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MEMORANDUM

SUBJECT: Special Accounts: Guidance on Key Decision Points
in Using Special Account Funds

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As Hazardous Substances Superfund Trust Fund (Trust Fund) money becomes more scarce, the effective use of special account funds is increasingly critical. There are currently substantial resources available in EPA special accounts. In general, these funds should first be used as an incentive for work parties to settle. If settlements have already been achieved, or if settlement is unlikely (e.g., there are no viable PRPs that have not otherwise fully settled), then decisions regarding other uses of these special account funds should be made at key points in the remedial process. It is important to make timely decisions regarding the most effective use of these funds; they should be actively managed to achieve site response actions.

There are several factors to consider concerning when and how to use special account funds as a settlement incentive versus using them for other site activities. Although the use of special account funds at each site must be evaluated independently, this guidance identifies general guidelines for Regions regarding when and how special account funds should be used throughout the remedial process.

Background

Establishment and use of special accounts are authorized by CERCLA § 122(b)(3). In October 1995, EPA announced an initiative to encourage greater use of special accounts as a means to ensure that appropriate portions of settlement funds received (as well as interest earned on those amounts) would be used to address response actions at a particular site. Special accounts are established with funds obtained from agreements with PRPs (e.g., cost recovery and cashout settlements). Those funds may be used consistent with the terms of the agreement under which EPA received the money. Special account funds may be used by the Agency for cleanup, or disbursed to other parties who agree to perform response actions at the same site.

Through the end of FY 2000, EPA had established 158 special accounts, totaling \$566 million. These special accounts have earned \$107 million in interest, for a total value of \$673 million. Using special accounts as a settlement incentive, EPA has reached settlements at 15 sites in which PRPs are eligible to receive approximately \$71 million from special accounts in reimbursement for response costs if they comply with the terms of the agreement. Most of these settlements have been reached in the last two fiscal years. An additional \$241 million has already been used by EPA to fund EPA-lead response actions where there were no viable PRPs to perform the response action, and another \$78 million is obligated for EPA-lead response actions. At the end of FY 2000, \$283 million in special accounts funds remained available for use as a settlement incentive, or to fund EPA-lead response actions.

The number of special accounts will increase in the future (an additional 18 special accounts worth over \$88 million were established in the first two quarters of FY 2001) due to the Regions' continuing efforts to place cost recovery and cashout settlement proceeds into special accounts. The number of settlements reached using special accounts as a settlement incentive is likely to increase as well. In the first two quarters of FY 2001, EPA reached settlements at two sites, with PRPs eligible to receive approximately \$10 million if they comply with the agreements. Negotiations for work settlements that include disbursement of special account funds are ongoing at several other sites.

Hierarchy of Special Account Use¹

Special account proceeds can be used by the Agency in several different ways. The highest priority for their use is as a settlement incentive to obtain commitments from PRPs to conduct future response actions at the site. The offer of special account proceeds to PRPs can have a significant effect on EPA's ability to reach settlement; PRPs that do not agree to perform work pursuant to a settlement agreement are not eligible to receive special account funds.² The second, and historically most

¹ The hierarchy applies to funds that have not yet been designated for other use or that are not restricted in any manner.

² For more information on entering into disbursement agreements with PRPs, see "Interim Final Guidance on Disbursement of Funds From EPA Special Accounts to CERCLA Potentially Responsible Parties" (November 3, 1998).

prevalent use of these funds, is to fund EPA-lead response actions at a site. A third use of special account funds, once moneys have been used or set aside for the first two higher priority uses, is to apply the funds toward previous EPA expenditures at a site (which, as discussed further, infra, will allow funds previously reserved for the site to be “deobligated” for use elsewhere). The fourth use of special account funds is to replenish the Trust Fund.

General Hierarchy of Special Account Funds Use

1. Use as settlement incentive for future work agreements.
2. Fund EPA-lead response actions.
3. Estimate future site costs and risks, reserve estimated amount; if there is a remainder, apply to previous EPA site expenditures.
4. If there are funds remaining after all site work is completed and funds have been applied to previous EPA site expenditures, transfer remaining balance to the Trust Fund.

Timing of Special Account Use

Decisions regarding the use of special account funds should be made at key points in the response process. The use and/or transfer of funds should depend on where the site is in the remediation process and whether there is a disbursement agreement with the PRPs. If there is such an agreement with PRPs, the amount of special account funds identified in that agreement will be transferred to a Disbursement Special Account and will be made available to PRPs as provided by the agreement.³ The following discussion applies to funds in a special account which EPA is not obligated to disburse to PRPs pursuant to a prior agreement.

Separating the remedial pipeline into the following four general stages identifies the key decision points for determining the appropriate use of special account proceeds at a particular site:

- < prior to first remedial design (RD) start;
- < RD commenced for any operable unit (OU) except for the last (or only) one;
- < RD commenced for the last (or only) OU; or
- < construction complete at last OU.

Using Special Account Funds Prior to First RD Start. Special account funds should *not* be used by EPA for cleanup work prior to the commencement of the first RD at a site with viable PRPs. At this stage, special account funds should generally be retained for use as a settlement incentive in future work negotiations with PRPs (i.e., remedial design/remedial action (RD/RA), or removal, if the removal is likely to be the final action). Funds used prior to implementation of the first RD will not be

³ See Revised Model RD/RA Consent Decree (June 2001) for disbursement language. Of course, if the PRPs fail to perform according to the terms of the agreement and the funds cannot be disbursed to them, those funds become available for EPA’s use at the site.

available as an incentive for PRPs to do work.

An exception to this general approach is use of special account funds to pre-pay the oversight of a PRP-lead remedial investigation/feasibility study (RI/FS) or PRP-lead removal action where there is an agreement in place for PRPs to reimburse EPA for its oversight costs. If there are sufficient funds in the special account, EPA can draw down on special account proceeds to pre-pay the oversight, and then bill PRPs for those costs. Oversight payments subsequently received from PRPs should be deposited back into the special account. In this manner, EPA does not have to use appropriated Trust Fund dollars for oversight.

A second exception is if a Region is unsuccessful in negotiating an agreement with PRPs to perform an emergency removal action. If there are documented valid reasons for not ordering the PRPs to do the removal action, the Region can perform the removal using special account funds.⁴

Apportioning special account funds among multiple OUs can serve as an incentive to PRPs to agree to perform work at future OUs. When Regions offer special account funds to PRPs for performance of work at an OU that is not the final OU, a portion of the special account funds should be retained as a settlement incentive for performing work at future OUs.

Using Special Account Funds at Sites Where RD Has Started. For sites with multiple OUs where work has not yet progressed to the final OU, if there is no settlement agreement with PRPs to perform RD/RA, and there are documented valid reasons for not ordering the PRPs to do the work and EPA commences the RD as an EPA-lead action, Regions should use special account funds for that action or for later RA activities rather than using appropriated Trust Fund money.

If there is a settlement agreement that provides for PRPs to perform the RD/RA, Regions should use special account funds to pre-pay oversight where there is an agreement in place for PRPs to reimburse EPA for its oversight costs.⁵ As with pre-paid removal oversight, once billed oversight costs have been received from PRPs, proceeds should be placed back into the special account. Any remaining special account proceeds should be held in the special account as a settlement incentive for PRPs in subsequent RD/RA negotiations (e.g. for another OU).

Using Special Account Funds at Sites Where the Last or Only RD Has Commenced. At sites where the last (or only) RD has been commenced by EPA or PRPs, Regions should use special accounts funds for site-related costs (e.g., oversight) in lieu of using appropriated Trust Fund money. Once the RA is sufficiently underway, Regions should estimate all potential unaddressed future costs; if the special account balance exceeds the estimate for future site response costs, the Region should consider using the difference to apply to previous EPA site expenditures, as discussed more fully

⁴ There may be other exceptions than those listed; Regions should consult with OSRE if they believe use of special account funds at the pre-RD stage is appropriate.

⁵ As with removals, work PRPs must still eventually pay for oversight.

below.

Using Special Account Funds after Construction Completion. When all response actions are deemed to be “construction complete”, all other site obligations (e.g., O&M, future oversight, five-year reviews) are adequately funded, and previous EPA site expenditures have been addressed, any remaining special account funds should be transferred to the Trust Fund.

Timing and Uses of Special Account Funds Not In PRP Disbursement Account

Pre-RD	Any RD Started Except last RD	Post-RD Start for last/only OU	Construction Complete at last OU
<p>! Use special account funds as a settlement incentive.</p> <p>[Possible exceptions: - pre-pay oversight of PRP-lead removal or RI/FS - performance of emergency removal]</p>	<p>! Use to fund RD if RD is not PRP-lead; ! Use to pre-pay oversight of PRP-lead RD/RA; ! Use remaining funds as settlement incentive in subsequent RD/RA negotiations.</p>	<p>! Use to fund RD if RD is not PRP-lead; ! Use to pre-pay oversight of PRP-lead RD/RA; ! Reserve estimated amount for future site costs in special account; ! If there is a balance after future costs have been reserved, apply to EPA’s previous site expenditures.</p>	<p>When all site work is completed, and other future site risks are being addressed: ! Apply funds to previous EPA site expenditures; ! Transfer any remaining funds to the Trust Fund.</p>

Applying Special Account Proceeds to Previous EPA Expenditures

In previous guidance, OSRE indicated that if cleanup at a site is construction complete and special account funds are still available, Regions should transfer the remainder to the Trust Fund.⁶ However, before undertaking such action, Regions should first consider using the remaining special account funds to apply to previous EPA site expenditures at the site.⁷ Use of the funds in this manner puts EPA in the same position it would have been if PRP settlement proceeds had been received prior to the use of appropriated Trust Fund dollars. In essence, those actions are now being paid for with PRP settlement funds.

For example, if EPA previously expended \$1 million of Trust Fund dollars to perform work at a site, and \$2 million remains in the special account for that site after the response action is construction complete, a Region could use up to \$1 million from the special account and apply it to the previous \$1

⁶ “Placement of Proceeds from CERCLA Settlements in Special Accounts” (1/27/00).

⁷ See forthcoming memo from FMD for specific instructions regarding reimbursable authority, reprogramming requests, deobligations and reobligations.

million expenditure. The net effect of this approach is that the \$1 million from the special account pays for the past work, and the appropriated Trust Fund money that was spent at the site (in this example, \$1 million) can be deobligated from this site. The deobligated amount is then available to address other response actions at the same or other sites, subject to some limitations (see below).

Regions should identify any special accounts having balances that are more than anticipated future site needs. These balances may be applied to costs previously incurred with appropriated funds at the same site. HQ will be working with Regional staff to make determinations regarding the use of those special account funds.

Use of Deobligated Funds

Refer to Annual Deobligation Guidance. Funds made available through the deobligation process will be used per guidance in the most recent Deobligation Policy issued by the Director of the Annual Planning and Budget Division in the Office of the Chief Financial Officer. This guidance is issued annually. Regions must still submit all RA starts (as well as removals that cannot be accommodated within their base removal budget) to the National Prioritization Panel for ranking before using deobligated dollars at those sites.

The originating Regional or Headquarters Response Planning and Implementation Office (RPIO) must recertify deobligated funds before the fiscal year ends. If it does not, the funds may lose identification with the RPIO and may become part of the Agency's Superfund carryover balance.

Deobligated Funds Must be Used for Like Activities. Deobligated funds made available from special accounts may only be applied toward activities in the same response category. This means that funds may only be used for: an ongoing remedial action if the deobligated dollars came from RA activities; an ongoing removal action if the deobligated dollars came from removal activities; Pipeline Operations activities (*e.g.*, site assessment, RI/FS, RD, Oversight) if the deobligated dollars came from Pipeline Operations activities; and Headquarters contracts if the deobligated dollars came from Headquarters contracts.⁸

Please contact Dottie Pipkin (OERR) (703 603-9095) or Douglas Dixon (OSRE) (202 564-4232) if you have any questions related to issues presented in this memo.

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cc: Office of Regional Counsel Branch Chiefs, Regions I-X

⁸ Any deviation from this process will require written approval from the Director, OERR.

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