UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
LAND AND EMERGENCY
MANAGEMENT

May 18, 2023

MEMORANDUM

SUBJECT: Fiscal Year (FY) 2023 Policy Revisions for Brownfields Revolving Loan Fund (RLF) Grants

FROM: David R. Lloyd, Director
Office of Brownfields and Land Revitalization (OBLR)

TO: Land, Chemicals and Redevelopment Division Directors
Regional Brownfields Branch and Section Chiefs
Regional Brownfield Coordinators
Regional RLF Leads

This memorandum establishes program policy revisions for open Brownfields RLF cooperative agreements (CAs) and replaces OBLR's March 27, 2019, policy memorandum titled "*Brownfields Revolving Loan Fund Policy Revisions.*" Since 2019, policy for the RLF program has changed due to updates to CA terms and conditions (T&Cs) and the award of Bipartisan Infrastructure Law (BIL; also known as the Infrastructure Investment and Jobs Act) funds for RLF grants. Therefore, the primary purpose of this memo is to provide regional EPA project officers (POs) and RLF cooperative agreement recipients (CARs) with current policy related to 1) caps for subgrants and discounted loans, 2) the 50/50 split rule, and 3) logistics associated with having multiple open RLF grants at the same time.

This memorandum assumes the RLF CAR is operating under FY22 or later T&Cs for their open CAs. Although this memorandum and the separate RLF Program Frequently Asked Questions (FAQs) document provide the latest RLF program policy (both documents are located on the Brownfields Program website), CARs cannot take advantage of all these policy updates without having FY22, and in some cases, FY23 or later CA T&Cs. If the CAR is operating under pre-FY22 T&Cs for any open grant, the T&Cs for that grant must be consulted and take precedence over the direction in this memorandum. For CARs to always be operating under CA T&Cs that are in line with the most recent program policy, OBLR highly recommends that T&Cs be updated to the latest version, at a minimum, when amendments are made to the grant (specifically, a no-cost extension or supplemental funding award).[1]

RLF funding can include some or all of the following four categories of funding:

- Category 1: Funds EPA awards directly to the CAR
- Category 2: Any associated cost share, if applicable
- Category 3: Program income governed by an open CA

[1] If a CAR has not already signed the FY22 Closeout Agreement, update to the latest CA T&Cs is required as a condition of any RLF grant award and/or amendment. This will be required again when the FY22 Closeout Agreement Template is updated in the future (e.g., every 5 years).

- Category 4: Retained and post-closeout program income governed by a Closeout Agreement (COA); see FAQ #28 in the RLF Program FAQs for definitions of program income

1. Caps for Subgrants and Discounted Loans

This memorandum establishes the following policy for subgrants and discounted loans:

- Subgrants: Each site being remediated via an RLF subgrant is limited to a total of $500,000 of the CAR's total award amount[2] (i.e., funds EPA awards directly to the CAR for all open RLF grants and any associated cost share, if applicable). For the purposes of determining compliance with the subgrant cap, the value of any technical assistance the CAR provides to a subgrantee [e.g., an Analysis of Brownfields Cleanup Alternatives (ABCA) paid for with EPA funds or cost share, if applicable] would not be included in the subgrant and does not count towards the $500,000 per site cap. However, any expenses charged to the subgrant by the subgrantee (e.g., including the cost of an ABCA) would count towards the $500,000 subgrant cap. Private, for-profit entities are not eligible for subgrants. See FAQ #6 in the RLF Program FAQs for additional details on the term "total award amount."

- Discounted Loans: The CAR may discount loans, also referred to as the practice of forgiving a portion of loan principal. For an individual loan, the amount of principal discounted may be any percentage of the total loan amount up to 50%, provided that the total amount of the principal forgiven for that loan shall not exceed $500,000 of the CAR's total award amount (EPA funds + cost share, if applicable). Private, for-profit entities are not eligible for discounted loans. In addition, a CAR shall not use its total award amount to fund a discounted loan in combination with a subgrant at the same site, and, in general, a loan may not be discounted after it has already been executed. Any post-execution discounting has to be approved by the PO, after consultation with OBLR.

  See FAQs #2 – 8 in the RLF Program FAQs for additional details on subgrants, loans, and discounted loans and important differences between each. Note that it is typically better to use a discounted loan, rather than combine a loan and subgrant at the same site, since the requirements and allowances are different for loans and subgrants as shown in FAQ #4.

- Subgrant and Discounted Loan Waivers: The CAR may request a waiver of the subgrant cap and/or discounted amount/percentage in a discounted loan by consulting with the PO for the CA who will provide guidance based on this memorandum. Waiver requests will be considered on a case-by-case basis and are subject to both eligibility requirements and OBLR approval. OBLR intends to approve waiver requests on a limited basis to promote

[2] The term "CAR's total award amount" is used in this memo and FY23 and later CA T&Cs to represent the EPA funds (category 1 in the types of RLF funding identified above) + cost share (category 2) from all the CAR's open RLF grants (i.e., the term considers the RLF program as a single, unified program rather than separate open RLF CAs; it does not include any funding from CAs that the CAR has already closed out). The total award amount also never includes program income earned while the CA is open (category 3) or retained and post-closeout program income (category 4), so neither should be included when determining compliance with the subgrant cap (i.e., a subgrant with $490,000 of EPA funds, $10,000 of cost share, and $100,000 of program income does not require a subgrant cap waiver under FY22 or later CA T&Cs).

revolution of the funds and to ensure that RLF CAs are being used to generate an ongoing source of capital within a community.

CARs that wish to make a subgrant or discount in excess of $500,000 of the total award amount (EPA funds + cost share, if applicable[3]) and/or discount more than 50% of a total loan amount must demonstrate:

- how they have ensured their fund will become, or is, self-sustained by making loans;
- how their fund has successfully generated program income;
- how the larger subgrant or discount amount will be of benefit to a local community of need[4]; and
- how no other funding opportunities are currently available to the subgrantee or recipient of the discounted loan.

CARs requesting a waiver will be instructed by the PO to prepare a letter that specifically addresses each of these four requirements above, in addition to providing the following information:

- the amount the CAR is interested in subgranting or discounting (i.e., amount and percentage of principal forgiven in a discounted loan)
- the amount of the CA's total award amount (EPA funds + cost share, if applicable) that has been committed thus far on loan costs and non-loan costs, respectively, and then whether the CA is expected to still meet the 50/50 split by the end of the CA project period with this proposed subgrant or discounted loan included (see below for further information on the 50/50 split rule);
- the subgrant or discounted loan recipient;
- the nature of the project for which they will be providing a subgrant or discounted loan, including the type of contamination to be remediated and the proposed or anticipated re-use;
- the anticipated benefits to a community of need that will occur as a result of this subgrant or discounted loan, with specific details describing why this is a community of need (e.g., population, poverty/unemployment rates, and/or any other information which demonstrates the community has a disproportionate share of adverse environmental consequences resulting from industrial, governmental, and/or commercial operations or policies); and
- how the approval of this waiver request will contribute toward meeting and/or achieving the goals of their RLF.

[3] Any amount of program income and post-closeout program income can be used in a subgrant or discounted loan since these caps only apply to EPA funds + cost share, not program income.

[4] Consistent with CERCLA 104(k)(6)(C), a community of need is considered one that has an inability to draw on other sources of funding to carry out environmental remediation and subsequent redevelopment because of the small population and/or low income of the community and disproportionate share of negative environmental consequences resulting from industrial, governmental, and/or commercial operations or policies. Subgrant and discounted loan waiver requests should outline the benefits for the local community that will result from the cleanup and redevelopment of the given project.

The Brownfields program for the EPA region will review the request and prepare a recommendation to OBLR for why the waiver should be approved or denied. The regional RLF Lead will forward their recommendation and the CAR's waiver request to the OBLR RLF Program Lead, who will review the information and forward to the Director of OBLR for final decision. Assuming the waiver request provides all information cited above, the regional Brownfields program will typically be informed of the decision within two weeks of receiving confirmation from the OBLR RLF Program Lead that the waiver request is under review. The regional Brownfields program will then inform the CAR of OBLR's decision, to include the reason for any denied requests, and provide a copy of the decision to EPA's Grants Management Officer (GMO) for their file.

2. 50/50 Split Rule

This memorandum establishes the following policy for the 50/50 split rule:

- 50/50 Split Rule: At least 50% of each open CA's total award amount (EPA funds + cost share, if applicable) must be used by the CAR to provide loans for the cleanup of eligible brownfield sites and associated eligible programmatic costs by the end of the CA project period. The remaining EPA funding and associated cost share may be used for all other eligible programmatic costs that are not associated with loans, such as subgrants, forgiven principal in discounted loans, and eligible programmatic costs to manage/market the RLF. This is referred to as the 50/50 split rule, which addresses the minimum ratio of loan costs to non-loan costs required for the CA's total award amount by the end of the CA project period. CARs are not required to meet the 50/50 split rule "proportionally" when drawing down funds, but the PO will monitor to confirm the CAR is on track to meet the minimum 50/50 split by the end of the CA. Note that program income should never be included when determining compliance with the 50/50 split rule. See FAQs #9 - 21 in the RLF Program FAQs for a more detailed explanation of the 50/50 split rule.

If a CAR wishes to use less than 50% of its open CA funds on loans and associated programmatic costs and has FY22 or later CA T&Cs[5] (or is willing to update their CA T&Cs), the CAR may request a waiver of the 50/50 split by consulting with the PO. As of the date of this memorandum, OBLR has revised the 50/50 split waiver process due to extenuating circumstances associated with BIL funding, as explained below.

BIL and non-BIL[6] funding cannot be combined in a single RLF CA. Therefore, beginning in FY22, EPA awarded RLF supplemental funding as a new BIL-funded CA which led to some RLF CARs having two open RLF grants (i.e., a BIL-funded CA and an older non-BIL funded CA[7]). Funds associated with each open RLF grant (i.e., federal funds, cost share, and program

[5] The possibility of a waiver to the 50/50 split requirement was not included in pre-FY22 CA T&Cs.

[6] Non-BIL funding is a term used in this memorandum for funding awarded through annual appropriation allocations, rather than through BIL allocations. Both BIL and non-BIL funds EPA obligates for RLF capitalization grants authorized by CERCLA 104(k) are from State and Tribal Assistance Grants (STAG) "no-year" appropriations which do not expire.

[7] Note that eventually when BIL funding is no longer used for the award of new RLF grants and/or RLF supplemental funding, the reverse of this will occur (i.e., the BIL-funded CA will be the older CA and a new non-BIL funded CA will be awarded).

income) must be kept in separate accounts since each grant is governed by different CA T&Cs with separate reporting requirements.

OBLR acknowledges that the award of supplemental funding as a new BIL grant makes application of the 50/50 split rule more complicated since many RLF CARs now have funding under two open grants. In the past, if the funding sources were the same, in most cases the supplemental funding would have been awarded as an amendment to the existing non-BIL grant, allowing the 50/50 split rule to apply to both the original award amount and the supplemental funding award amount added together, rather than to each CA separately.

In addition, OBLR believes it is in the best interest of the national Brownfields RLF Program to reduce the number of open RLF grants to ease the administrative burden on CARs, POs, and GMOs. That is, lowering the number of open RLF grants simplifies RLF program management and significantly reduces the reporting and financial management burden. Furthermore, OBLR believes the general practice of spending "old" money prior to "new" money should be followed as much as possible, meaning closeout of the oldest RLF CA should be expedited.

OBLR still supports upholding the 50/50 split rule for the national RLF program (i.e., an RLF grant is a <u>revolving</u> <u>loan</u> fund grant, not a 100% pass-through cleanup subgrant; this is what distinguishes an RLF Grant from a Cleanup Grant under the Brownfields program). However, due to the circumstance explained above of having multiple open grants that was brought on by BIL funding, OBLR has revised its 50/50 split policy to allow for the following three waiver options:

- <u>Option 1 - CARs who receive **FY23 and later supplemental funding** as a new grant and seek a 50/50 split waiver for their older open grant:</u>
  The FY23 and later CA T&Cs for these CARs will allow for the option of applying the 50/50 split rule to the CAR's RLF program as a whole for all open CAs, rather than to each open CA individually, on one condition: if one of those open grants closes out (i.e., project period ends) and that closing CA does not meet the 50/50 split requirement on its own due to excessive non-loan costs, the CAR must continue to include that CA in the 50/50 split calculation for the other open CA going forward. This allows the 50/50 split rule to be honored for the entire open RLF program.

  EPA cautions that CARs who choose this option in order to close out their oldest RLF CA more quickly will need to spend more of their remaining open RLF CA funds on eligible loan-related expenses. For example, under the current scenario, a CAR with open BIL and non-BIL CAs will not have to adhere to the 50/50 split to close out the non-BIL CA (i.e., the CAR can spend more than 50% of their non-BIL CA on non-loan expenses), but then that CAR will be required to use more of their BIL CA funds for loan-related expenses.

  If a CAR would like to take advantage of this option to close out their oldest CA more quickly, the CAR must describe its intentions in writing to the PO, including documenting agreement to the condition of applying the 50/50 split to their total open CAs going forward. OBLR approval for this waiver is not required. However, the CAR must receive PO approval and there must be an existing T&C in the closing CA allowing a waiver of the 50/50 split or the CA must be amended to include such a T&C. In addition, the CA remaining open must have FY23 or later T&Cs which allow for this option. Note that if the extra non-loan costs exceed the subgrant or discounted loan caps, an OBLR waiver for that would still be required.

In addition, prior to CA close out, the RLF CAR must state in its Final CA Performance Report (formerly called the Final Technical CA Report) that the closing CA did not meet the 50/50 split requirement at the end of the project period and therefore, it will be included in the 50/50 split calculation for the remaining open CA. The PO must then confirm that going forward, the 50/50 split calculation for the remaining open CA includes the closing CA. See FAQ #11 in the RLF Program FAQs for a more detailed explanation of how to calculate and determine if the CAR meets the 50/50 split for one CA or for multiple open CAs, as well as an example of both calculations. Note that the Final CA Performance Report must document the actual dollar amounts for the closing CA (i.e., EPA funds and cost share used for loans under the closing CA, EPA funds and cost share used for eligible programmatic costs associated with those loans under the closing CA, and the total EPA funds and cost share for the closing CA) to clearly show what dollar amounts will be used as part of the 50/50 split calculation going forward for the remaining open CA.

- <u>Option 2 - CARs who received an **FY22 supplemental funding award** as a new BIL grant and seek a 50/50 split waiver for their older open non-BIL grant which has $350,000 or less in uncommitted funds:</u>
  Because the option described above was not included in FY22 CA T&Cs, as long as the non-BIL CA T&Cs include a T&C allowing a waiver of the 50/50 split, OBLR will universally allow CARs who received FY22 supplemental funding to spend up to an additional $350,000 of their non-BIL CA funds on eligible non-loan costs (e.g., subgrants), even if this causes the CAR to not meet the 50/50 split for that CA at closeout. For Option 2, the CAR is not required to include the closing non-BIL CA in the 50/50 split calculation for the BIL CA going forward because that option is not included in FY22 CA T&Cs. However, if the BIL CA T&Cs for this CAR were updated to FY23 or later T&Cs (either based on the CAR's request or due to an amendment such as receiving an FY23 or later supplemental funding award), the BIL CA T&Cs would then include that option and so the CAR would follow Option 1.

  If a CAR would like to take advantage of Option 2 to close out their oldest CA more quickly, the CAR must describe its intentions in writing to the PO and include details on how they qualify for this option (e.g., provide EPA funds/cost share used for loan and non-loan costs so far under the non-BIL CA, amount of uncommitted EPA funds/cost share remaining that the CAR is proposing be used for eligible non-loan costs, and expected timeframe for CA closeout). See FAQ #19 for an explanation of committed versus uncommitted funds. OBLR approval for this waiver is not required. However, the CAR must receive PO approval and there must be an existing T&C in the closing CA allowing a waiver of the 50/50 split or the CA must be amended to include such a T&C, prior to the expenditure of the additional $350,000 on eligible non-loan costs (e.g., prior to the award of a subgrant). OBLR will not consider approval of any waiver beyond this universal waiver of $350,000. To take advantage of Option 2, the non-BIL CA <u>cannot</u> be updated to FY23 or later T&Cs.

- Option 3 - All other CARs who seek a 50/50 split waiver, typically to close it out:
  If any other CAR would like to close out their CA without meeting the 50/50 split (e.g., the CAR no longer wants to operate an RLF under an open CA), the CAR must submit a 50/50 split waiver request following the same process described above for a subgrant or discounted loan waiver. While it is understood that the CAR may not be asking to also increase the caps for a subgrant or discounted loan (i.e., only asking for a waiver to the 50/50 split), the same information is needed by the PO to evaluate the waiver. Option 3 does not have a universally-approved OBLR waiver as described in the two options above. Waiver requests will be considered on a case-by-case basis and are subject to both eligibility requirements and OBLR approval. OBLR intends to approve these 50/50 split waiver requests on a very limited basis. See FAQ #20 in the RLF Program FAQs which explains the need for PO monitoring to ensure a CAR can meet the minimum 50/50 split by the end of the CA based on the CA's current total award amount.

See FAQs #18 – 23 for more details on all these 50/50 split waiver options.

3. Logistics associated with having multiple open RLF grants

As described above, the best strategy for a CAR with multiple open RLF grants is to close out the oldest RLF CA as quickly as possible by using the oldest RLF CA funding first for the next loan or subgrant the CAR plans to execute. The following are some scenarios the CAR may encounter, with EPA feedback on how each scenario could be handled:

- Scenario 1 - The CAR would like to use the remaining funds (i.e., EPA funds and cost share) from the oldest RLF CA to award a subgrant, but this would cause the CAR to exceed the 50/50 split rule for that CA: See the 50/50 split waiver options discussed earlier in this memo.

- Scenario 2 - The CAR has identified an eligible site cleanup, but the amount of funding left on the oldest RLF CA (i.e., EPA funds and cost share) is not sufficient to cover the site cleanup cost: In this case, funds from more than one open RLF CA can be used for the cleanup of one site.[8] If the CAR has post-closeout program income, another option for covering the cleanup cost is to use funds from both the oldest open RLF CA and the post-closeout RLF grant. See FAQs #24 - 26 in the RLF Program FAQs for logistical considerations on how this could be done.

- Scenario 3 - The CAR has identified an eligible site cleanup which will use all of the remaining funds left on the oldest RLF CA (i.e., federal funds and cost share), but a period of performance extension would be needed to complete the cleanup project: As long as the period of performance extension will not cause the CA project period to exceed 15 years, the region's GMO can award a no-cost extension amendment for the extra time needed to complete the site cleanup. If an extension is needed which will cause the CA project period to exceed 15 years, a waiver is still possible but requires the region to initiate a longer process which includes seeking OBLR and the Office of Grants and Debarment (OGD) approval.

[8] If the funding will be used for a subgrant from two open CAs from the same CAR at the same site, see FAQ #8. See the table in FAQ #2 if the subgrants are from two different RLF CARs.

- Scenario 4 - Considering both open grants as an RLF program rather than two separate RLF CAs, the CAR wants to pay for programmatic costs for both grants from funding in the older CA (e.g., non-BIL grant) to expedite its closeout: In accordance with 2 CFR 200.405(c)[9] and on a case-by-case basis, the region's program office can work with the GMO to allow shifting of programmatic costs (loan and non-loan costs) between CAs to better achieve the CAR's RLF program priorities. This option will be included in FY23 (and later) T&Cs, so for the CAR to select this scenario, both open CAs (e.g., BIL and non-BIL) must have FY23 and later T&Cs. Once the oldest CA closes out, the workplan and budget for the remaining open CA would need to be amended to include programmatic costs.

- Scenario 5 - The CAR wants to close out their non-BIL CA without spending further funding on subgrants or loans: The CAR may notify the PO that it wishes to voluntarily terminate (2 CFR 200.340(a)(4)) and closeout the non-BIL CA without spending remaining funds, and the CAR will receive no penalty for this action in future Brownfields grant competitions. The region will de-obligate the remaining balance of EPA funds and send the funds back to OBLR for use on other Brownfield grants. Any retained program income at the time of CA closeout must either be returned to EPA or be transferred to the CAR's post-closeout account and managed under the CAR's COA. If the CAR has signed the FY22 COA, the CAR will have a single post-closeout account for all existing and future post-closeout program income from the CAR's RLF program.

After all site cleanup activities funded from the oldest RLF CA are complete, the closeout process for that CA can begin, which includes the transfer of retained program income to the CAR's post-closeout account. If the remaining funds from the oldest RLF CA are used for a loan, see FAQs #26 - 27 in the RLF Program FAQs for an explanation of how future program income should be accounted for after the CA project period ends.

EPA believes the above clarifications provide CARs with the tools needed to achieve faster closeout of their oldest open RLF CA, so that the CAR can return to operating under one open RLF grant.

POs who have questions should contact their regional RLF Lead, who will contact the OBLR RLF Program Lead as needed. In addition, OBLR has posted a copy of this memorandum and the RLF Program FAQs to the Brownfields Program website and requests that POs share the documents and/or link with all CARs who have an open and/or post-closeout RLF CA.

cc: Regional Grants Management Officers
Jim Drummond / Kelsey Binder (OGC)
Patricia Overmeyer / Rachel Lentz / Nicole Wireman (OBLR)

[9] 2 CFR 200.405(c): Any cost allocable to a particular Federal award under the principles provided for in this part may not be charged to other Federal awards to overcome fund deficiencies, to avoid restrictions imposed by Federal statutes, regulations, or terms and conditions of the Federal awards, or for other reasons. However, this prohibition would not preclude the non-Federal entity from shifting costs that are allowable under two or more Federal awards in accordance with existing Federal statutes, regulations, or the terms and conditions of the Federal awards.