



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

November 3, 1998

MEMORANDUM

SUBJECT: Interim Final Guidance on Disbursement of Funds From EPA Special Accounts to CERCLA Potentially Responsible Parties

FROM: Barry Breen, Director
Office of Site Remediation Enforcement

A handwritten signature in black ink, appearing to be "B. Breen", followed by a horizontal line and a vertical line to the right, indicating a signature block.

TO: Addressees

Attached is the interim final guidance governing disbursements made pursuant to Section 122(b)(3) of the Comprehensive Environmental Compensation and Liability Act of 1980 (CERCLA), as amended, 42 U.S.C. §9622(b)(3), from special accounts to potentially responsible parties (PRPs) who undertake response actions at Superfund sites under a settlement agreement. The guidance addresses the circumstances under which a PRP may receive special account funds; timing and amount of special account disbursements; special account disbursement priorities; disposition of special account funds after completion of the response action addressed in the settlement; the disbursement process; and implementation of the guidance.

This guidance is being issued as interim final guidance because of the need to have consistent procedures in effect across the country, while allowing for review based on actual experience. Model settlement provisions are currently in preparation and will be issued in the near future.

I ask that Regions obtain prior written approval from the Director, Regional Support Division, before an offer to disburse the funds is made to the PRPs, and that the final draft of the settlement agreement be submitted to the Director for review and approval. Gary Worthman, of the Regional Support Division, is available to assist during settlement negotiations and drafting of the special account disbursement provisions. He can be reached at (202) 564-4296. You may also contact him if you have any questions concerning this guidance.

Attachment

Addressees:

Office of Regional Counsel
CERCLA Branch Chiefs
Regions I-V; VII, IX and X

Office of Regional Counsel
Superfund Division
Region VI

Office of Enforcement, Compliance & Environmental Justice
Region VIII

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**Interim Final Guidance On Disbursement of Funds from EPA Special Accounts to
CERCLA Potentially Responsible Parties (11/3/98)**

Dated: November 3, 1998

I. Introduction

The purpose of this guidance is to provide direction to the regional offices of the Environmental Protection Agency (EPA or Agency) for disbursing funds from special accounts established pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA), 42 U.S.C. §9601 *et. seq.* This guidance is designed to achieve national consistency in the disbursement of special account funds to potentially responsible parties (PRPs). Issues addressed in this guidance include the circumstances under which PRPs may receive special account funds; the timing and amount of special account disbursements; the disposition of any remaining funds in the special account after completion of site work; the Agency's procedure for disbursing special account funds; and the Headquarters role in approving settlements containing disbursement provisions. Establishing a special account is discretionary with the Agency, and this guidance does not create any entitlement on the part of PRPs to receive funds from such accounts.

II. Background

A special account is a site-specific, interest-bearing subaccount within the EPA Hazardous Substance Superfund (Superfund Trust Fund or Fund). Special accounts, which are maintained by EPA, are used to fund response actions conducted pursuant to CERCLA. The legal authority for establishing special accounts is found at Section 122(b)(3) of CERCLA, 42 U.S.C. §9622(b)(3), which authorizes the government to retain and use monies received from PRPs to carry out response actions contemplated by the agreement. This means that special account funds are available for response actions at the site as long as the response action falls within the scope of the purposes set forth in the agreement that established or funded the special account for that site. This authority enables EPA to use special account funds for Fund-financed (Federal or State) cleanup at the site, or for disbursement to PRPs who agree to perform a response action for that site under a settlement agreement.

On October 2, 1995, the Agency announced its intention to encourage greater use of special accounts as a means to ensure that settlement funds would be used for response actions at a particular site. In this Superfund Administrative Reform on special accounts, the Agency also sought to ensure that interest earned on special accounts would be credited to those accounts and be available for response actions.¹

¹ For further information on creating, using and funding special accounts, please see the **February 1997 Special Accounts Short Sheet**, which was issued by the Office of Site Remediation Enforcement (OSRE) of EPA's Office of Enforcement and Compliance Assurance (OECA). This document is currently being updated.

Special accounts are funded through CERCLA settlement agreements which designate some or all of the collected funds for response activities at a site. Usually, funds are received through administrative consent orders, administrative agreements, or consent decrees arising out of “cashout” settlements, such as de minimis, ability to pay, or bankruptcy settlements. For example, EPA may enter into a settlement agreement whereby de minimis parties make payments to EPA, which the Agency deposits into a special account to fund site-specific response activities at that site.

Disbursements from special accounts are different from reimbursement to parties performing a response action pursuant to Section 122(b)(1) of CERCLA, 42 U.S.C. §9622(b)(1). Section 122(b)(1) is commonly known as the preauthorization mixed funding provision, under which the government agrees to reimburse parties to a settlement agreement from the Fund for certain costs where the government has agreed to finance, but parties have agreed to perform. Procedures for filing claims against the Fund pursuant to a preauthorization agreement are found at 40 CFR Part 307. In contrast, Section 122(b)(3) allows the government to retain and use amounts received under a settlement agreement for the purposes of carrying out that agreement. There is no legislative language to suggest congressional intent that parties who receive funds under Section 122(b)(3) must do so in the same manner as through Section 122(b)(1). When the Agency issued the Section 122(b)(1) regulations it never intended that they apply to Section 122(b)(3).² The preamble to the final mixed funding regulation states that it provides the procedures for filing response claims authorized by Sections 111(a)(2) and 112(b)(1) of CERCLA. 58 FR 5460 (January 21, 1993).

While Section 122(b)(3) may not require identical procedures in disbursing funds from a special account, there is the same need for adequate fiscal controls in disbursing funds from a special account. See Section III for a greater discussion on what provisions a PRP must agree to in a settlement agreement to be eligible for special account disbursements.

III. Eligibility Requirements for PRPs to Receive Special Account Funds

Special accounts may be used to fund response actions at Fund-lead, State-lead or PRP-lead sites. To encourage PRPs to perform site cleanup, regions should only consider disbursing special account funds to PRPs that agree to conduct response actions at a particular site as part of the settlement agreement.

Once a region establishes a special account and determines that a settling PRP is available to conduct response activities, the region must then determine whether to agree to disburse funds

² Because the mixed funding regulation is silent on this point, the Agency will remove any ambiguity by clarifying that the regulation does not apply to Section 122(b)(3) disbursements. This clarification will be part of the upcoming revision of the mixed funding regulation.

to the PRP from the special account. In making that determination, the region needs to consider the scope and cost of the work. The scope of work for the site to be addressed by the settlement agreement should be known and well-defined. This will enable the region to accurately estimate the value of the work to be performed and to compare it with the available special account funds. Equally important, regions must consider the PRP's willingness to provide the Agency with sufficient assurances that it will perform the work.

To receive a special account disbursement, the PRP must agree to perform the a response action pursuant to a settlement agreement (e.g., administrative order on consent (AOC) or Consent Decree (CD), as appropriate) with EPA. Special account funds for remedial design (RD) should only be made available where the PRP agrees to perform the remedial action (RA) pursuant to a CD. For example, if RD is begun pursuant to an AOC, the PRP must sign an RD/RA CD to receive a disbursement for work performed during the RD portion of the response action. Disbursement may also be appropriate where the PRP agrees to perform a non-time-critical removal where no subsequent RA is anticipated. Special account disbursement provisions must be included in the settlement agreement under which the PRP agrees to perform the work for which it will receive the special account funds.

To receive disbursement from a special account, the PRP must agree to several conditions. The PRP must provide documentation of the response costs incurred for work that it performs and must only seek special account funds for the cost of work addressed by the settlement agreement. The PRP must also agree not to seek any special account funds for legal fees or expenses or for expenses incurred under the supervision or direction of counsel, even if those expenses are related to the settlement with EPA. Additionally, a PRP official not directly involved in the cleanup, but with sufficient knowledge of the costs incurred, must certify to the accuracy of all information provided to EPA for purposes of securing a special account disbursement, and must acknowledge both the government's reliance on this information and the possibility of sanctions, such as prosecution for perjury, based on any misstatements.

The Agency will not provide special account funds to a PRP performing a response action pursuant to an unilateral administrative order (UAO) issued pursuant to Section 106(a) of CERCLA, 42 U.S.C. §9606(a). A UAO for performance of site cleanup is generally issued to PRPs once settlement negotiations have failed. When parties perform under a UAO there are no assurances that the PRP will continue to perform the work. Providing funds to a PRP in such a situation presents an unacceptable fiscal risk to the Agency, especially if the Agency were to disburse funds and then later made a determination to take over the work. In addition, given the PRP's unwillingness to perform the work under a consensual agreement, it would defeat the policy goal of fostering settlement if special account proceeds were made available to parties performing work pursuant to a UAO.

IV. Timing and Amount of Disbursements to PRPs

A. Determining When To Disburse Funds

Disbursements from the special account to a PRP should follow EPA's written certification of completion of the work at the site. Where there are distinct phases of work, phased disbursement to the PRP of the respective portion of the special account funds for the completed phase may be an acceptable alternative to disbursement upon completion of all work at the site.

If EPA agrees to a phased disbursement plan, installment disbursements may be made after the PRP completes a certain percentage or phase of the site work, submits the requisite certified cost summary to EPA for that phase, and receives a written Agency determination that the work has been fully performed in accordance with the settlement. Phased disbursements should be tied to major performance milestones such as completion of the RD or completion of a percentage or phase of the RA.

Disbursement after completion of the work provides greater assurance that the work will be performed to the Agency's satisfaction. Written certification would not be issued until EPA receives and reviews the PRP's certified cost summary verifying site expenditures. For RD/RA CDs, completion would occur upon EPA's issuance of the Certification of Completion of the Remedial Action (see Section XIV of the **Revised Model RD/RA Consent Decree** issued on July 13, 1995). For removal AOCs, completion would occur upon EPA's issuance of the Notice of Completion (see Section XXI of the **Model Administrative Order on Consent for Removal Action** issued on March 16, 1993).

B. Determining the Amount To Disburse

There are several competing uses for special account funds. Special account funds may be used for funding response actions at a site. Such response actions include: 1) actual cleanup activities; 2) EPA's oversight costs; 3) a potential work takeover by EPA if the PRP fails to perform the work; 4) cleanup at additional operable units (OUs) at the site; 5) pursuit of non-settlers; and 5) cost overruns or remedy failure. Since the actual amount of funds available in the special account may limit or preclude the achievement of all of these funding priorities, regions will need to balance these priorities and make disbursement decisions on a site-by-site basis.

Special account proceeds, such as proceeds from de minimis settlements which are earmarked for certain response actions, should generally be disbursed to the PRP that agrees to perform that response action. However, EPA may reserve in the special account a portion of these proceeds to protect the Agency in the event that costs are incurred due to a work takeover by EPA; for RD/RA work for additional OUs that the PRP has not agreed to perform; or for pursuing non-settlers. If a region elects to retain a portion of the special account funds to fund

oversight costs, then the PRP should be billed for any additional oversight costs not covered by the de minimis proceeds.

The regions should identify the amount of special account funds to disburse in a manner that reflects the amount of risk assumed by the PRP. If, for example, de minimis premium proceeds are specifically earmarked during negotiations for purposes such as cost overruns or remedy failure, such proceeds should be made available for disbursement to the PRP that assumes the responsibility for such cost overruns or remedy failure. Otherwise, EPA should reserve a greater portion of the de minimis premium for the risk that the Agency retains.

Once funding priorities are established and reserves are identified, a settlement may be negotiated which provides for disbursement of special account funds. Generally, the regions should agree to disburse an amount equal to a percentage of the response action addressed by the settlement agreement not to exceed a set amount from the special account.³ This disbursement structure protects the Agency in the event the actual cost of the response action is less than originally contemplated while delineating to the PRPs a set amount for disbursement.

Notwithstanding the above, regions may agree to provide a set amount without the percentage provision where the negotiated disbursement amount is significantly less than the estimated cost of the response action, or where there is a high confidence level of the expected cost of the response action. Regardless of the disbursement structure, the Agency will not provide the PRPs with access to special accounts funds in excess of actual costs expended by the PRP that are addressed by the settlement agreement.

C. Disposition of Special Account Funds After Completion of Work

When parties enter into cashout settlements, they accept certain cost assumptions in determining the payment amounts and assume the risk that these assumptions may either underestimate or overestimate projected costs of response. Similarly, when EPA determines the amount of special account proceeds to disburse to performing PRPs and the amount to hold in reserve for the various contingencies, discussed in Section B above, the Agency bases its decision on certain cost and risk assumptions that may also prove to be inaccurate. Where funds remain in a special account either because the cost of a future response action has been overestimated or funds held in reserve are not used, it is Agency policy to transfer all special account balances to the Fund.⁴ Such transfer would generally occur after the performing parties

³ The set amount may also include any interest earned from the date of the settlement agreement to the date of the PRP submittal for disbursement.

⁴ This policy does not apply to settlements in which the settling parties agree to perform the response action and to fund EPA's oversight of that response action through advance payments into the special account (instead of through the receipt of periodic bills after EPA

have completed the response action and the Agency has liquidated all other obligations, including agreed upon disbursements to the performing parties, with respect to the site. Since the money in the special account never actually leaves the Fund, the “transfer” of funds remaining after completion of the work is essentially a bookkeeping transaction.

On the first anniversary of construction completion of the site regions should determine whether to close the special account and return any remaining special account funds to the Fund. One year following construction completion should provide the Agency with sufficient time to cover close-out costs or other similar expenditures. Unless there are outstanding disbursements due, or there are other response actions at the site that might be funded from the special account, the regions should generally transfer the special account residuals to the Fund one year after construction completion. In a given situation (e.g., where an innovative technology was employed) it may be appropriate to wait until a later date before transferring the funds to the Fund (e.g., after completion of the 5 year review).

V. Disbursements to PRPs from Special Accounts

To receive funds from a special account, a PRP must submit to the appropriate Regional Program Office (RPO) a summary of expenditures incurred in performance of all, or where phased disbursements have been agreed upon, the required portion of the response action. The information contained in the cost summary must be certified as true, accurate and complete by the PRP's Chief Financial Officer (CFO). A CFO is an appropriate person to make such a certification because he or she is usually responsible for the financial accounting system of the PRP organization, and will have had no involvement with the day to day decisions concerning the performance of the response action.⁵ The PRP Project Manager is not an appropriate person to provide this certification because the project manager is too closely involved to provide an independent review and is generally not an expert on financial accounting practices. The certification must also acknowledge that the PRP will be subject to penalties for submission of false information.

The RPO, in consultation with the Remedial Program Manager and Office of Regional Counsel attorney assigned to the site, will then review the cost summary to determine whether the expenses claimed by the PRP are appropriate (e.g., relationship of the cost to the action taken). Inappropriate expenses such as costs not covered by the disbursement agreement and

incurs the oversight costs). In such cases, the settlement may be negotiated to permit the return of excess oversight cost payments to the contributing PRPs after completion of the work. See Attachment 2 of the February 1997 Special Accounts Short Sheet, Question 13.c.

⁵ In a multiparty settlement it may be difficult to have one CFO provide the certification. In that situation the parties may employ an Independent Certified Public Accountant to provide the certification, or other independent person acceptable to the Agency.

attorneys' fees will be excluded during this review process. Following this review, the RPO prepares a Commitment Notice, EPA Form 2550-9. Upon approval of the Commitment Notice by the Director of the RPO, a portion of the region's allowance is reserved for the future obligation to disburse to the PRP.

To initiate disbursement to the PRP, the RPO must prepare a Miscellaneous Obligation Document (MOD), EPA Form 2550-10. Together with a copy of the settlement agreement which establishes the obligation to disburse special account funds, the RPO must forward the MOD, the Commitment Notice, and the PRP's certified cost summary to the Regional Administrator (RA) for approval. The RA reviews the package and signifies his or her approval by signing the MOD, and then forwards the package to the Regional Financial Management Office for disbursement of funds to the PRP.

VI. Termination and Recapture of Special Account Funds

There are several situations where the Agency obligation to disburse special accounts funds under the settlement agreement will terminate. For example, termination would occur where EPA triggers the work takeover or work stoppage provisions of an agreement. Termination would also occur where, after EPA disburses funds from a special account to a PRP, the Agency determines that the PRP's submission was false, inaccurate, incomplete, or that the certification was misleading. An example would be where the costs incurred are unsupported by documentation, or where cost information was provided for work that was never performed.⁶ Another example would be where the CFO certifies the costs, but in fact never reviewed any cost information.

Termination of eligibility for special account disbursement has several impacts. If termination occurs before disbursement of funds, the PRP will no longer be eligible for any disbursement under the agreement. If termination occurs after disbursement of funds (such as the discovery of falsification of data), the PRP will be required to reimburse the Agency for that portion of the special account proceeds already disbursed related to the reason for the termination. Where a PRP receives disbursement from the special account and then termination occurs for a separate component of the response action, the region should only seek to recapture those funds affected by the termination. In all instances, once termination occurs there will be no further disbursements under that agreement.

⁶ Inadvertent mathematical error cannot be the sole basis for terminating eligibility for special account disbursements. If such an error is discovered after funds are disbursed, the PRP receiving the funds will be required to reimburse the special account for the amount of the error. Where the error is discovered before the actual disbursement takes place, then the eligible disbursement amount will be reduced.

Due to the implications of termination, PRPs are to be afforded (pursuant to the settlement agreement) an ability to challenge the Agency's determination of termination under the dispute resolution provisions of the settlement agreement.

VII. Summary of Disbursement Provisions

A settlement agreement which includes a provision for disbursing special account funds should contain minimum terms to ensure national consistency in the administration of disbursements from those accounts.⁷ Such minimum terms should include provisions addressing: (1) the identification of the special account; (2) the documentation and certification that must be submitted to EPA by the settling parties to receive a disbursement; (3) the timing and amount of special account disbursements; (4) the termination of disbursements; (5) the recapture of disbursements; (6) the transfer to the Fund of funds remaining in the special account after completion of response action addressed in the agreement ; and (7) a covenant not to sue the United States.

(1) *Identification of the special account.* This provision should identify the site-specific special account from which disbursements will be made to the PRP.

(2) *Documentation and certification that must be submitted to EPA by the settling party to receive a disbursement.* This provision should require the PRP to submit a certified cost summary to EPA to receive special account disbursements. Two options are available: 1) the cost summary and certification be submitted after EPA has issued a written certification of completion for the work performed under the agreement; 2) the same cost summary and certification, but submitted after completion of a phase or percentage of the work (or other milestone) where EPA has agreed to phased or installment disbursements from the special account.

(3) *Timing and amount of special account disbursements.* This provision should authorize EPA to disburse special account funds to the PRP following the Agency's review and acceptance of the PRP's certified costs. This provision should set forth the amount of the disbursement contemplated by the agreement (e.g., a percentage of the response action not to exceed a set amount). This provision should also state that the PRPs are only eligible for the amount of special account funds they have actually expended which are addressed by the agreement.

(4) *Termination of disbursements.* This provision should list circumstances under which EPA may terminate special account disbursements. The Agency has the discretion to terminate disbursements if it has to assume performance of any portion of the work or if it determines that the PRP has submitted a false, inaccurate, incomplete, or misleading certification, or failed

⁷ The Agency is currently drafting model settlement language. An addendum to this guidance will be issued in the near future.

outright to submit a required certification. The PRP would be able to challenge such termination of special account payments under the dispute resolution provisions of the settlement agreement.

(5) *Recapture of disbursements.* This provision should direct the PRP to repay amounts received from the special account, with interest, where EPA has terminated disbursements. Interest would accrue from the date of disbursement of the special account funds through the date of repayment.

(6) *Transfer to the Fund of funds remaining in the special account after completion of the response action.* This provision should indicate that if any funds remain in the special account after response actions at the site have been completed, then those funds revert to the Fund.

(7) *Covenant Not to Sue the United States.* This provision, which is standard in CERCLA settlements, requires the PRP to relinquish its right to pursue claims against the United States involving the site, the Fund, and the special account.

VIII. Implementation of Interim Final Special Account Guidance

The regions are required to obtain prior written approval from the Director of the Regional Support Division, Office of Site Remediation Enforcement, before making an offer or oral commitment to a PRP that includes the disbursement of funds to a PRP from a special account. The final draft of the settlement agreement must also be submitted to the Director for review and approval.

During negotiations with the PRP and drafting of the special account provisions that address disbursement, ongoing consultation should occur as needed between the regional attorney and the Headquarters person designated to handle special account disbursement issues (Gary Worthman, (202) 564-4296). During this consultation, the region and Headquarters will discuss the impact of the proposed special account disbursement both on achieving the goals of the settlement and on any other Agency policy or guidance. The assigned staff should also discuss whether the proposed disbursement provisions comply with this guidance.

IX. Purpose and Use of This Guidance

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. Whether and how EPA applies the guidance to any particular site will depend on the facts at the site.