



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

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MEMORANDUM

SUBJECT: Additional Guidance on Prepayment of Oversight Costs and Special Accounts

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I. INTRODUCTION

The purpose of this memorandum is to provide additional guidance on the prepayment of oversight costs discussed in the October 4, 2002 "Consolidated Guidance on the Establishment, Management and Use of CERCLA Special Accounts" ("Consolidated Guidance"). Attached to this memorandum is sample settlement language for the prepayment of oversight costs.¹ This language was developed in consultation with the Department of Justice Environmental Enforcement Section.

¹ While the sample language in Attachment 1 is for an RD/RA Consent Decree, it may be modified to accommodate other types of settlements for performance of work (e.g., RI/FS, removal action).

II. BACKGROUND

Section 122(b)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9622(b)(3), authorizes EPA to retain and use funds received through an agreement to pay for response actions contemplated in the agreement. EPA retains these funds in site-specific accounts, called “special accounts,” which are subaccounts within the EPA Hazardous Substance Superfund (“Trust Fund”). EPA uses these funds to address response actions at a site.² EPA considers oversight of work performed by a PRP to be a response action.³ The Consolidated Guidance generally discusses issues relevant to special accounts and money received for EPA oversight of PRP work.⁴

In most agreements under which PRPs agree to perform work, the PRPs also agree to reimburse the Agency for all EPA “future costs.” Future costs include the “direct” and “indirect” costs the Agency incurs for oversight of the PRPs’ activities.⁵ It has been the Agency’s general practice to use appropriated Trust Fund money to pay for EPA’s oversight, and periodically bill the PRPs. Payments received are then deposited in the Trust Fund. In the past several years, however, the Agency has been placing the amounts received into a special account (in accordance with language in the settlement agreements), which it has been using to fund oversight costs. The Region still continues to bill the PRPs for oversight while using the special account to fund those activities. The chief benefit of this approach is that it ensures that oversight will be immediately available for the site while, at the same time, conserving appropriated Trust Fund money for use at other sites where there are no viable PRPs.

III. PREPAYMENT OF OVERSIGHT COSTS

The Consolidated Guidance generally discusses negotiating with PRPs to prepay oversight costs.⁶ As a means to save additional appropriated Trust Fund dollars, Regions should, in appropriate cases, request that PRPs prepay the first installment of oversight costs under any settlement where the PRPs have agreed to perform a response action (e.g. RI/FS, RD/RA, or removal actions) and pay future oversight costs. Oversight is a necessary part of a PRP-lead response action, and it is appropriate, as part of that response action, to ask the PRPs to prepay a certain amount up front so that the Agency does not have to expend Trust Fund money.

² See the 2001 Model RD/RA Consent Decree (“Model RD/RA CD”) for language concerning the establishment and use of special accounts.

³ October 4, 2002 “Consolidated Guidance on the Establishment, Management and Use of CERCLA Special Accounts.”

⁴ See Consolidated Guidance, section III.E “Oversight Payments,” at 4-5.

⁵ See Consolidated Guidance, at 2.

⁶ See Consolidated Guidance at 5.

Requiring PRPs to prepay the first year of estimated oversight costs also does not significantly burden PRPs because cost payments are not increased, but are merely accelerated. We acknowledge that the PRPs would lose the use of, or interest on, the prepaid funds.

For a number of situations, it will be unnecessary to seek prepayment of oversight costs. For example, at sites for which there is already an established special account, the Agency will already have access to special account dollars as an additional funding source so there is no need to request prepayment of oversight. Prepayment may also be unnecessary if, as part of the settlement agreement, the PRPs will be paying past costs that can be placed into a special account that can be used to initially fund oversight.⁷ In addition, it may not be cost-effective to request prepayment of oversight costs where the overall amount of oversight costs is expected to be minimal (e.g., less than \$25,000), or the duration of the response action will be relatively short (e.g., less than 9 months). Further, prepayment may be inappropriate where there is a significant orphan share compromise in the form of an initial reduced oversight bill. Finally, the case team may, within its discretion, determine that requesting prepayment of oversight is inappropriate based on site-specific circumstances.

A. Establishing the Amount

When seeking prepayment of oversight costs, a Region should first estimate the dollar amount necessary to fund the cost of oversight. Often, the decision document (e.g., Action Memorandum or Record of Decision) will be useful to determine the amount necessary to fund oversight costs. Similarly, historic oversight costs at the site or estimates from other operable units at similar sites may be useful to determine these costs.⁸ Regions may estimate an amount to address both direct and indirect costs, but at a minimum, should seek an amount to fund expected direct oversight costs.

After establishing the total dollar amount of oversight, the Region will need to determine the amount of oversight dollars to be prepaid prior to the commencement of the response action. If the response action is a longer term action, like a remedial action, the prepaid amount should typically be for the portion of the full amount the Region anticipates it will need to cover costs from the commencement of the work until the estimated date it would likely receive payment for the first bill. For shorter term actions, like a removal action, Regions may request that the PRPs prepay the total amount of oversight. Regions may also consider requesting an amount that includes an additional amount to offset the possibility that costs could be higher than expected. This approach ensures that Trust Fund dollars will not have to be used for oversight at that site.

⁷ If the existing funds in the special account or the past costs obtained under a settlement are earmarked for a specific purpose or need to be retained for other activities at the site then negotiating for the prepayment of oversight costs may be appropriate.

⁸ See *A Guide to Developing and Documenting Cost Estimates During the Feasibility Study*, OSWER Directive 9355.0-75, July 2000.

B. Accounting for and Managing the Prepaid Funds and Other Oversight Payments

When the Agency receives funds prior to work being performed, for financial and reporting purposes, the Agency classifies the funds received as a “cashout.” Oversight amounts that are prepaid would be categorized as a cashout, and entered into the financial management system as “unearned” (TR2) revenue, because the funds are being collected in anticipation of future costs to be incurred.⁹ In the situation where it is necessary to obligate and/or expend funds prior to receipt of the prepaid amount, Regions can still obligate appropriated Trust Fund dollars (“T”), but should then reclassify any expended amounts once the prepaid amount is received.¹⁰ Any open obligations (unliquidated) recorded in the “T” appropriation should be modified to reflect the TR2B special account fund code.

After receiving the prepaid amount, the Regions should use their existing oversight billing procedures for all future billings to PRPs.¹¹ This means that for the initial billing after the receipt of the prepaid amount, and all subsequent billings, the Region will seek payment of all actual direct and indirect costs incurred in that billing period.¹² Amounts received, which are considered as a cost recovery, would then be deposited into the special account (TR2B) for that site as provided in the settlement document. These amounts are considered “earned revenue” because it is the collection of costs previously incurred during that period.¹³ This process would be repeated for each subsequent payment.¹⁴ For the shorter term actions where the region receives the full amount prepaid, the region would still bill the PRPs for any costs (e.g., unpaid indirect costs) associated with that action that exceed the prepayment amount.

⁹ See *Superfund Special Account Guidance*, (OCFO) July 16, 2002, at Attachment 1, p. 7. Typically oversight costs are coded as TR2B or “earned” revenue because they are costs that are being collected or have already been incurred.

¹⁰ See discussion in *Superfund Special Account Guidance*, July 16, 2002, at Attachment 4, p. 2, for proper steps to undertake for the reclassification process; see also *Consolidated Guidance*, at p. 7, for general reclassification discussion.

¹¹ In July 1999, the Office of the Chief Financial Officer created a new performance measure for the timely, periodic billing of future response costs and further defined “periodic billing” as annual billings of such costs (for purposes of the measure only). Oversight bills are to be billed in accordance with the terms of individual settlement agreements. See CERCLA Future Response Costs: Settlement, Billing and Collection, June 20, 2002, at p.5. See also Model RD/RA CD, Section XVI, Payments for Response Costs, ¶ 55, which states “...on a periodic basis the United States will send Settling Defendants a bill requiring payment...”

¹² These monies should be treated as cost recovery (TR2B) dollars because such amounts are considered earned revenue.

¹³ See *Superfund Special Account Guidance*, July 16, 2002, at Attachment 1, p. 3.

¹⁴ A bill would still be sent to PRPs at the end of the first year for all the oversight costs incurred in that year in order to ensure available funding for the second year’s oversight.

Once the Region receives the first reimbursement payment for future costs, the Region should cease drawing down on the prepaid amounts (TR2) (the cashout funds),¹⁵ and instead should start using the reimbursed amounts (TR2B) (the cost recovery or reimbursed funds) to fund oversight for the remainder of the response action.¹⁶ It is not necessary to establish a separate special account to accomplish this task. To accommodate this, Regions should modify any open obligations (unliquidated) recorded in TR2 to reflect the TR2B special account fund code.

C. Addressing a Shortfall

There may be situations where it becomes clear that the prepaid amount will be exhausted before receipt of the first reimbursement payment from the PRPs. In this case, the Region may want to consider sending the first oversight bill early to avoid running out of prepayment funds. In addition, at the time of settlement negotiations, the Regions should consider including a provision that allows the Agency to request additional funds if it becomes apparent that the prepaid amount will be insufficient to fund the oversight prior to the receipt of the first reimbursement payment. If the settlement provides for a one-time payment of oversight costs, the Regions may wish to include a provision that would allow the Agency to: (1) request a set additional amount, (2) issue one or more requests for the estimated amount necessary to complete the oversight of the project, or (3) begin to send future oversight bills based on the amount actually spent above the original payment. If the settlement provides for periodic billing of future costs, the additional payment provision could require the PRPs to pay a set amount that is expected to be significant enough to cover all expenses until the first billing period. Alternatively, the language could be drafted to allow EPA to estimate at the time of demand what will be needed to fund oversight until receipt of the first reimbursement payment. In either case, the “trigger” for a new payment should be established when a negotiated dollar balance remains from the prepaid amount.

D. Remainder of Prepaid Funds

When work parties agree to pay oversight costs, the parties usually only agree to pay the actual direct and indirect costs of EPA oversight. In the prepayment situation, this may result in prepaid amounts remaining in the special account after the completion of the response action. As a result, after completion of the work any remaining prepaid dollars plus any interest earned may be used to reduce the PRPs’ last payment for oversight once EPA has accounted for all of its direct and indirect oversight costs. In the alternative, as long as it is negotiated in advance, it is also acceptable for those funds to be transferred to a different special account at the site for use by the Agency to address other response actions for which the same PRPs are also liable. In that

¹⁵ This allows the Agency to keep a reserve of funds if necessary to use if oversight funds for the site fall short between billing periods and maximizes interest accrued on the prepaid amounts.

¹⁶ See Attachment 2 for an example of how the prepayment scenario of oversight may work.

situation, the Region should consider providing a credit against future liability for amounts already paid. If none of these options is selected, the remaining prepaid amount should be returned to the PRPs (See Attachment 2).

IV. CONCLUSION

It is important to maximize the use of available mechanisms to finance work. Prepayment of PRP oversight costs contributes toward this goal. This memorandum is intended to encourage EPA personnel to include this model language in ongoing and upcoming settlement negotiations.

This guidance and any internal procedures adopted for its implementation are intended exclusively as guidance for employees of the U.S. Environmental Protection Agency. This guidance is not a rule and does not create any legal obligations or enforceable rights. Whether and how EPA applies the guidance to any particular site will depend on the facts at the site. EPA may periodically review the implementation of this guidance to evaluate settling parties' compliance with the terms of the consent decree and NCP cleanup requirements.

Questions or comments regarding this memorandum should be directed to Melissa Franolich in OSRE at (202) 564-6300, Leslie Kelley-Huffman in OCFO at (202) 564-4805, or Kevin Hollingsworth in OSRTI at (703) 603-9058.

Attachments

ATTACHMENT 1
DRAFT PREPAYMENT LANGUAGE FOR MODEL RD/RA CD



XVI. PAYMENTS FOR RESPONSE COSTS

[NOTE: If the Settling Defendants will be prepaying any part of EPA’s Future Response Costs, include the following language]

55. Payment of Future Response Costs.

a. Within 30 days of the Effective Date, Settling Defendants shall pay to EPA \$_____ in prepayment of Future Response Costs. The total amount paid shall be deposited by EPA in the **(Site Name)** Future Response Costs Special Account, within the EPA Hazardous Substance Superfund. These funds shall be retained and used by EPA to conduct or finance Future Response Actions. Payment shall be made by FedWire Electronic Funds Transfer (“EFT”), to the U.S. Department of Justice account in accordance with current EFT procedures, referencing the civil action number, EPA Site/Spill ID Number ____, and DOJ Case Number _____. Payment shall be made in accordance with instructions provided to the Settling Defendants by the Financial Litigation Unit of the United States Attorney’s Office for the District of ____ following lodging of the Consent Decree. Any payment received by the Department of Justice after 4:00 p.m. (Eastern Time) will be credited on the next business day. [If the payment amount is less than \$10,000, use the language in Paragraph 54.a of the Model RD/RA Decree for certified or cashier’s check.] Any amounts received under this Subparagraph will be credited to Settling Defendants in the final accounting pursuant to Subparagraph 55.e.

b. At the time of payment, Settling Defendants shall send notice that payment has been made to the United States, to the EPA Project Coordinator and to the Servicing Financing Office, in accordance with Section XXVI (Notices and Submissions).

c. Settling Defendants shall pay to EPA all Future Response Costs not inconsistent with the National Contingency Plan. On a periodic basis, the United States will send Settling Defendants a bill requiring payment that includes a **[insert name of standard Regionally-prepared costs summary, which includes the direct and indirect costs incurred by EPA and its contractors, and name of DOJ-prepared cost summary, which reflects costs incurred by DOJ and its contractors, if any]**. Settling Defendants shall make all payments within 30 days of Settling Defendants’ receipt of each bill requiring payment, except as otherwise provided in Paragraph 56. Settling Defendants shall make all payments required by this Paragraph in the manner required by Subparagraph 55.a., with notice as required by Subparagraph 55.b. The total amount paid will be deposited by EPA in the **(Site Name)** Future Response Costs Special Account within the EPA Hazardous Substance Superfund. These funds will be retained and used by EPA to conduct or finance Future Response Costs. Any amounts remaining in the **(Site Name)** Future Response Costs Special Account, will be disbursed or credited in accordance with Subparagraph 55.e.

[NOTE: Subparagraph 55.d. below is an optional provision to address shortfalls.]

d. In the event that EPA's use of the **(Site Name)** Future Response Costs Special Account results in there being \$_____ or less in the **(Site Name)** Future Response Costs Special Account at any time, Settling Defendants agree, within [] days of EPA's notice that the **(Site Name)** Future Response Costs Special Account has reached \$____ or less, to remit to EPA \$ _____ for deposit in the **(Site Name)** Future Response Costs Special Account, in accordance with the payment procedure described in Subparagraph 55.a and 55.b. Any amounts received under this Subparagraph will be credited to Settling Defendants in the final accounting in Subparagraph 55.e.

e. After EPA issues its written Certification of Completion of Work and EPA has performed a final accounting of Future Response Costs, EPA shall **(choose one or more provisions from the following language: "offset the final bill for Future Response Costs by the unused amount paid by the Settling Defendants pursuant to Subparagraphs 55.a. or 55.d"; "apply any unused amount paid by the Settling Defendants pursuant to Subparagraphs 55.a. or 55.d to any other unreimbursed response costs or response actions remaining at the Site for which the Settling Defendants are liable," or "remit and return to Settling Defendants any unused amount of the funds paid by Settling Defendants pursuant to Subparagraphs 55.a or 55.d.")**

56. Settling Defendants may contest payment of any Future Response Costs under Paragraph 55 that were incurred during the time period that any prepaid amounts were received under Subparagraph 55.c., with the exception of amounts due under Paragraphs 55.a and 55.d., if they determine that the United States [or the State] has made a mathematical error or if they allege that a cost item that is included represents costs that are inconsistent with the NCP or outside the definition of Future Response Costs.

ATTACHMENT 2

An Example of How Prepayment of Oversight May Work

- Oversight Estimate for Remedial Action: \$300,000 per billing period. PRP enters into CD under which it agrees to prepay \$450,000 (base amount plus 50% premium) 30 days after entry of CD. The appropriate servicing finance office records a billing document using the TR2 fund code in the amount of \$450,000.
- Region obligates and begins expending, in advance of prepayment receipt, \$100,000 of appropriated Trust Fund money (T) to bring on oversight contractor at entry of CD. Once prepayment amount of \$450,000 is received and deposited to TR2, the \$100,000 is reclassified from T to TR2 (the freed up T funds are then available, through the regional budget office, for regional use at this or other sites). Any remaining open obligations attributable to the T appropriation should be modified to reflect the TR2 special account fund code. In this example, the total \$100,000 was obligated and expended, so only the reclassification of the \$100,000 is necessary.
- Region spends \$300,000 of the prepaid amount (TR2) for oversight during the first billing period (consisting of the \$100,000 reclassification and \$200,000 in direct costs expended, both recorded in TR2). Region's actual bill to PRPs is \$420,000 (\$300,000 direct costs plus \$120,000 indirect costs, assuming a 40% indirect rate). Amount received is deposited in the special account using the TR2B fund code, since these receipts are classified as earned. At the time the payment is received, the remaining prepaid amount (TR2) is \$150,000 (consisting of original \$450,000 prepaid amount less the \$100,000 reclassified amount, and the \$200,000 direct costs expended during the 1st billing period above). The Region then stops using the prepaid amount (TR2) to fund oversight and starts using the reimbursed amounts, as explained in Section III, B of this guidance.
- Region continues to bill and use reimbursed amounts (TR2B) in subsequent years.
- At completion of RA, the bill for oversight for that billing period (direct and indirect costs) is \$420,000 (\$300,000 direct costs plus \$120,000 indirect costs). Before sending this final bill, the Region should perform a reconciliation of the special account to determine what the PRPs have paid and what costs the Agency incurred. The reconciliation will allow for indirect costs paid but not charged in the IFMS system to be accounted for. This will allow the Region to determine if there are any amounts the PRP overpaid and is eligible to receive, or in the alternative, will need to be billed for.¹⁷ In this example, the \$150,000 available amount to the TR2 special

¹⁷See *OCFO Superfund Special Account Guidance*, Attachment 5, for handling indirect costs under pre-paid future costs special accounts. This is especially important where, as applicable, remaining pre-paid amounts are to be refunded to a PRP in accordance with settlement agreement provisions, or applied to a final oversight bill.

account should be reduced by \$120,000 for the indirect costs (\$300,000 @ 40%). In addition, the \$120,000 available amount to the TR2B special account (\$420,000 less the \$300,000 direct cost at completion) should be reduced by \$120,000 (\$300,000 @ 40%). Thus a total of \$30,000 is available for refunding to the PRP or handling otherwise in accordance with the terms of the settlement agreement.