

## State Cost Share Payment Options

### Background

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The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) § 104, 42 USC § 9604, and the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) require states to share the costs of Fund-financed remedial actions incurred at sites listed on the National Priorities List (NPL). A state's cost share can be paid in cash, credit, or in-kind services as described below.

### Purpose

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This fact sheet explains state options for providing cost share as provided in 40 CFR Part 35 Subpart O "Cooperative Agreements and Superfund State Contracts for Superfund Response Actions". 40 CFR §35.6105(b)(2)(i) states that where a facility is not operated by the state (or political subdivision) the state must pay 10 percent of the cost of the remedial action. 40 CFR § 35.6105(b)(2)(ii) provides that where a state (or political subdivision) operates a facility either directly or through a contractual relationship, at the time of disposal, the state must pay 50 percent (or greater as EPA may determine as appropriate) of the cost of removal, remedial planning, and remedial action.

### Options for Meeting State Cost Share Obligations

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#### Option 1: Cash

**The state may pay for its required share of remedial action costs in direct cash payments to EPA.**

These payments may be made over the course of the remedial action. Payment schedules are negotiated with states and set forth in the Superfund State Contract (SSC). Payment schedules may provide for a lump-sum payment or incremental payments. If a state expends more cash than its required cost share, EPA can return the excess cash back to the state or apply the excess cash to another NPL site where the state owes cost share.

#### *Limitations*

A state may not use Federal grant funds for the cost share or match it provides under another Federal grant to pay its cost share (2 CFR § 200.306).

#### Option 2: In-Kind Contributions

**The state may provide in-kind contributions (equipment or services) to satisfy its required cost share obligation.** In-kind contributions are defined as the value of a non-cash contribution (generally from third parties) to meet a state's cost share requirements. In-kind services must be necessary and reasonable for accomplishment of the project, i.e., must qualify as remedial action activities as defined by CERCLA § 101(24), for the contribution's value to be used for a state cost share obligation (40 CFR § 35.6285 and 2 CFR § 200.306). An in-kind contribution, as defined in 40 CFR § 35.6015(a), may consist of charges for real property and equipment, or the value of goods and services directly benefiting the

CERCLA-funded project. It should be noted that in-kind contributions are not credit and cannot be reimbursed to the state nor used to satisfy cost share at another site.

The SSC for the remedial action must indicate the use of a support agency cooperative agreement as a vehicle for providing the cost share by in-kind services.

#### *Limitations*

For EPA-lead remedial actions, a state may not pay for its cost share using in-kind services, unless the state has entered into a support agency cooperative agreement with EPA and the SSC documents the support agency cooperative agreement as a vehicle for providing the cost share (40 CFR § 35.6815(a)(1)).

### **Option 3: Credit**

#### **The state may request credit for remedial action activities conducted and paid for with state funds.**

Credit is defined as state expenses that EPA determines to be reasonable, documented, direct out-of-pocket expenditures of non-Federal funds for remedial action (40 CFR § 35.6285(c)(1)). CERCLA limits creditable expenses by time period and type of activity as follows:

#### *Before a site is listed on the NPL*

Under CERCLA § 104(c)(5)(B), the state may be entitled to credit for remedial action costs it incurred before a site was listed on the NPL if EPA determines that such activities are consistent with the permanent remedy at the site. For example, if the state controlled a source of contamination at a site and the record of decision later indicates such activity was necessary to implement the remedy, the state may be eligible for a credit if its technical and cost records are adequate.

#### *After a site is listed on the NPL*

The state could be entitled to credit for remedial action activities it conducted after a site is listed on the NPL. The state must obtain EPA written approval prior to a state conducting any activities for which it intends to seek credit. The state must also provide the technical and financial documentation for these activities.

#### *Limitations*

States must submit documentation to EPA to support their request for approval of creditable expenses at a site pursuant to 40 CFR § 35.6285(c)(2).

Credit can only be given for remedial action activities that are consistent with the permanent remedy at the site. Credit may not be given for non-remedial action costs (e.g., preliminary assessment/site investigation costs, removal costs) incurred at a site.

Credit must first be applied at the site where the credit was earned. Any excess credit over the required cost share amount for that site can be applied toward the state's cost share requirement at another NPL site. The SSC will specify where and how the excess credit will be utilized. The credit amount is available until it is depleted.

Regions may use two options if excess credit will be transferred to meet the cost share requirement at a receiving site prior to final financial reconciliation being completed at the earning site.

Option 1: The region and state can earmark the excess credit in SSC amendments for both the earning site and receiving site but not actually apply the excess credit as payment at the receiving site until the earning site’s final financial reconciliation. This earmark would not require a deviation request (see next paragraph), but both SSCs will need to be amended to reflect the future credit transfer to ensure an adequate assurance of the state’s ability to meeting both sites’ cost share requirements.

Option 2: If the region and state want to transfer excess credit as a cost share payment at the receiving site prior to the earning site’s final financial reconciliation, a formal deviation request (per 40 CFR 35.6025) must be requested from 40 CFR 35.6285(c)(3). A sufficient credit balance must be maintained at the earning site to assure that the original cost share will be satisfied. Regions should consult with Headquarters prior to requesting a deviation.

<b>DIFFERENCES BETWEEN CASH, IN-KIND CONTRIBUTIONS AND CREDITS</b>			
<b>Example</b>	<b>Cash</b>	<b>In-Kind Contribution</b>	<b>Credit</b>
Can it be used to offset a state’s remedial action cost share at the site?	Yes.	Yes, if the state enters into a support agency cooperative agreement and the in-kind contribution is consistent with 2 CFR 200.306.	Yes. CERCLA 104(c)(5)(F).
Can it include expenses incurred before EPA enters into an SSC or Cooperative Agreement with the state that establishes cost share?	Not applicable.	No. A state cannot provide an in-kind contribution to offset its cost share until the state has entered into a grant agreement with EPA that requires a cost share. (40 CFR 35.6815(a)(1))	Yes, however, 40 CFR 35.6285(c)(ii) requires the state to get EPA’s written approval prior to initiating a remedial action for credit. (CERCLA 104(c)(5)(B))
Can it be used to offset a state’s remedial action cost share at another site in the state?	Yes, with EPA approval, excess cash payments may be applied to cost share at another site. (40 CFR 35.6285(d) and 40 CFR 35.6805(k))	No. An in-kind contribution may only be applied to a state’s cost share at the site where the in-kind contribution is earned.	Yes, with EPA written approval, excess credit may be used to offset the cost share at another site. (40 CFR 35.6285(c)(3))