the CAR, if directed to do so, must implement a corrective action plan concurred on by the EPA Project Officer and approved by the Award Official or Grants Management Officer. Alternatively, EPA may terminate this agreement under 2 CFR § 200.340 for material non-compliance with its terms, or with the consent of the CAR as provided at 2 CFR § 200.340, depending on the circumstances. Sufficient progress is indicated when an appropriate remediation plan is in place, institutional control development (if necessary) has commenced, initial community involvement activities have taken place, relevant state or tribal pre-cleanup requirements are being addressed, and a solicitation for remediation services has been issued.

#### B. Substantial Involvement

1. The EPA Project Officer will be substantially involved in overseeing and monitoring this cooperative agreement. Substantial involvement, includes, but is not limited to:
  - a. Close monitoring of the recipient's performance to verify the results compliance with the EPA-approved workplan and achievement of environmental results.
  - b. Participation in periodic telephone conference calls to share ideas, project successes and challenges, etc., with EPA.
  - c. Reviewing and commenting on quarterly and annual reports prepared under the cooperative agreement (the final decision on the content of reports rests with the recipient).

Substantial involvement may also include, depending on the direction of the EPA Project Officer:

- d. Collaboration during the performance of the scope of work including participation in project activities, to the extent permissible under EPA policies. Examples of collaboration include:
  - i. Consultation between EPA staff and the CAR on effective methods of carrying out the scope of work provided the CAR makes the final decision on how to perform authorized activities.
  - ii. Advice from EPA staff on how to access publicly available information on EPA or other federal agency websites.

iii. With the consent of the recipient, EPA staff may provide technical advice to the CAR's contractors or subrecipients provided the CAR approves any expenditures of funds necessary to follow advice from EPA staff. (The CAR remains accountable for performing contract and subaward management as specified in 2 CFR § 200.318 and 2 CFR § 200.332 as well as the terms of the EPA cooperative agreement.)

iv. EPA staff participation in meetings, webinars, and similar events upon the request of the recipient or in connection with a co-sponsorship agreement.

e. Reviewing proposed procurements in accordance with 2 CFR § 200.325, as well as the substantive terms of proposed contracts or subawards as appropriate.

f. Reviewing the qualifications of key personnel (EPA does not have the authority to select employees or contractors, including consultants, employed by the CAR or subrecipients receiving pass-through awards).

g. Reviewing all costs incurred by the CAR and/or its contractor(s) if needed to ensure appropriate expenditure of grant funds.

EPA may waive any of the provisions in Section III.B.1. The EPA Project Officer will provide waivers to provisions a. – c. in Section III.B.1. in writing.

2. Effects of EPA's substantial involvement include:

a. EPA's review of any project phase, document, or cost incurred under this cooperative agreement will not have any effect upon CERCLA § 128 *Eligible Response Site* determinations or rights, authorities, and actions under CERCLA or any federal statute.

b. The CAR remains responsible for ensuring that all cleanups are protective of human health and the environment and comply with all applicable federal and state laws. If changes to the expected cleanup become necessary based on public comment or other reasons, the CAR must consult with the EPA Project Officer and the State.

c. The CAR and its subrecipients remain responsible for ensuring costs are allowable under 2 CFR Part 200, Subpart E.

### C. Cooperative Agreement Recipient Roles and Responsibilities

1. CARs, other than state entities, that procure a contractor(s) (including consultants) where the contract will be more than the micro-purchase threshold in 2 CFR § 200.320(a)(1) (\$10,000 for most CARs) must select the contractor(s) in compliance with the fair and open competition requirements in 2 CFR Part 200 and 2 CFR Part 1500. CARs may procure multiple contractors to ensure the appropriate expertise is in place to perform work under the agreement (e.g., expertise to conduct site remediation activities vs. community engagement) and to allow the ability for work be performed concurrently at multiple sites.

2. The CAR must acquire the services of a Qualified Environmental Professional(s) as defined in 40 CFR § 312.10, if it does not have such a professional on staff to coordinate, direct, and oversee the brownfield site cleanup activities at a given site.

3. **[If subawards are approved for this agreement] Subawards** are defined at 2 CFR § 200.1. The CAR shall not



subaward to for-profit organizations or individual consultants. The CAR must obtain commercial services and products necessary to carry out this agreement under competitive procurement procedures as described in 2 CFR §§ 200.317 through 200.327. The CAR must obtain written approval from EPA's Award Official for any subawards that are not described in the approved work plan in accordance with 2 CFR § 200.308.

In addition, EPA policy encourages awarding subawards competitively and the CAR must consider awarding subawards through competition. Recipients may consult EPA's [Subaward Policy](#) and [Best Practice Guide for Procuring Services, Supplies, and Equipment Under EPA Assistance Agreements](#) for additional guidance. The Best Practice Guide provides information on distinguishing between subawards and procurement contracts.

**4. [If the application includes leveraged resources that will materialize during the period of performance]**

**Leveraged Resources** – The CAR agrees to provide the proposed leveraged funding, including any voluntary cost-share contribution or overmatch, that is described in its workplan. If the proposed leveraging does not materialize during the period of award performance, and the CAR does not provide a satisfactory explanation, EPA may consider this factor in evaluating future applications from the CAR. In addition, if the proposed leveraging does not materialize during the period of award performance, then EPA may reconsider the legitimacy of the award. If EPA determines that the CAR knowingly or recklessly provided inaccurate information regarding the leveraged funding in its FY22 application, EPA may take action as authorized by CFR Parts 200 and 1500, and/or 2 CFR Part 180 as applicable.

5. **Cybersecurity** – The recipient agrees that when collecting and managing environmental data under this cooperative agreement, it will protect the data by following all applicable State or Tribal law cybersecurity requirements.

a. EPA must ensure that any connections between the recipient's network or information system and EPA networks used by the recipient to transfer data under this agreement are secure. For purposes of this section, a connection is defined as a dedicated persistent interface between an Agency IT system and an external IT system for the purpose of transferring information. Transitory, user-controlled connections such as website browsing are excluded from this definition.

If the recipient's connections as defined above do not go through the Environmental Information Exchange Network or EPA's Central Data Exchange, the recipient agrees to contact the EPA Project Officer no later than 90 days after the date of this award and work with the designated Regional/Headquarters Information Security Officer to ensure that the connections meet EPA security requirements, including entering into Interconnection Service Agreements as appropriate. This condition does not apply to manual entry of data by the recipient into systems operated and used by EPA's regulatory programs for the submission of reporting and/or compliance data.

b. The recipient agrees that any subawards it makes under this agreement will require the subrecipient to comply with the requirements in Cybersecurity Section a. above if the subrecipient's network or information system is connected to EPA networks to transfer data to the Agency using systems other than the Environmental Information Exchange Network or EPA's Central Data Exchange. The recipient will be in compliance with this condition: by including this requirement in subaward agreements; and during subrecipient monitoring deemed necessary by the recipient under 2 CFR § 200.332(d), by inquiring whether the subrecipient has contacted the EPA Project Officer. Nothing in this condition requires the recipient to contact the EPA Project Officer on behalf of a subrecipient or to be involved in the negotiation of an Interconnection Service Agreement between the subrecipient and EPA.

6. All geospatial data created must be consistent with Federal Geographic Data Committee (FGDC) endorsed

standards. Information on these standards may be found at [www.fgdc.gov](http://www.fgdc.gov).

#### D. Quarterly Progress Reports

1. In accordance with EPA regulations 2 CFR Parts 200 and 1500 (specifically, § 200.329, *Monitoring and Reporting Program Performance*), the CAR agrees to submit quarterly progress reports to the EPA Project Officer within 30 days after each reporting period. The reporting periods are October 1 – December 31 (1<sup>st</sup> quarter); January 1 – March 31 (2<sup>nd</sup> quarter); April 1 – June 30 (3<sup>rd</sup> quarter); and July 1 – September 30 (4<sup>th</sup> quarter).

These reports shall cover work status, work progress, difficulties encountered, preliminary data results and a statement of activity anticipated during the subsequent reporting period, including a description of equipment, techniques, and materials to be used or evaluated. A discussion of expenditures and financial status for each workplan task, along with a comparison of the percentage of the project completed to the project schedule and an explanation of significant discrepancies shall be included in the report. The report shall also include any changes of key personnel concerned with the project.

The CAR shall refer to and utilize the Quarterly Reporting function within the Assessment, Cleanup and Redevelopment Exchange System (ACRES) to submit quarterly reports unless approval is obtained from the EPA Project Officer to use an alternate format for reports.

2. The CAR must submit progress reports on a quarterly basis in ACRES, or to the EPA Project Officer if an alternate format is approved. Quarterly progress reports must include:

- a. A summary that clearly differentiates between activities completed with EPA funds provided under the Brownfield Cleanup cooperative agreement, including the required cost share, and related activities completed with other sources of leveraged funding.
- b. A summary and status of approved activities performed during the reporting quarter; a summary of the performance outputs/outcomes achieved during the reporting quarter; and a description of problems encountered during the reporting quarter that may affect the project schedule.
- c. A comparison of actual accomplishments to the anticipated outputs/outcomes specified in the EPA-approved workplan and reasons why anticipated outputs/outcomes were not met.
- d. An update on the project schedule and milestones, including an explanation of any discrepancies from the EPA-approved workplan.
- e. A budget summary table with the following information: current approved project budget; EPA funds drawn down during the reporting quarter; costs drawn down to date (cumulative expenditures); cost share contributions (amount and type); program income generated and used (if applicable); and total remaining funds. The CAR should include an explanation of any discrepancies in the budget from the EPA-approved workplan, cost overruns or high unit costs, and other pertinent information.
- f. **[Local governments only]** For local governments that are using cooperative agreement funds for health monitoring, the quarterly report must also include the specific budget, the quarterly expenditure, and cumulative expenditures to demonstrate that 10% of federal funding is not exceeded.

Note: Each property where cleanup activities were performed and/or completed must have its corresponding information updated in ACRES (or via the Property Profile Form with prior approval from the EPA Project Officer) prior

to submitting the quarterly progress report (see Section III.E. below).

3. **[If subawards are approved for this agreement]** Subawards – If the workplan and budget for this agreement include subawards, the CAR is a pass-through entity under the “Establishing and Managing Subaward” General Term and Condition of this agreement. As the pass-through entity, the CAR must report to EPA on its subaward monitoring activities under [2 CFR § 200.332\(d\)](#), including the following information on subawards as part of the CAR’s quarterly performance reporting:

- a. Summaries of results of reviews of financial and programmatic reports;
- b. Summaries of findings from site visits and/or desk reviews to ensure effective subrecipient performance;
- c. Environmental results the subrecipient achieved;
- d. Summaries of audit findings and related pass-through entity management decisions, if any; and
- e. Actions the pass-through entity has taken to correct any deficiencies such as those specified at [2 CFR § 200.332\(e\)](#), [2 CFR § 200.208, Specific conditions](#), and [2 CFR § 200.339, Remedies for Noncompliance](#).

4. The CAR must maintain records that will enable it to report to EPA on the amount of funds (direct EPA funding and the cost share) disbursed by the CAR to clean up the specific property(ies) under this cooperative agreement.

5. In accordance with 2 CFR § 200.329(e)(1), the CAR agrees to inform EPA as soon as problems, delays, or adverse conditions become known which will materially impair the ability to meet the outputs/outcomes specified in the EPA-approved workplan.

#### E. Property Profile Submission

1. The CAR must report on interim progress (i.e., clean up started) and any final accomplishments (i.e., clean up completed, contaminants removed, institutional controls, engineering controls) by completing and submitting relevant portions of the Property Profile Form using the Assessment, Cleanup and Redevelopment Exchange System (ACRES). The CAR must enter the data in ACRES as soon as the interim action or final accomplishment has occurred, or within 30 days after the end of each reporting quarter. The CAR must enter any new data into ACRES prior to submitting the quarterly progress report to the EPA Project Officer. The CAR must utilize ACRES unless approval is obtained from the EPA Project Officer to utilize the hardcopy version of the Property Profile Form.

#### F. Final Technical Cooperative Agreement Report with Environmental Results

1. In accordance with EPA regulations 2 CFR Parts 200 and 1500 (specifically, § 200.329, *Monitoring and Reporting Program Performance* and 2 CFR § 200.344(a), *Closeout*), the CAR agrees to submit to the EPA Project Officer within 120 days after the expiration or termination of the approved project period a final technical report on the cooperative agreement via email; unless the EPA Project Officer agrees to accept a paper copy of the report. The final technical report shall document project activities over the entire project period and shall include brief information on each of the following areas:

- a. a comparison of actual accomplishments with the anticipated outputs/outcomes specified in the EPA-approved workplan;
- b. reasons why anticipated outputs/outcomes were not met; and

- c. other pertinent information, including when appropriate, analysis and explanation of cost overruns or high unit costs.

#### IV. FINANCIAL ADMINISTRATION REQUIREMENTS

##### A. Cost Share Waiver approved for this Agreement

1. No Cost Share is required for this agreement. 100% of the cost share has been waived.

##### B. Eligible Uses of the Funds for the Cooperative Agreement Recipient

1. To the extent allowable under the EPA-approved workplan, cooperative agreement funds may be used for eligible programmatic expenses necessary to clean up sites. Eligible programmatic expenses include activities described in Section V. of these Terms and Conditions. In addition, eligible programmatic expenses may include:
  - a. Ensuring cleanup activities at a particular site are authorized by CERCLA § 104(k) and the EPA-approved workplan.
  - b. Ensuring that a cleanup complies with applicable requirements under federal and state laws, as required by CERCLA § 104(k).
  - c. Limited site characterization to confirm the effectiveness of the proposed cleanup design or the effectiveness of a cleanup once an action has been completed.
  - d. Preparing and updating an Analysis of Brownfield Cleanup Alternatives (ABCA) which will include information about the site and contamination issues, cleanup standards, applicable laws, alternatives considered, and the proposed cleanup.
  - e. Ensuring that public participation requirements are met. This includes preparing a Community Involvement Plan which will include reasonable notice, opportunity for public involvement and comment on the proposed cleanup, and response to comments.
  - f. Establishing an Administrative Record.
  - g. Developing a Quality Assurance Project Plan (QAPP) as required by 2 CFR § 1500.12. The specific requirement for a QAPP is outlined in *Implementation of Quality Assurance Requirements for Organizations Receiving EPA Financial Assistance* available at <https://www.epa.gov/grants/implementation-quality-assurance-requirements-organizations-receiving-epa-financial>.
  - h. Using a portion of the cooperative agreement funds to purchase environmental insurance for the remediation of the site. [Funds shall not be used to purchase insurance intended to provide coverage for any of the ineligible uses under Section IV., *Ineligible Uses of the Funds for the Cooperative Agreement Recipient* .]
  - i. Any other eligible programmatic costs, including direct costs incurred by the recipient in reporting to EPA; procuring and managing contracts; awarding, monitoring, and managing subawards to the extent required to comply with 2 CFR § 200.332 and the “Establishing and Managing Subawards” General Term and Condition; and carrying out community involvement pertaining to the cleanup activities.
2. **[Local Governments Only]** If authorized in the EPA approved scope of work and budget narrative, up to 10% of

the funds awarded by this agreement may be used by the CAR itself as a programmatic cost for Brownfield Program development and implementation of monitoring health conditions and institutional controls. The health monitoring activities must be associated with brownfield sites at which at least a Phase II environmental site assessment is conducted and is contaminated with hazardous substances. The CAR must maintain records on funds that will be used to carry out this task to ensure compliance with this requirement.

**3. Administrative Costs** – Under CERCLA § 104(k)(5)(E), CARs and subrecipients may use up to 5% of the sum of direct EPA funding plus the CAR's cost share for this cooperative agreement for administrative costs, including indirect costs under 2 CFR § 200.414. **The limit on administrative costs for the CAR under this agreement is \$20,125.**

The total amount of indirect costs and any direct costs for cooperative agreement administration by the CAR paid for by EPA under the cooperative agreement, or used to meet the recipient's cost share, shall not exceed this amount. Subrecipients may use up to 5% of the amount of Federal funds in their subawards for administrative costs. As required by 2 CFR § 200.403(d), the CAR and subrecipients must classify administrative costs as direct or indirect consistently and shall not classify the same types of costs in both categories. The term "administrative costs" does not include:

- a. Investigation and identification of the extent of contamination of a brownfield site;
- b. design and performance of a response action; or
- c. monitoring of a natural resource.

Eligible cooperative agreement and subaward administrative costs subject to the 5% limitation include direct costs for:

- a. Costs incurred to comply with the following provisions of the *Uniform Administrative Requirements for Cost Principles and Audit Requirements for Federal Awards* at 2 CFR Parts 200 and 1500 other than those identified as programmatic.
  - i. Record-keeping associated with equipment purchases required under 2 CFR § 200.313;
  - ii. Preparing revisions and changes in the budgets, scopes of work, program plans and other activities required under 2 CFR § 200.308;
  - iii. Maintaining and operating financial management systems required under 2 CFR § 200.302;
  - iv. Preparing payment requests and handling payments under 2 CFR § 200.305;
  - v. Financial reporting under 2 CFR § 200.328;
  - vi. Non-federal audits required under 2 CFR Part 200, Subpart F; and
  - vii. Closeout under 2 CFR § 200.344 with the exception of preparing the recipient's final performance report. Costs for preparing this report are programmatic and are not subject to the 5% limitation on direct administrative costs.
- b. Pre-award costs for preparation of the proposal and application for this cooperative agreement (including the final workplan) or applications for subawards are not allowable as direct costs but may be included in the CAR's or subrecipient's indirect cost pool to the extent authorized by 2 CFR § 200.460.

### C. Ineligible Uses of the Funds for the Cooperative Agreement Recipient

1. Cooperative agreement funds shall not be used by the CAR for any of the following activities:

- a. Pre-cleanup Phase I and Phase II environmental site assessment activities with the exception of site monitoring activities that are reasonable and necessary during the cleanup process, including determination of the effectiveness of a cleanup;
- b. Monitoring and data collection necessary to apply for, or comply with, environmental permits under other federal and state laws, unless such a permit is required as a component of the cleanup action;
- c. Construction, demolition, and site development activities that are not cleanup actions (e.g., marketing of property (activities or products created specifically to attract buyers or investors), construction of a new facility, or addressing public or private drinking water supplies that have deteriorated through ordinary use);
- d. Job training activities unrelated to performing a specific cleanup at a site covered by the cooperative agreement;
- e. To pay for a penalty or fine;
- f. To pay a federal cost share requirement (e.g., a cost share required by another federal grant) unless there is specific statutory authority;
- g. To pay for a response cost at a brownfield site for which the CAR or subaward recipient is potentially liable under CERCLA § 107;
- h. To pay a cost of compliance with any federal law, excluding the cost of compliance with laws applicable to the cleanup; and
- i. Unallowable costs (e.g., lobbying and purchases of alcoholic beverages) under 2 CFR Part 200, Subpart E.

2. Cooperative agreement funds shall not be used for any of the following properties:

- a. Facilities listed, or proposed for listing, on the National Priorities List (NPL);
- b. Facilities subject to unilateral administrative orders, court orders, and administrative orders on consent or judicial consent decree issued to or entered by parties under CERCLA;
- c. Facilities that are subject to the jurisdiction, custody or control of the United States government except for land held in trust by the United States government for an Indian tribe; or
- d. A site excluded from the definition of a brownfield site for which EPA has not made a property-specific funding determination.

D. Interest-Bearing Accounts and Program Income

1. In accordance with 2 CFR § 1500.8(b), during the performance period of the cooperative agreement, the CAR is authorized to add program income to the funds awarded by EPA and use the program income under the same terms and conditions of this agreement. CARs that intend to use program income for cost share under 2 CFR § 200.307(e)(3) must obtain prior approval from EPA's Grant Management Officer or Award Official unless the cost share method for using program income was approved at time of award.

2. Program income for the CAR shall be defined as the gross income received by the recipient, directly generated by the cooperative agreement award or earned during the period of the award. Program income includes, but is not limited to, fees charged for cleanup planning, clean up activities, or other activities when the costs for the activities are charged to this agreement.
3. The CAR must deposit advances of cooperative agreement funds and program income (i.e., fees) in an interest-bearing account.
  - a. For interest earned on advances, CARs are subject to the provisions of 2 CFR § 200.305(b)(7)(ii) relating to remitting interest on advances to EPA on a quarterly basis.
  - b. Any program income earned by the CAR will be added to the funds EPA has committed to this agreement and used only for eligible and allowable costs under the agreement as provided in 2 CFR § 200.307 and 2 CFR § 1500.8, as applicable.
  - c. Interest earned on program income is considered additional program income.
  - d. The CAR must disburse program income (including interest earned on program income) before requesting additional payments from EPA as required by 2 CFR § 200.305(b)(5).
4. As required by 2 CFR § 200.302, the CAR must maintain accounting records documenting the receipt and disbursement of program income.
5. The recipient must provide as part of its quarterly performance report and final technical report a description of how program income is being used. Further, a report on the amount of program income earned during the award period must be submitted with the quarterly performance report, final technical report, and Federal Financial Report (Standard Form 425).

## V. CLEANUP REQUIREMENTS

### A. Authorized Cleanup Activities

1. The CAR shall prepare an Analysis of Brownfield Cleanup Alternatives (ABCA), or equivalent state Brownfields program document, which will include information about the site and contamination issues (i.e., exposure pathways, identification of contaminant sources, etc.); cleanup standards; applicable laws; alternatives considered; and the proposed cleanup. The evaluation of alternatives must include effectiveness, ability to implement, and the cost of the response proposed. The evaluation of alternatives must also consider the resilience of the remedial options to address potential adverse impacts caused by extreme weather events (e.g., sea level rise, increased frequency and intensity of flooding, etc.). The alternatives may additionally consider the degree to which they reduce greenhouse gas discharges, reduce energy use or employ alternative energy sources, reduce volume of wastewater generated/disposed of, reduce volume of materials taken to landfills, and recycle and re-use materials generated during the cleanup process to the maximum extent practicable. The evaluation will include an analysis of reasonable alternatives including no action. The cleanup method chosen must be based on this analysis and documented in a decision document upon completion of the public comment period. The CAR must consult with the relevant state program (or EPA if there is not a state program that covers the site) to determine if the selected cleanup requires formal modification based on public comments or new information.
2. Prior to conducting or engaging in any on-site activity with the potential to impact historic properties (such as invasive sampling or cleanup), the CAR shall consult with the EPA Project Officer regarding potential applicability of

the National Historic Preservation Act (NHPA) (16 USC § 470) and, if applicable, shall assist EPA in complying with any requirements of the NHPA and implementing regulations.

## B. Quality Assurance (QA) Requirements

1. If environmental data are collected as part of the brownfield cleanup (e.g., cleanup verification sampling, post-cleanup confirmation sampling), the CAR shall comply with 2 CFR § 1500.12 requirements to develop and implement quality assurance practices sufficient to produce data adequate to meet project objectives and to minimize data loss. State law may impose additional QA requirements. Recipients implementing environmental programs within the scope of the assistance agreement must submit to the EPA Project Officer an approvable Quality Assurance Project Plan (QAPP) at least 60 days prior to the initiating of data collection or data compilation. The Quality Assurance Project Plan (QAPP) is the document that provides comprehensive details about the quality assurance, quality control, and technical activities that must be implemented to ensure that project objectives are met. Environmental programs include direct measurements or data generation, environmental modeling, compilation of data from literature or electronic media, and data supporting the design, construction, and operation of environmental technology.

The QAPP should be prepared in accordance with [EPA QA/R-5: EPA Requirements for Quality Assurance Project Plans](#). No environmental data collection or data compilation may occur until the QAPP is approved by the EPA Project Officer and Quality Assurance Regional Manager. Additional information on the requirements can be found at the EPA Office of Grants and Debarment website at <https://www.epa.gov/grants/implementation-quality-assurance-requirements-organizations-receiving-epa-financial>.

### 2. Competency of Organizations Generating Environmental Measurement Data:

In accordance with Agency Policy Directive Number FEM-2012-02, Policy to Assure the Competency of Organizations Generating Environmental Measurement Data under Agency-Funded Assistance Agreements, the CAR agrees, by entering into this agreement, that it has demonstrated competency prior to award, or alternatively, where a pre-award demonstration of competency is not practicable, the CAR agrees to demonstrate competency prior to carrying out any activities under the award involving the generation or use of environmental data. The CAR shall maintain competency for the duration of the project period of this agreement and this will be documented during the annual reporting process. A copy of the Policy is available online at [http://www.epa.gov/fem/lab\\_comp.htm](http://www.epa.gov/fem/lab_comp.htm) or a copy may also be requested by contacting the EPA Project Officer for this award.

## C. Public Involvement and Community Outreach

1. All cleanup activities require a site-specific Community Involvement Plan. The plan must include providing reasonable notice to the community and opportunity for public involvement and comment on the proposed cleanup options under consideration for the site. All information, including responses to public comments and administrative records, may be made available to the public to the extent consistent with 2 CFR § 200.338 and applicable state, tribal, or local law.

2. The CAR agrees to clearly reference EPA investments in the project during all phases of community outreach outlined in the EPA-approved workplan, which may include the development of any post-project summary or success materials that highlight achievements to which this project contributed.

a. If any documents, fact sheets, and/or web materials are developed as part of this cooperative agreement, then they shall comply with the *Acknowledgement Requirements for Non-ORD Assistance Agreements* in the General Terms and Conditions of this agreement.



b. If a sign is developed as part of a project funded by this cooperative agreement, then the sign shall include either a statement (e.g., this project has been funded, wholly or in part, by EPA) and/or EPA's logo acknowledging that EPA is a source of funding for the project. The EPA logo may be used on project signage when the sign can be placed in a visible location with a direct linkage to site activities. Use of the EPA logo must follow the sign specifications available at <https://www.epa.gov/grants/epa-logo-seal-specifications-signage-produced-epa-assistance-agreement-recipients>.

3. The CAR agrees to notify the EPA Project Officer of public or media events publicizing the accomplishment of significant events related to construction and/or site reuse projects as a result of this agreement, and provide the opportunity for attendance and participation by federal representatives with at least ten (10) working days' notice.

4. To increase public awareness of projects serving communities where English is not the predominant language, CARs are encouraged to include in their outreach strategies communication in non-English languages. Translation costs for this purpose are allowable, provided the costs are reasonable.

5. All public awareness activities conducted with EPA funding are subject to the provisions in the General Terms and Conditions on compliance with section 504 of the Americans with Disabilities Act.

#### D. Administrative Record

1. The CAR shall establish an Administrative Record that contains the documents that form the basis for the selection of a cleanup plan. Documents in the Administrative Record shall include the ABCA; site investigation reports; the cleanup plan; cleanup standards used; responses to public comments; and verification that shows that cleanup is complete. The CAR shall keep the Administrative Record available at a location convenient to the public and make it available for inspection. The Administrative Record must be retained for three (3) years after the termination of the cooperative agreement subject to any requirements for maintaining records of site cleanups ongoing at the time of termination.

#### E. Implementation of Cleanup Activities

1. The CAR shall ensure the adequacy of each cleanup in protecting human health and the environment as it is implemented.

2. If the CAR is unable or unwilling to complete the cleanup, the CAR shall ensure that the site is secure. The CAR shall notify the appropriate state agency and EPA to ensure an orderly transition should additional activities become necessary.

#### F. Completion of Cleanup Activities

1. The CAR shall ensure that the successful completion of a cleanup is properly documented. This must be done through a final report or letter from a Qualified Environmental Professional, or other documentation provided by a State or Tribe that shows cleanup is complete (including No Further Action letters, institutional controls, etc.). This documentation must be included as part of the Administrative Record.

#### G. Inclusion of Additional Terms and Conditions

1. In accordance with 2 CFR § 200.334, the CAR shall maintain records pertaining to the cooperative agreement for a minimum of three (3) years following submission of the final financial report unless one or more of the conditions described in the regulation applies. The CAR shall provide access to records relating to cleanups supported with

Cleanup cooperative agreement funds to authorized representatives of the Federal government as required by 2 CFR § 200.337.

2. The CAR has an ongoing obligation to advise EPA if it assessed any penalties resulting from environmental noncompliance at the site(s) subject to this agreement.

## VI. PAYMENT AND CLOSEOUT

For the purposes of these Terms and Conditions, the following definitions apply: “payment” is EPA’s transfer of funds to the CAR; “closeout” refers to the process EPA follows to ensure that all administrative actions and work required under the cooperative agreement have been completed.

### A. Payment Schedule

1. The CAR may request advance payment from EPA pursuant to 2 CFR § 200.305(b)(1) and the prompt disbursement requirements of the General Terms and Conditions of this agreement.

This requirement does not apply to states which are subject to 2 CFR § 200.305(a)

### B. Schedule for Closeout

1. Closeout will be conducted in accordance with 2 CFR § 200.344. EPA will close out the award when it determines that all applicable administrative actions and all required work under the cooperative agreement have been completed.

2. The CAR, within 120 days after the expiration or termination of the cooperative agreement, must submit all financial, performance, and other reports required as a condition of the cooperative agreement.

- a. The CAR must submit the following documentation:

- i. The Final Technical Cooperative Agreement Report as described in Section III.F. of these Terms and Conditions.
- ii. Administrative and Financial Reports as described in the General Administrative Terms and Conditions of this agreement.

- b. The CAR must ensure that all appropriate data have been entered into ACRES or all hardcopy Property Profile Forms are submitted to the EPA Project Officer.

- c. As required by 2 CFR § 200.344, the CAR must immediately refund to EPA any balance of unobligated (unencumbered) advanced cash or accrued program income that is not authorized to be retained for use on other cooperative agreements.

### **Davis-Bacon Terms and Conditions For Cooperative Agreements to Governmental Entities**

#### DAVIS-BACON PREVAILING WAGE TERM AND CONDITION

The following terms and conditions specify how Cooperative Agreement Recipients (CARs) will assist EPA in meeting its Davis-Bacon (DB) responsibilities when DB applies to EPA awards of financial assistance under CERCLA 104(g) and any other statute which makes DB applicable to EPA financial assistance. If a CAR has questions regarding when DB applies, obtaining the correct DB wage determinations, DB contract provisions, or DB compliance monitoring, they should contact the regional Brownfields Coordinator or Project Officer for guidance.

## 1. Applicability of the Davis-Bacon Prevailing Wage Requirements

After consultation with DOL, EPA has determined that for Brownfields Grants for remediation of sites contaminated with hazardous substances and petroleum, DB prevailing wage requirement apply when the project includes the following activities.

Hazardous substances contamination:

- (a) All construction, alteration and repair activity involving the remediation of hazardous substances, including excavation and removal of hazardous substances, construction of caps, barriers, structures which house treatment equipment, and abatement of contamination in buildings.

Petroleum contamination:

- (a) Installing piping to connect households or businesses to public water systems or replacing public water system supply well(s) and associated piping due to groundwater contamination,
- (b) Soil excavation/replacement when undertaken in conjunction with the installation of public water lines/wells described above, or
- (c) Soil excavation/replacement, tank removal, and restoring the area by paving or pouring concrete when the soil excavation/replacement occurs in conjunction with both tank removal and paving or concrete replacement.

In the above circumstances, all the laborers and mechanics employed by contractors and subcontractors will be covered by the DB requirements for all construction work performed on the site. Other petroleum site cleanup activities such as in situ remediation, and soil excavation/replacement and tank removal when not in conjunction with paving or concrete replacement, will normally not trigger DB requirements.

If the CAR encounters a unique situation at a site (e.g., unusually extensive excavation, construction of permanent facilities to house in situ remediation systems, reconstruction of roadways) that presents uncertainties regarding DB applicability, the CAR must discuss the situation with EPA before authorizing work on that site.

## 2. Obtaining Wage Determinations

- (a) Unless otherwise instructed by EPA on a project specific basis, the CAR shall use the following DOL General Wage Classifications for the locality in which the construction activity subject to DB will take place. CARs must obtain proposed wage determinations for specific localities at <https://beta.sam.gov/>.

- (i) When soliciting competitive contracts, awarding new contracts or issuing task orders, work assignments or similar instruments to existing contractors (ordering instruments), the CAR shall use the "Heavy Construction" classification for the following activities:

Hazardous substances contamination: excavation and removal of hazardous substances, construction of caps, barriers, and similar activities that do not involve construction of buildings.

Petroleum contamination: installing piping to connect households or businesses to public water systems or replacing public water system supply well(s) and associated piping, including soil excavation/replacement.

- (ii) When soliciting competitive contracts, awarding new contracts, or issuing ordering instruments, the

CAR shall use the “Building Construction” classification for the following activities:

Hazardous substances contamination: construction of structures which house treatment equipment, and abatement of contamination in buildings (other than residential structures less than 4 stories in height).

Petroleum contamination: soil excavation/replacement, tank removal, and restoring the area by paving or pouring concrete when the soil excavation/replacement occurs in conjunction with both tank removal and paving or concrete replacement at current or former service station sites, hospitals, fire stations, industrial or freight terminal facilities, or other sites that are associated with a facility that is not used solely for the underground storage of fuel or other contaminant.

(iii) When soliciting competitive contracts, awarding new contracts or issuing ordering instruments for soil excavation/replacement, tank removal, and restoring the area by paving or pouring concrete when the soil excavation/replacement occurs in conjunction with both tank removal and paving or concrete replacement at a facility that is used solely for the underground storage of fuel or other contaminant the CAR shall use the “Heavy Construction” classification. (Only applies to petroleum contamination.)

(iv) When soliciting competitive contracts, awarding new contracts or issuing ordering instruments for the abatement of contamination in residential structures less than 4 stories in height the CAR shall use “Residential Construction” classification. (Only applies to hazardous substances contamination.)

Note: CARs must discuss unique situations that may not be covered by the General Wage Classifications described above with EPA. If, based on discussions with a CAR, EPA determines that DB applies to a unique situation (e.g., unusually extensive excavation) the Agency will advise the CAR which General Wage Classification to use based on the nature of the construction activity at the site.

(b) CARs shall obtain the wage determination for the locality in which a Brownfields cleanup activity subject to DB will take place *prior* to issuing requests for bids, proposals, quotes or other methods for soliciting contracts (solicitation) for activities subject to DB. These wage determinations shall be incorporated into solicitations and any subsequent contracts. Prime contracts must contain a provision requiring that subcontractors follow the wage determination incorporated into the prime contract.

(i) While the solicitation remains open, the CAR shall monitor <https://beta.sam.gov/> on a weekly basis to ensure that the wage determination contained in the solicitation remains current. The CAR shall amend the solicitation if DOL issues a modification more than 10 days prior to the closing date (i.e. bid opening) for the solicitation. If DOL modifies or supersedes the applicable wage determination less than 10 days prior to the closing date, the CAR may request a finding from EPA that there is not a reasonable time to notify interested contractors of the modification of the wage determination. EPA will provide a report of the Agency’s finding to the CAR.

(ii) If the CAR does not award the contract within 90 days of the closure of the solicitation, any modifications or supersedes DOL makes to the wage determination contained in the solicitation shall be effective unless EPA, at the request of the CAR, obtains an extension of the 90-day period from DOL pursuant to 29 CFR 1.6(c)(3)(iv). The CAR shall monitor <https://beta.sam.gov/> on a weekly basis if it does not award the contract within 90 days of closure of the solicitation to ensure that wage determinations contained in the solicitation remain current.

(iii) If the CAR carries out Brownfields cleanup activity subject to DB by issuing a task order, work assignment or similar instrument to an existing contractor (ordering instrument) rather than by publishing a solicitation, the CAR shall insert the appropriate DOL wage determination from <https://beta.sam.gov/> into the ordering instrument.

(c) CARs shall review all subcontracts subject to DB entered into by prime contractors to verify that the prime contractor has required its subcontractors to include the applicable wage determinations.

(d) As provided in 29 CFR 1.6(f), DOL may issue a revised wage determination applicable to a CAR's contract after the award of a contract or the issuance of an ordering instrument if DOL determines that the CAR has failed to incorporate a wage determination or has used a wage determination that clearly does not apply to the contract or ordering instrument. If this occurs, the CAR shall either terminate the contract or ordering instrument and issue a revised solicitation or ordering instrument or incorporate DOL's wage determination retroactive to the beginning of the contract or ordering instrument by change order. The CAR's contractor must be compensated for any increases in wages resulting from the use of DOL's revised wage determination.

### 3. Contract and Subcontract Provisions

(a) The CAR shall insert in full in any contract in excess of \$2,000 which is entered into for the actual construction, alteration and/or repair, including painting and decorating, of a public building or public work, or building or work financed in whole or in part from Federal funds or in accordance with guarantees of a Federal agency or financed from funds obtained by pledge of any contract of a Federal agency to make a loan, grant or annual contribution (except where a different meaning is expressly indicated), and which is subject to DB, the following labor standards provisions.

#### (1) Minimum wages.

(i) All laborers and mechanics employed or working upon the site of the work will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 CFR Part 3)), the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the applicable wage determination of the Secretary of Labor which the CAR obtained under the procedures specified in Item 2, above, and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the contractor and such laborers and mechanics.

Contributions made or costs reasonably anticipated for bona fide fringe benefits under section 1(b)(2) of the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of paragraph (a)(1)(iv) of this section; also, regular contributions made or costs incurred for more than a weekly period (but not less often than quarterly) under plans, funds, or programs which cover the particular weekly period, are deemed to be constructively made or incurred during such weekly period. Such laborers and mechanics shall be paid the appropriate wage rate and fringe benefits on the wage determination for the classification of work actually performed, without regard to skill, except as provided in § 5.5(a)(4). Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein: Provided that the employer's payroll records accurately set forth the time spent in each classification in which work is performed. The wage determination (including any additional classification and wage rates conformed under paragraph (a)(1)(ii) of this section) and the Davis-Bacon poster (WH-1321) shall be posted at all times by the

contractor and its subcontractors at the site of the work in a prominent and accessible place where it can be easily seen by the workers. CARs shall require that the contractor and subcontractors include the name of the CAR employee or official responsible for monitoring compliance with DB on the poster.

(ii)(A) The CAR, on behalf of EPA, shall require that contracts and subcontracts entered into under this agreement provide that any class of laborers or mechanics, including helpers, which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination. The EPA Award Official shall approve an additional classification and wage rate and fringe benefits therefore only when the following criteria have been met:

- (1) The work to be performed by the classification requested is not performed by a classification in the wage determination; and
- (2) The classification is utilized in the area by the construction industry; and
- (3) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.

(ii)(B) If the contractor and the laborers and mechanics to be employed in the classification (if known), or their representatives, and the CAR agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken shall be sent by the CAR to the EPA Award Official. The Award Official will transmit the report, to the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, DC 20210. The Administrator, or an authorized representative, will approve, modify, or disapprove every additional classification action within 30 days of receipt and so advise the award official or will notify the award official within the 30-day period that additional time is necessary.

(ii)(C) In the event the contractor, the laborers or mechanics to be employed in the classification or their representatives, and the CAR do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the award official shall refer the questions, including the views of all interested parties and the recommendation of the award official, to the Administrator for determination. The Administrator, or an authorized representative, will issue a determination within 30 days of receipt and so advise the contracting officer or will notify the Award Official within the 30-day period that additional time is necessary.

(ii)(D) The wage rate (including fringe benefits where appropriate) determined pursuant to paragraphs (a)(1)(ii)(B) or (C) of this section, shall be paid to all workers performing work in the classification under this contract from the first day on which work is performed in the classification.

(iii) Whenever the minimum wage rate prescribed in the contract for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly rate, the contractor shall either pay the benefit as stated in the wage determination or shall pay another bona fide fringe benefit or an hourly cash equivalent thereof.

(iv) If the contractor does not make payments to a trustee or other third person, the contractor may consider as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing bona fide fringe benefits under a plan or program, Provided, That the Secretary of Labor has found, upon the written request of the contractor, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the contractor to set aside in a separate account assets for the meeting of

obligations under the plan or program.

(1) Withholding. The CAR, upon written request of the Award Official or an authorized representative of the Department of Labor, shall withhold or cause to withhold from the contractor under this contract or any other Federal contract with the same prime contractor, or any other federally-assisted contract subject to Davis-Bacon prevailing wage requirements, which is held by the same prime contractor, so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics, including apprentices, trainees, and helpers, employed by the contractor or any subcontractor the full amount of wages required by the contract. In the event of failure to pay any laborer or mechanic, including any apprentice, trainee, or helper, employed or working on the site of the work, all or part of the wages required by the contract, EPA may, after written notice to the contractor, or CAR take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

(2) Payrolls and basic records.

(i) Payrolls and basic records relating thereto shall be maintained by the contractor during the course of the work and preserved for a period of three years thereafter for all laborers and mechanics working at the site of the work. Such records shall contain the name, address, and social security number of each such worker, his or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in section 1(b)(2)(B) of the Davis-Bacon Act), daily and weekly number of hours worked, deductions made and actual wages paid. Whenever the Secretary of Labor has found under 29 CFR 5.5(a)(1)(iv) that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in section 1(b)(2)(B) of the Davis-Bacon Act, the contractor shall maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual cost incurred in providing such benefits. Contractors employing apprentices or trainees under approved programs shall maintain written evidence of the registration of apprenticeship programs and certification of trainee programs, the registration of the apprentices and trainees, and the ratios and wage rates prescribed in the applicable programs.

(ii)(A) The contractor shall submit weekly for each week in which any contract work is performed a copy of all payrolls to the CAR who will maintain the records on behalf of EPA. The payrolls submitted shall set out accurately and completely all of the information required to be maintained under 29 CFR 5.5(a)(3)(i), except that full social security numbers and home addresses shall not be included on weekly transmittals. Instead the payrolls shall only need to include an individually identifying number for each employee (e.g., the last four digits of the employee's social security number). The required weekly payroll information may be submitted in any form desired. Optional Form WH-347 is available for this purpose from the Wage and Hour Division website at <https://www.dol.gov/whd/forms/wh347.pdf> or its successor site. The prime contractor is responsible for the submission of copies of payrolls by all subcontractors. Contractors and subcontractors shall maintain the full social security number and current address of each covered worker, and shall provide them upon request to the CAR for transmission to the EPA, if requested by EPA, the contractor, or the Wage and Hour Division of the Department of Labor for purposes of an investigation or audit of compliance with prevailing wage requirements. It is not a violation of this section for a prime contractor to require a subcontractor to provide addresses and social security numbers to the prime contractor for its own records, without weekly

submission to the CAR.

(ii)(B) Each payroll submitted to the CAR shall be accompanied by a "Statement of Compliance," signed by the contractor or subcontractor or his or her agent who pays or supervises the payment of the persons employed under the contract and shall certify the following:

(1) That the payroll for the payroll period contains the information required to be provided under § 5.5 (a)(3)(ii) of Regulations, 29 CFR Part 5, the appropriate information is being maintained under § 5.5 (a)(3)(i) of Regulations, 29 CFR Part 5, and that such information is correct and complete;

(2) That each laborer or mechanic (including each helper, apprentice, and trainee) employed on the contract during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth in Regulations, 29 CFR Part 3;

(3) That each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification of work performed, as specified in the applicable wage determination incorporated into the contract.

(ii)(C) The weekly submission of a properly executed certification set forth on the reverse side of Optional Form WH-347 shall satisfy the requirement for submission of the "Statement of Compliance" required by paragraph (a)(3)(ii)(B) of this section.

(ii)(D) The falsification of any of the above certifications may subject the contractor or subcontractor to civil or criminal prosecution under section 1001 of title 18 and section 231 of title 31 of the United States Code.

(iii) The contractor or subcontractor shall make the records required under paragraph (a)(3)(i) of this section available for inspection, copying, or transcription by authorized representatives of the EPA or the Department of Labor, and shall permit such representatives to interview employees during working hours on the job. If the contractor or subcontractor fails to submit the required records or to make them available, EPA may, after written notice to the contractor, CAR, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds. Furthermore, failure to submit the required records upon request or to make such records available may be grounds for debarment action pursuant to 29 CFR 5.12.

### (3) Apprentices and Trainees.

(i) Apprentices. Apprentices will be permitted to work at less than the predetermined rate for the work they performed when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Office of Apprenticeship Training, Employer and Labor Services, or with a State Apprenticeship Agency recognized by the Office, or if a person is employed in his or her first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Office of Apprenticeship Training, Employer and Labor Services or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice. The allowable ratio of apprentices to journeymen on the job site in any craft classification shall not be greater than the ratio permitted to the contractor as to the entire work force under the registered program. Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated above, shall be



paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. Where a contractor is performing construction on a project in a locality other than that in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyman's hourly rate) specified in the contractor's or subcontractor's registered program shall be observed. Every apprentice must be paid at not less than the rate specified in the registered program for the apprentice's level of progress, expressed as a percentage of the journeymen hourly rate specified in the applicable wage determination. Apprentices shall be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the wage determination for the applicable classification. If the Administrator determines that a different practice prevails for the applicable apprentice classification, fringes shall be paid in accordance with that determination. In the event the Office of Apprenticeship Training, Employer and Labor Services, or a State Apprenticeship Agency recognized by the Office, withdraws approval of an apprenticeship program, the contractor will no longer be permitted to utilize apprentices at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(ii) Trainees. Except as provided in 29 CFR 5.16, trainees will not be permitted to work at less than the predetermined rate for the work performed unless they are employed pursuant to and individually registered in a program which has received prior approval, evidenced by formal certification by the U.S. Department of Labor, Employment and Training Administration. The ratio of trainees to journeymen on the job site shall not be greater than permitted under the plan approved by the Employment and Training Administration. Every trainee must be paid at not less than the rate specified in the approved program for the trainee's level of progress, expressed as a percentage of the journeyman hourly rate specified in the applicable wage determination. Trainees shall be paid fringe benefits in accordance with the provisions of the trainee program. If the trainee program does not mention fringe benefits, trainees shall be paid the full amount of fringe benefits listed on the wage determination unless the Administrator of the Wage and Hour Division determines that there is an apprenticeship program associated with the corresponding journeyman wage rate on the wage determination which provides for less than full fringe benefits for apprentices. Any employee listed on the payroll at a trainee rate who is not registered and participating in a training plan approved by the Employment and Training Administration shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any trainee performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. In the event the Employment and Training Administration withdraws approval of a training program, the contractor will no longer be permitted to utilize trainees at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(iii) Equal employment opportunity. The utilization of apprentices, trainees and journeymen under this part shall be in conformity with the equal employment opportunity requirements of Executive Order 11246, as amended, and 29 CFR Part 30.

(4) Compliance with Copeland Act requirements. The contractor shall comply with the requirements of 29 CFR Part 3, which are incorporated by reference in this contract.

(5) Subcontracts. The contractor or subcontractor shall insert in any subcontracts the clauses contained in 29 CFR 5.5(a)(1) through (10) and such other clauses as the EPA may by appropriate instructions require, and also a

clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for the compliance by any subcontractor or lower tier subcontractor with all the contract clauses in this term and condition.

(6) Contract termination: debarment. A breach of the contract clauses in 29 CFR 5.5 may be grounds for termination of the contract, and for debarment as a contractor and a subcontractor as provided in 29 CFR 5.12.

(7) Compliance with Davis-Bacon and Related Act requirements. All rulings and interpretations of the Davis-Bacon and Related Acts contained in 29 CFR Parts 1, 3, and 5 are herein incorporated by reference in this contract.

(8) Disputes concerning labor standards. Disputes arising out of the labor standards provisions of this contract shall not be subject to the general disputes clause of this contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR Parts 5, 6, and 7. Disputes within the meaning of this clause include disputes between the contractor (or any of its subcontractors), the CAR, borrower or subrecipient and EPA, the U.S. Department of Labor, or the employees or their representatives.

(9) Certification of eligibility.

(i) By entering into this contract, the contractor certifies that neither it (nor he or she) nor any person or firm who has an interest in the contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

(ii) No part of this contract shall be subcontracted to any person or firm ineligible for award of a Government contract by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

(iii) The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001.

#### 4. Contract Provisions for Contracts in Excess of \$100,000

(a) Contract Work Hours and Safety Standards Act. The **CAR** shall insert the following clauses set forth in paragraphs (a)(1), (2), (3), and (4) of this section in full in any contract in an amount in excess of \$100,000 and subject to the overtime provisions of the Contract Work Hours and Safety Standards Act. These clauses shall be inserted in addition to the clauses required by Item 3, above or 29 CFR 4.6. As used in this paragraph, the terms laborers and mechanics include watchmen and guards.

(1) Overtime requirements. No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic in any workweek in which he or she is employed on such work to work in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours in such workweek.

(2) Violation; liability for unpaid wages; liquidated damages. In the event of any violation of the clause set forth in paragraph (a)(1) of this section the contractor and any subcontractor responsible therefore shall be liable for the unpaid wages. In addition, such contractor and subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory), for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchmen and guards, employed in violation of the clause set forth in paragraph (a)(1) of this section, in the sum of \$10 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set

forth in paragraph (a)(1) of this section.

(3) Withholding for unpaid wages and liquidated damages. The **CAR**, upon written request of the Award Official or an authorized representative of the Department of Labor, shall withhold or cause to withhold from any moneys payable on account of work performed by the contractor or subcontractor under any such contract or any other Federal contract with the same prime contractor, or any other federally-assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same prime contractor, such sums as may be determined to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as provided in the clause set forth in paragraph (a)(2) of this section.

(4) Subcontracts. The contractor or subcontractor shall insert in any subcontracts the clauses set forth in paragraph (a)(1) through (4) of this section and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in paragraphs (a)(1) through (4) of this section.

(b) In addition to the clauses contained in Item 3, above, in any contract subject only to the Contract Work Hours and Safety Standards Act and not to any of the other statutes cited in [29 CFR 5.1](#), the CAR shall insert a clause requiring that the contractor or subcontractor shall maintain payrolls and basic payroll records during the course of the work and shall preserve them for a period of three years from the completion of the contract for all laborers and mechanics, including guards and watchmen, working on the contract. Such records shall contain the name and address of each such employee, social security number, correct classifications, hourly rates of wages paid, daily and weekly number of hours worked, deductions made, and actual wages paid. Further, the CAR shall insert in any such contract a clause providing that the records to be maintained under this paragraph shall be made available by the contractor or subcontractor for inspection, copying, or transcription by authorized representatives of the (write the name of agency) and the Department of Labor, and the contractor or subcontractor will permit such representatives to interview employees during working hours on the job.

## 5. Compliance Verification

(a) The CAR shall periodically interview a sufficient number of employees entitled to DB prevailing wages (covered employees) to verify that contractors or subcontractors are paying the appropriate wage rates. As provided in [29 CFR 5.6\(a\)\(6\)](#), all interviews must be conducted in confidence. The CAR must use Standard Form 1445 or equivalent documentation to memorialize the interviews. Copies of the SF 1445 are available from EPA on request.

(b) The CAR shall establish and follow an interview schedule based on its assessment of the risks of noncompliance with DB posed by contractors or subcontractors and the duration of the contract or subcontract. At a minimum, the CAR must conduct interviews with a representative group of covered employees within two weeks of each contractor or subcontractor's submission of its initial weekly payroll data and two weeks prior to the estimated completion date for the contract or subcontract. CARs must conduct more frequent interviews if the initial interviews or other information indicates that there is a risk that the contractor or subcontractor is not complying with DB. CARs shall immediately conduct necessary interviews in response to an alleged violation of the prevailing wage requirements. All interviews shall be conducted in confidence.

(c) The CAR shall periodically conduct spot checks of a representative sample of weekly payroll data to verify that contractors or subcontractors are paying the appropriate wage rates. The CAR shall establish and follow a spot check schedule based on its assessment of the risks of noncompliance with DB posed by contractors or subcontractors and the duration of the contract or subcontract. At a minimum, the CAR must spot check payroll data within two weeks of

each contractor or subcontractor's submission of its initial payroll data and two weeks prior to the completion date the contract or subcontract. CARs must conduct more frequent spot checks if the initial spot check or other information indicates that there is a risk that the contractor or subcontractor is not complying with DB. In addition, during the examinations the CAR shall verify evidence of fringe benefit plans and payments thereunder by contractors and subcontractors who claim credit for fringe benefit contributions.

(d) The CAR shall periodically review contractors and subcontractors use of apprentices and trainees to verify registration and certification with respect to apprenticeship and training programs approved by either the U.S Department of Labor or a state, as appropriate, and that contractors and subcontractors are not using disproportionate numbers of, laborers, trainees and apprentices. These reviews shall be conducted in accordance with the schedules for spot checks and interviews described in Item 5(b) and (c) above.

(e) CARs must immediately report potential violations of the DB prevailing wage requirements to the EPA DB contact listed above and to the appropriate DOL Wage and Hour District Office listed at <https://www.dol.gov/whd/america2.htm>.

## **EPA DECISION MEMORANDUM**

**SUBJECT:** Adjustment Period Waiver of Section 70914(a) of P.L. 117-58, Build America, Buy America Act, 2021 for Brownfields and Superfund Cooperative Agreements Barry N. Breen Acting Assistant Administrator

**FROM:** Barry N. Breen Acting Assistant Administrator

**Date:** August 31, 2022

### **Introduction**

In November 2021, Congress passed, and the President signed, the Infrastructure Investment and Jobs Act (IIJA) which included the Build America, Buy America (BABA) Act. This is a transformational opportunity to build a resilient supply chain and manufacturing base for critical products here in the United States and will catalyze new and long-term investment in good-paying American manufacturing jobs and businesses. Consistent with the policy direction of Executive Order 14005: Ensuring the Future is Made in All of America by All of America's Workers, section 70914 of IIJA establishes government-wide Buy America conditions on all federally funded infrastructure projects funded after May 14, 2022.

As required by section 70913 of the IIJA, EPA determined that BABA applies to certain Superfund cooperative agreements awarded under section 104(d) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and certain Brownfields cooperative agreements awarded under sections 104(k) and 128(a) of CERCLA (Superfund and Brownfields Cooperative Agreements). EPA efforts to implement BABA will help cultivate the domestic manufacturing base for a range of products. This will take time and flexibility to ensure that EPA programs, like Superfund and Brownfields, are appropriately and effectively implementing these new requirements, which includes educating and supporting the state, local, tribal, and non-profit recipients as they transition to supporting BABA in their federally funded activities.

Consistent with the OMB guidance M-22-11, EPA is issuing a brief, time-limited public interest adjustment period waiver applicable to CERCLA 104(d), 104(k), and 128(a) cooperative agreements to avoid undue increases in the time and cost of projects and to allow recipients and EPA to transition to new rules and processes. This adjustment period is critical to ensure that Superfund and Brownfields cleanup projects conducted by state, tribal, local, and non-profit cooperative agreements recipients sustain progress in communities across the country as we transition to best support the goals of BABA. Ensuring that EPA presents a smooth transition to BABA

implementation, while initially delayed, will create dividends when delays are avoided, grantee questions are answered

quickly, and support is provided that encourages future engagement.

### **BABA Adjustment Period Waiver**

The Office of Management and Budget's April 18, 2022, memorandum, "Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure" (M-22-11) describes several types of authorized public interest implementation waivers, ". . . time-limited waivers to allow recipients and agencies to transition to new rules and processes." With this memorandum, EPA issues a six-month adjustment period waiver for the implementation of the BABA requirements for Superfund and Brownfields Cooperative Agreements. While BABA applies to certain EPA funded Superfund and Brownfields cleanup activities, the scope of that applicability needs additional clarification, as does the degree to which Superfund and Brownfields cleanup activities create opportunities for domestic manufacturing.

To avoid delays in site cleanup that could occur if waivers were determined on a site-by-site or project by project basis, EPA will use this waiver time period to determine, among other things, the applicability of BABA to sites that are not publicly owned or do not clearly meet the definition of infrastructure and the applicability to equipment or materials brought to a site and removed before completion, e.g., a pump that will be removed prior to completion of the cleanup. Once clarification of applicability is obtained, EPA will then need to develop educational materials, training, and other support materials for our recipients, as well as training and processes for EPA personnel. As part of this process, EPA will also need to consider the applicability of other EPA BABA waivers, e.g., de minimis, small grant, etc, to projects or cooperative agreements.

A critical part of EPA's cleanup programs is to ensure that residents living in communities historically affected by economic disinvestment, health disparities, and environmental contamination have an opportunity to benefit from cleanup and redevelopment. EPA's cleanup programs are committed to helping communities revitalize contaminated properties, mitigate potential health risks, and restore economic vitality. EPA cooperative agreement funding plays a significant role in the cleanup and revitalization process. To ensure that we continue to support communities, EPA needs to consider whether application of BABA creates a challenge for rural or disadvantaged communities that may outweigh the potential benefits to domestic manufacturing. To do so, during this adjustment period, EPA will coordinate with our state, tribal, local, and non-profit cooperative agreement recipients and additional stakeholders, including the contracting community, to gather information on the types of products covered by BABA and the degree to which they are manufactured domestically. This will allow EPA to create tools that may support a streamlined process or to demonstrate that further waivers may be needed for equity or other concerns.

In addition, information gathered will help determine whether there are opportunities to expand domestic manufacturing of materials used during the cleanup of Superfund and Brownfields sites. For example, in addition to iron and steel products commonly used in construction, both Superfund and Brownfields cleanup may use PVC piping, geo-textiles, vapor intrusion mitigation and other abatement systems.

### **Anticipated Program Impacts Absent a Waiver**

While BABA potentially affects all Superfund and Brownfields cleanup cooperative agreements, including those awarded with Bipartisan Infrastructure Law (BIL) funds, annual appropriations, and, for Superfund, Special Account and tax resources, it is expected to be more applicable to those remedies that involve engineering controls or other more permanent placement of materials. For example, while the average annual appropriation for Brownfields is approximately \$158.0 million, the average annual funding level for Cleanup and Revolving Loan Fund (RLF) cooperative agreements is approximately \$28.0 million or approximately 18% of the average annual appropriation. The level of cooperative agreement funding that is likely to be covered by BABA is an even smaller subset of this funding. For Superfund, the annual average

appropriation is \$579.8 million, but the average cooperative agreement funding to states, tribes, and local governments is \$82 million. The level of cooperative agreement funding that is likely to be covered by BABA would be an even smaller subset of this level.

For Brownfields cooperative agreements, it is our estimation that immediate implementation of the requirements would be challenging for our most vulnerable communities, delaying cleanups and exacerbating environmental concerns. There are dozens of Brownfields RLF cooperative agreement recipients that submitted applications in October 2021, before the BABA law was passed. Cleanup applicants developed budget proposals and were evaluated on those proposals, prior to the effective date of BABA and issuance of OMB guidance, without contemplating the impact of future domestic sourcing requirements such as those included in BABA. Over 80 percent of applicants that receive Brownfields cleanup cooperative agreements meet the program's pilot definition of a Justice40 community. And a significant portion of the remaining cleanup projects are in rural communities. There is concern that communities would suffer from any implementation delays while the program waits for BABA-related clarifications. States and tribes have been using a portion of their CERCLA section 128 response program funds to cleanup brownfield sites under long-term continuing environmental program grants and they will need to adjust their procurement procedures to take BABA into account. The potential for delays in project execution would prevent recipients from effectively carrying out the EPA-funded activity in a timely manner and possibly exacerbate risks to human health and the environment.

For Superfund cooperative agreements, concerns are similar to Brownfields. There are several Superfund cooperative agreements in the review process now to award IIJA funds to state, tribal and local governments to clean up sites on the Superfund National Priorities List (NPL). These cooperative agreements will fund ongoing remedial action projects and initiate new remedial action projects that cannot be delayed while the program waits for BABA-related clarification. Remedial designs for cleanup projects were started or completed prior to the effective date of BABA and issuance of OMB guidance without contemplating the impact of future domestic sourcing requirements such as those included in BABA. EPA and cooperative agreement recipients may have to reevaluate design alternatives and potentially investigate potential domestic products, redesign elements of projects, revise engineering drawings and bid specifications, and approve complete redesigns, thereby delaying the initiation or continuation of construction, increasing project costs, and impacting schedules. If EPA delays funding these cooperative agreements, EPA may be required to shut down site cleanups, secure sites, and demobilize personnel and equipment, incurring additional costs, slowing down important cleanup, and impacting communities. The potential for delays in project execution would prevent

recipients from effectively carrying out the EPA-funded activity in a timely manner and possibly exacerbate risks to human health and the environment.

#### **Additional Information Required Prior to BABA Implementation**

EPA is issuing this adjustment period waiver as an important tool to fill our knowledge gaps and implement the BABA provisions in the most efficient manner to promote investment in our domestic manufacturing base, strengthen critical supply chains, and position U.S. workers and businesses to compete and lead globally in the 21st century. EPA understands that advancing Made in America objectives is a long-term strategy, and the Agency plans to move forward with sufficient information to implement the new requirements in a way that maximizes coordination and collaboration to support long-term investments in domestic production. The waiver period will provide EPA with sufficient time to work collaboratively with other federal agencies and learn from existing processes established for domestic preference for iron and steel. EPA is planning to use the waiver time to leverage the lessons learned, templates, guidance, and policies and procedures developed by our Office of Water and other federal agencies that have long applied domestic preference to iron and steel. We are also looking to leverage the work OMB's Made in America Office is doing to identify domestic sources for

these materials. Importantly, EPA is planning to use the six-month period to work directly with our Superfund and Brownfields cooperative agreement recipients to fill knowledge gaps and to understand the common needs for iron and steel products, construction materials and manufactured products.

EPA will work directly with recipients to identify and document the availability of required goods, including any specific supply chain challenges experienced. EPA will use the information gained from close engagement with other federal agencies, its cooperative agreement recipients, and OMB to determine the appropriate scope of additional waivers that may be necessary to ensure projects stay on time, on task and on budget. EPA will ensure that any waivers issued under BABA are balanced, practical, and an efficient tool to promote both American manufacturing and timely infrastructure investment. Furthermore, EPA is committed to building our internal capacity and the capacity of our external stakeholders, including providing training to subrecipients and contractors in these requirements. This adjustment period will give cooperative recipients and subrecipients -a large portion of which are small, local, or tribal governmental entities -time to put in place their own policies, procedures, and systems to collect and submit required information; to identify needs for project- or product-specific waivers; to increase staff capacity to handle the increased workload; to educate construction contractors about these requirements; and to participate in EPA-led working groups to guide BABA implementation.

More specifically, the Superfund and Brownfields programs intend to use the adjustment period to conduct a thorough analysis of BABA applicability to different types of projects, better understand the scope of covered projects, and develop more narrowly tailored waivers, as needed, to meet program requirements consistent with statute and OMB guidance.

For example, both programs need to obtain greater clarity on which projects constitute “infrastructure.” According to the April 2022 guidance:

*When determining if a particular construction project . . . constitutes “infrastructure,” agencies should consider whether the project will serve a public function, including whether*

*the project is publicly owned and operated, privately operated on behalf of the public, or is a place of public accommodation, as opposed to a project that is privately owned and not open to the public.*

While the Superfund and Brownfields programs may award funding for projects that meet the infrastructure definition, most Superfund cleanup projects and many Brownfields projects occur on private land or primarily impact a private residence or business, and it is unclear whether they serve a “public function” in the context of the BABA requirements. For example, there could be a Superfund project involving construction of a water line that connects to a private residence or a Brownfields project where the city owns a site for the purposes of remediating it with brownfields funding in order prepare it for sale to a developer for development. This end use will lead to improvements to real property that is privately owned. In other instances, a state or tribal recipient may clean up a site owned by a private party in order to effectively respond to releases or threatened releases of hazardous substances and contaminants. Often, the ultimate end use of the site that is cleaned up is not known at the time of application or award and may not be reused for months or years after the federally funded cleanup occurs.

The Superfund and Brownfields programs need to understand which projects meet the BABA infrastructure and public purpose requirements and involve use of the materials covered under BABA. The programs need time to work with their regional counterparts to look at recent projects to determine whether BABA covered materials and projects are occurring. The national programs are in the process of awarding IJA funding for response activities to states, tribes, local governments, and non-profits (Brownfields). EPA needs time to analyze the work to have a more complete understanding of the projects and materials planned for use. EPA has convened a group of experts and has initiated work to analyze prior and pending cooperative agreements that will be awarded in the coming months.

EPA will also be working with OMB as refinements are made to definitions related to manufactured goods and construction materials. Use of this information will help inform the impact both the Superfund and Brownfields programs have on domestic manufacturing. For example, with approximately 100 Brownfields cleanups a year, we do not anticipate the funding will have a significant impact on any supply chains of manufactured products that may be permanently incorporated into the final clean up, but data collected will help inform our information and potentially highlight opportunities.

Lastly, both programs require time to develop guidance and training materials for BABA implementation for both cooperative agreement recipients and EPA project officers, as well as waiver processes that will expeditiously support situations where a waiver may be needed. We need to develop protocols for recipients to document, where appropriate, that domestic materials were purchased or that the project did not fit within the BABA requirements. With recipients having a wide range of experience in managing federal funding, proper support is critical to ensuring success of funded projects. Ensuring that EPA presents a smooth transition to BABA implementation, while initially delayed, will create dividends when delays are avoided, grantee questions are answered quickly, and support is provided that encourages future engagement. In addition, our cooperative agreement recipients may also need time to alter their own procurement processes to be able to comply with the BABA requirements. They will need to work with our regional offices to understand the new requirements and then develop their own strategies for how they will comply.

EPA has and will continue to engage with our cooperative agreement recipients, the contracting community, and other stakeholders during the adjustment time period. For example, during the Brownfields Conference in August 2022, EPA staff hosted two sessions with cooperative recipients and vendors to discuss BABA implementation and gather information on potential products that may present a challenge to meeting the BABA requirements. EPA staff met with state representatives in August 2022 at the Association of State and Territorial Solid Waste Management Officials CERCLA and Brownfields Subcommittee Symposium and have established ongoing discussions with volunteer groups of recipients, e.g., existing Brownfields Revolving Loan Fund recipients. EPA is also engaging with our Office of Acquisition Solutions, the lead for Made in America as it relates to contracting efforts. For Superfund, the vast majority of federal funding will be expended through contracts and Interagency Agreements. Because cleanups and the materials used will be very similar regardless of whether or not the funds are expended by a cooperative agreement recipient or a contractor, it will be critical that EPA develop a process that best aligns the implementation processes. EPA has initiated a review of the contracting waiver process and will continue this review to help refine the full suite of materials that may benefit from domestic manufacturing.

Finally, as directed in the April 2022 OMB guidance, EPA needs to consider whether international obligations impact BABA applicability and additional time is needed to assess this factor.

The Agency does not expect the conclusion of this waiver to have any impact on industry, and there is no cost advantage of a foreign-sourced product that is the result of the use of dumped items.

### **Public Notice**

On July 14, 2022, EPA published a notice proposing to issue this adjustment period waiver, and the comment period was open until July 29, 2022. The Agency received 5 comments during the public comment period, three representing the interests of steel workers and steel manufacturers, one representing the wastewater industry, and another representing the information technology sector. Two were supportive of the waiver, appreciating the time needed for adjustment. Three commenters did not support issuing a waiver. The commenters raised concerns about the breadth of the proposed waiver and the length of time given for public comments. The commenter also indicated that proposed waiver and short comment period could be perceived as preventing U.S. manufacturing workers from the chance to fully benefit from Federal Buy America policy.



After reviewing these comments, EPA concludes that the information provided to the Agency generally supports the idea that additional time is needed for potential funding applicants and EPA to be prepared to order, produce, and fund equipment that meets the program's Buy America goals. This waiver will also allow EPA to work jointly with other land cleanup programs and EPA's contracting community to develop a common approach to applying Buy America provisions.

### **Waiver Decision**

Section 70914(b)(1) of the IIJA authorizes the Administrator to waive the requirements of BABA if implementation would be inconsistent with the public interest. Due to the critical need to award Superfund and Brownfields cooperative agreements in a timely and cost-effective manner, delaying BABA requirements for eligible projects until EPA is prepared for implementation is in the public's interest. This waiver encompasses all funding obligated for Superfund and Brownfields cooperative agreements during the waiver period even if the funds are expended by recipients after the waiver period expires. As OMB's April 2022 guidance advises ". . . public interest waivers may be needed for awards and amendments made on or after May 14, 2022, where budgets for purchase of covered materials have already been agreed upon (including if materials have been ordered and construction has begun)."

### **Finding**

Based on the above information and the stakeholders' comments received during public notice period, EPA hereby finds that this waiver is in the public interest and grants a program waiver of the requirements of section 70914(a) of the IIJA (Build America, Buy America), pursuant to Section 70914(b)(1), for the cooperative agreements issued under CERCLA 104(d), 104(k), and 128(a) for a six-month period starting on the date of signature of this memorandum. For those cooperative agreements awarded, or amended with additional funding, from May 14, 2022, until the date of signature of this waiver, if requested, EPA will review those projects on an individual basis to determine whether a waiver is appropriate.

If you have any questions concerning the contents of this memorandum, please contact Jennifer Wilbur ([wilbur.jennifer@epa.gov](mailto:wilbur.jennifer@epa.gov)).

**END OF DOCUMENT**