



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

MAY 27 1988

OSWER Directive #9834.9a

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Received  
DEC 02 1999  
Enforcement & Compliance Docket  
& Information Center

MEMORANDUM

SUBJECT: ~~Interim Policy on Mixed~~ Funding Settlements Involving  
the Preauthorization of States or Political  
Subdivisions

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I. INTRODUCTION

The purpose of this memorandum is to establish the Agency's interim policy on the use of mixed funding settlements that involve the preauthorization of States or political subdivisions when such parties are potentially responsible parties (PRPs) at Superfund sites. <sup>1</sup> This memorandum addresses one specific question that arose during negotiations at a municipal landfill. The question was whether the Agency could approve a request for preauthorization submitted by a political subdivision seeking to file a claim against the Fund for reimbursement of a portion of response costs at a Superfund site. The question of whether a political subdivision is eligible to request preauthorization in the context of a mixed funding settlement was resolved during a November 1987 Assistant Administrator Review Team (AART) meeting. This policy formalizes that decision and is expanded to include States as well.

<sup>1</sup> This policy supplements the guidance on "Evaluating Mixed Funding Agreements Under CERCLA." The Mixed Funding guidance presents a method for determining whether it may be appropriate to settle for less than 100% of response costs and provides examples of the types of sites that are good and poor candidates for mixed funding. This guidance was signed on October 20, 1987 and was issued under OSWER Directive #9834.9.

## II. ISSUE

### Mixed Funding (Section 122(b)(1))

Section 122(b) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 as amended by the Superfund Amendments and Reauthorization Act of 1986 (CERCLA) authorizes EPA to enter into mixed funding settlements with PRPs. Section 122(b)(1) authorizes one type of mixed funding where PRPs agree to perform the response activity and the Agency agrees to reimburse the PRPs for a portion of their response costs. The Agency implements this type of mixed funding by approving the PRP's request for preauthorization to undertake the response and by awarding monies from the Fund once the response action is completed.

The term preauthorization refers to the approval that PRPs must obtain from EPA prior to the conduct of cleanup actions and before a claim for reimbursement of response costs is presented to the Fund. If preauthorization is granted, it serves as an Agency commitment that, if the response is conducted pursuant to the settlement agreement and the costs are reasonable and necessary, reimbursement will be available from the Fund as specified by the agreement. EPA will grant preauthorization to PRPs only in the context of settlement agreements.<sup>2</sup>

Although section 122(b)(1) provides authority for mixed funding, it does not specify a mechanism for permitting the Fund to be used for this purpose. CERCLA's principal claims mechanism is section 111(a) and the Agency uses this mechanism for reimbursing PRPs for a portion of their response costs pursuant to a mixed funding agreement.

### Reimbursement of Claims (Section 111(a))

Section 111(a) provides that the President shall use the money in the Fund for:

- (1) payment for governmental response costs incurred pursuant to section 104
- (2) payment of any claim for necessary response costs incurred by any other person ... (emphasis added).

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<sup>2</sup> For a more detailed discussion about preauthorization see the guidance on "Evaluating Mixed Funding Settlements Under CERCLA" cited earlier.

A question arose on the precise meaning of "any other person" under section 111(a)(2). Specifically, the question was whether, when read in conjunction with section 111(a)(1), "any other person" means any person other than a governmental entity. The Agency believes that "any other person" can include governmental entities when they are PRPs and when they are acting pursuant to a settlement agreement as discussed below. Note that any person who plans to file a claim against the Fund under the section 111(a)(2) response claims process must first obtain preauthorization (i.e., prior EPA approval).

### III. PREAUTHORIZATION OF STATES OR POLITICAL SUBDIVISIONS

In considering mixed funding at a site that involves a State or political subdivision as a PRP, the Region must first determine whether the offer is an acceptable candidate for mixed funding. This determination must be made at all sites where mixed funding is being considered and must be made by applying the criteria established in the "Interim CERCLA Settlement Policy" and the guidance on "Evaluating Mixed Funding Agreements Under CERCLA."<sup>3</sup>

The Settlement Policy establishes ten criteria that must be applied to a settlement offer to determine whether it is appropriate to settle for less than 100% of response costs. The Mixed Funding guidance provides a more detailed discussion about how to apply the ten settlement criteria to mixed funding settlement offers, including a discussion about which factors generally make an offer an acceptable candidate for mixed funding.

The Region must also consider the following additional criteria. States or political subdivisions are eligible to file claims against the Fund only when:

- (1) the State or political subdivision is a PRP under section 107 at the site; and
- (2) the State or political subdivision will carry out the response pursuant to a settlement agreement under section 122.

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<sup>3</sup> The "Interim CERCLA Settlement Policy" was issued under OSWER Directive #9835.0 on February 5, 1985. The Mixed Funding guidance was cited earlier.

If you have any questions or comments regarding this interim policy, please contact Kathleen MacKinnon in the Office of Waste Programs Enforcement at FTS-475-9812.

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