



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
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**MEMORANDUM**

**SUBJECT:** Guidance on the Planning and Use of Special Account Funds

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**TO:** Superfund National Program Managers, Regions 1 – 10  
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Section 122(b)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) authorizes EPA to retain and use funds received pursuant to an agreement with a Potentially Responsible Party (PRP) for purposes of carrying out the agreement. EPA retains such funds in Superfund special accounts, which are sub-accounts within EPA's Hazardous Substance Superfund ("Trust Fund"). EPA uses special account funds to conduct or finance site-specific response actions, as defined by CERCLA Section 101(25), at the site for which the account was established. Through the use of special accounts, EPA pursues its "enforcement first" policy – ensuring responsible parties pay for cleanup, and conserving congressionally appropriated resources for the cleanup of sites where alternative sources of funding are not available.

**I. Purpose**

This guidance addresses the appropriate uses of settlement resources that are deposited in special accounts for future use, and supersedes the September 28, 2001, "Special Accounts: Guidance on Key Decision Points in Using Special Account Funds," also known as the 2001 Timing and Use Guidance. This guidance also supersedes the "Timing for Use of Special Account Funds" in Section IV., Part B of the October 4, 2002, "Consolidated Guidance on the

Establishment, Management and Use of CERCLA Special Accounts,” also known as the 2002 Consolidated Guidance. No other portions of the 2002 Consolidated Guidance are affected by this guidance.<sup>1</sup>

## **II. Using Special Account Funds Throughout the Site Response Process**

Special account funds may be used for a wide range of site-specific response actions. These include not only the actual construction of the remedy, but also all the response activities, including but not limited to the investigation that determines the nature and extent of the contamination; studies and analysis that inform the appropriate remedy decisions; enforcement activities; and post construction monitoring. EPA may use special account funds to conduct response actions or disburse special account funds to other parties who will be conducting response actions at the site.<sup>2</sup>

Superfund sites are often complex in nature, requiring response actions over many years. In many cases, EPA may use special account funds to address short term needs. However, in other cases it may be more prudent for EPA to plan to use special account funds at a later date for future response actions where there is a potential for a significant resource burden in the future.

Once settlement proceeds are deposited in a special account,<sup>3</sup> Regions should develop plans for the use of those funds in the Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS). Initial plans should generally be recorded in CERCLIS within three months of receipt of the first settlement proceeds. Decisions regarding the most appropriate use of special account funds are made and adjusted throughout the lifecycle of the response at a site. As site conditions change (e.g., need for an emergency removal), or if the circumstances of the PRP change (e.g., insolvency), so may the priority for the use of the special account funds. Regions should evaluate the planned uses of special account funds on an ongoing basis, as warranted by site activity, to ensure that these resources are used efficiently and effectively, and make corresponding changes to their planned use of special account funds as appropriate.

### **A. Overarching Principles**

The following principles provide the general framework for planning the use of special account funds within the context of the Superfund program.

Terms of the applicable agreement. Special accounts are funded with money paid to the United States pursuant to site-specific settlement agreements with PRPs consistent with CERCLA Section 122(b)(3). Special account use is ultimately determined by the agreement under which the funds were received. Regions should strive to use model settlement language to establish special accounts, as this language provides EPA with an appropriate degree of flexibility as to the use of special account funds.<sup>4</sup>

Conservation of congressionally appropriated resources. In general, special account funds should be used prior to funds appropriated annually by Congress from the Trust Fund.

Where there are not enough special account funds for all future work remaining at a site, Regions should consider all of the site activities that may require funding and prioritize the appropriate use of special account funds.

Site uncertainties. Uncertainty is an inherent part of addressing Superfund sites. As a result, the response process is dynamic and funding plans require ongoing adjustment throughout the course of the response at a site. Site uncertainties will typically decline over time and planning should be revised accordingly.

## **B. General Hierarchy of Special Account Use**

Taking into consideration the overarching principles discussed above, Regions should plan the use of special account funds to advance EPA's goals of "enforcement first" and site cleanup. To satisfy these goals, the General Hierarchy of Special Account Use represents EPA's priorities for planning and using special account funds:

1. Use to facilitate settlement with PRPs for response actions;
2. Use to fund EPA's costs for response actions;
3. Apply to previous EPA site expenditures through reclassification; and,
4. Transfer to the Trust Fund.

The following discussion expands on these priority areas and provides additional guidance on when they should be considered for use. As sites proceed through the response process, Regions should routinely review and revise plans accordingly.

### **1. Use to facilitate settlement with PRPs for response actions.**

Under EPA's "enforcement first" policy, Regions should seek to have PRPs conduct response actions at the site.<sup>5</sup> The availability of special account funds can serve as a significant incentive for PRPs to enter into settlement agreements for the performance of work, thereby preserving congressionally appropriated resources to be used to clean up other sites where viable PRPs do not exist. Accordingly, prior to other uses, Regions should consider using special account funds to facilitate settlement of ongoing or anticipated negotiations with PRPs for performance of work.

Regions may use special account funds in several ways to facilitate settlement with PRPs. During negotiations, Regions may make special account funds available as part of the settlement package in a way that supports the "polluter pays" principle, resulting in a final settlement under which the PRPs are not receiving an undue benefit. The decision whether to offer special account funds as an incentive during settlement negotiations is within the Regions' discretion and is dependent upon site-specific circumstances. One of the ways in which special account funds can be made available to facilitate settlement is by offering to disburse special account funds to eligible work parties that agree to conduct response actions at a site.<sup>6</sup> Sometimes however, EPA's ability to fund response actions through the use of special account funds, without needing to rely on the availability of annually appropriated funds, may alone help motivate PRPs to finalize an agreement with EPA to perform the work.

Conversely, in some cases it may not be appropriate to plan to use special account funds to facilitate settlement negotiations. Such situations may arise, for example, where there are no viable PRPs to perform remaining response work. Also, there are cases where a PRP is not eligible to receive a disbursement, or where the special account funds that are available would not be considered sufficient to provide a meaningful settlement incentive.

If negotiations are successful and special account funds will be used pursuant to the settlement agreement, Regions should update their plans for the use of the special account funds.

## **2. Use to fund EPA's costs for response actions.**

Special account funds may also be used by EPA for any future response costs at the site, assuming such use is not inconsistent with the settlement agreement. Costs incurred by EPA for response actions include EPA's use of special account funds to conduct response actions or EPA's allocation of special account funds to designees other than PRPs, such as states, other federal agencies, and local municipalities. Future response actions that EPA may conduct using special account funds range from those that are relatively well defined (e.g., current plans to conduct a remedial action), to potential future response actions that are contingent on other factors at a site (e.g., additional contamination may be found). Estimates of EPA's future response costs at a site are based on the best information available at a given point in time and the best professional judgment of Regional staff. Consistent with all plans for site-specific response actions, the use of special account funds should be fully discussed with Regional program management to ensure they are fully aware of the planned use(s), estimate(s) and spending plan(s) for the site.

The following discussion addresses site circumstances that usually entail a high degree of uncertainty that should decrease over time as the response proceeds. As a general matter, special account funds planned to address these potential future needs should also decrease as the response proceeds at a site. The Office of Superfund Remediation and Technology Innovation (OSRTI) and Office of Site Remediation Enforcement (OSRE) will review plans for special accounts as part of the annual mid-year and work planning review processes to ensure planning for site uncertainties and long-term actions is in accordance with this guidance. In addition, where special account funds are being used to support remedial actions or high-cost non-time critical removal actions, Regions should consult with OSRTI through the special accounts mid-year or work planning discussions, or on an ad hoc basis as needed, to ensure that any potential future need for congressionally appropriated resources has been planned.

*Pre-remedy future costs.* In cases where the special account funds will be used to finance the remedy, but the remedy has yet to be selected through a record of decision or other remedy selection document, Regions may plan to use special account funds for future costs EPA expects to incur to implement the selected remedy. The best professional judgment of Regional staff should be relied on to estimate the costs for EPA to perform the possible remediation options. Once the remedy has been selected, the special account funds should be planned and used to conduct the remedy.

*Pre-work settlement.* In instances where Regions are or may be engaged in negotiations with one or more PRPs to secure a work settlement, and where special account resources are

available, Regions should generally plan to conduct the response work at the site and plan actions and financial transactions without an assumption that the settlement negotiations will be successful (e.g., special account-financed remedial action).

However, depending on the progress of the negotiations, and a Region's best estimate of the outcome, the Region may alternatively choose to plan actions and financial transactions that assume the success of work party settlement negotiations (e.g., special account-financed remedial action oversight). In such cases, the Region may also choose to retain special account funds as a contingency in case the settlement negotiations ultimately do not succeed (e.g., for special account-financed remedial action). Once settlement negotiations are complete, Regions must adjust their special account use plans accordingly.

*Potential EPA work takeover.* The availability of special account funds should not be a substitute for requiring adequate financial assurance from the PRPs.<sup>7</sup> One of the following conditions should exist if there are plans to use special account funds for a potential EPA work takeover:

- One or more PRPs are performing the work under a settlement agreement that did not require them to provide financial assurance, and the insolvency of the PRPs would potentially leave EPA without recourse but to fund necessary work.
- The financial assurance requirement has been met on the basis of the PRPs' financial status or a corporate guarantee, and the subsequent insolvency of the PRPs would not provide EPA with ready access to a funding source for EPA to perform the work.
- There is a reasonable concern, given site-specific circumstances, that PRP recalcitrance may threaten the prompt or proper implementation of the response, and the financial assurance provisions would not provide EPA with ready access to a funding source for EPA to perform the work.

The appropriate amount of special account funds to be allocated for this use should be based on an evaluation of the likelihood of the Region needing to take over work at the site and the estimated cost of that work. The amount allocated for this purpose should not exceed the estimated cost for EPA to complete the work.

As the PRPs proceed with cleanup and more of the work is accomplished over time, the cost to EPA of taking over the work would typically be expected to decline. The special account funds allocated for this purpose would similarly be expected to decrease over time, and ultimately no funds would be allocated to this purpose once the PRPs complete the work in accordance with the settlement agreement.

*Post-construction.* Where contamination has been left in place that requires post-construction completion activities (e.g., monitoring, five year reviews), Regions may use special account funds for post-construction activities consistent with the Superfund statute, regulations, and guidance. The amount allocated for these purposes typically should not exceed the amount estimated by Regional staff for these activities. Generally, Regions should plan to use special account funds for post-construction activities after special account funds have been allocated for current and future pipeline action and remedial action costs at the site.

*Remedy optimization.* Regions may use funds in a special account to optimize the remedy in the future based on a reasonable expectation that such an activity will occur. Regions should have planned or conducted an optimization study and coordinated with OSRTI on the analysis before allocating special account funds for this future use. Generally, Regions should allocate special account funds for remedy optimization after current and future pipeline action and remedial action costs at the site have been addressed or funds allocated for those activities.

*Protectiveness contingencies.* EPA ensures that the remedy, once completed at a site, will remain protective of human health and the environment. Regions may plan to use special account funds where there is a reasonable potential that contingencies may occur, based on current site information and experience, which will cause a remedy to not be protective in the future. In such situations, Regions should consider whether any settlement reopeners need to be enforced to require PRPs to conduct additional work to address these contingencies. Over time, the risk of occurrence of some or all contingencies that would cause a remedy to no longer be protective will decline (e.g., the risk that a remedy will not function as intended, discovering unknown conditions that might affect performance of the remedy). Regions must document as part of the mid-year and work planning processes the factors considered in determining the amount allocated for this purpose and an estimated date for when resources would no longer need to be allocated for this purpose.

### **3. Apply to previous EPA site expenditures through reclassification.**

If the Region reasonably estimates that the special account contains more funds than are needed to address all known and potential future work at the site, remaining special account funds should be used to reimburse previous EPA site expenditures of appropriated funds through the reclassification process (*see* the January 23, 2009, “Revised Guidance on Reclassification of Superfund Special Accounts”).<sup>8</sup> There should be a site-by-site discussion as part of the mid-year and work planning reviews as to the possible reclassification of special account funds, including consideration of regional workload to complete the transactions. Please refer to the annual Deobligation Recertification Guidance issued by the Office of Budget for the appropriate recertification of funds made available as a result of special account reclassifications.<sup>9</sup>

### **4. Transfer to the Trust Fund.**

Special account balances that exceed the estimated known and potential future response costs should be transferred to the general portion of the Trust Fund after resources have been considered for reclassification in accordance with the “Superfund Special Account Guidance” issued July 16, 2002.<sup>10</sup> These resources will be made available for future appropriation by Congress.

## **III. Monitoring Special Account Plans and Use**

Regions must document plans for using special account funds in CERCLIS. Regions should update their plans in CERCLIS for the use of special accounts at a minimum of twice a year as part of the Headquarters and Regional mid-year and work planning review processes, but also when a site milestone is reached or as site conditions change. OSRTI and OSRE will review

the data in CERCLIS as part of the annual mid-year and work planning review processes to ensure appropriate implementation of this guidance. OSRTI and OSRE may follow up with Regions on an account or site-specific basis after a review of the data entered in CERCLIS.

#### **IV. Conclusion**

Special account funds are a critical tool in achieving CERCLA site cleanups. To ensure effective use of these resources, they should be used consistent with the overarching principles and hierarchy described in this guidance. In order to achieve Superfund's goals and maximize our limited resources, EPA's use of special account funds should balance addressing short term needs and potential response costs that might present a significant resource burden in the future.

This guidance and any internal procedures adopted as a result of 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 this guidance to any particular sites will depend on the facts at the site.

Questions or comments regarding this guidance should be directed to Tracey Stewart (OSRTI) at (703) 603-8791 or Manuel Ronquillo (OSRE) at (202) 564-6065.

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<sup>1</sup> Special account guidance documents, unless noted otherwise, are available at

[http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund/index.cfm?action=3&sub\\_id=1235](http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund/index.cfm?action=3&sub_id=1235).

<sup>2</sup> EPA may choose to implement response actions using special account resources through a cooperative agreement with a state or local agency, or through an interagency agreement with another federal agency, as appropriate. Alternatively, PRPs may agree to perform work.

<sup>3</sup> The following guidance documents discuss the establishment of special accounts and the depositing of funds into special accounts: "Consolidated Guidance on the Establishment, Management and Use of CERCLA Special Accounts," (October 4, 2002) ("2002 Consolidated Guidance") and "Placement of Proceeds from CERCLA Settlements in Special Accounts," (January 27, 2000).

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<sup>4</sup> “2009 Revised CERCLA Model Remedial Design/Remedial Action Consent Decree,” (October 1, 2009) is available at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/rev-rdra-2009.pdf>. A modifiable version is available to EPA personnel at, <http://intranet.epa.gov/oeca/osre/workgroup/sa/sa-policy.html>.

<sup>5</sup> See “Enforcement First for Remedial Action at Superfund Sites,” (September 20, 2002) and “Enforcement First at Superfund Sites: Negotiation and Enforcement Strategies for Remedial Investigation/Feasibility Studies (RI/FS),” (August 9, 2005). These documents are available at <http://www.epa.gov/compliance/resources/policies/cleanup/index.html>.

<sup>6</sup> Disbursement of funds to a PRP may not be appropriate in all cases, and Regions should consult the “Interim Final Guidance on Disbursement of Funds from EPA Special Accounts to CERCLA Potentially Responsible Parties” (November 3, 1998) and the “2002 Consolidated Guidance” when considering this use.

<sup>7</sup> Settlement agreements without provisions for financial assurance should be mostly historic, since as part of the Office of Enforcement and Compliance Assurance’s (OECA’s) 2008-2011 Enforcement Priorities (available at <http://www.epa.gov/compliance/data/planning/priorities>) all recent settlement agreements should contain a requirement that the work PRPs provide adequate financial assurance.

<sup>8</sup> The “Reclassification Guidance” can be found at <http://intranet.epa.gov/oeca/osre/workgroup/sa/sa-policy.html>

<sup>9</sup> The current “Deobligation Recertification Guidance” can be found under the budget execution section at <http://intranet.epa.gov/ocfo/budget/budget.htm>.

<sup>10</sup> The “Superfund Special Account Guidance” (OCFO, July 16, 2002) can be found on EPA’s intranet at <http://intranet.epa.gov/ocfo/policies/superfund/spec-acct.htm>.