



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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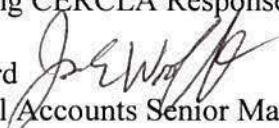
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MEMORANDUM

SUBJECT: Guidance on Disbursement of Funds from EPA Special Accounts to Entities Performing CERCLA Response Actions

FROM: James E. Woolford 
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Director, Office of Superfund Remediation and Technology Innovation
Office of Land and Emergency Management

TO: Assistant Regional Administrators, Regions I-X
Regional Counsels, Regions I-X
Superfund Division Directors, Regions I-X

I. INTRODUCTION

This memorandum is issued on behalf of the U.S. Environmental Protection Agency's (EPA's or the Agency's) Special Accounts Senior Management Committee (SASMC)¹ and is intended to provide guidance to EPA's Regional offices on 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.*, to entities who will be performing CERCLA response actions at a site. The establishment and use of a special account is discretionary with the Agency, and this guidance does not create any entitlement on behalf of any party to receive funds from such accounts.

Special account funds may be disbursed to entities such as federal agencies, states, political subdivisions of states, and federally-recognized Indian tribes for those parties to conduct EPA-selected CERCLA response actions. Special account funds may be disbursed, as a settlement incentive, to potentially responsible parties (PRPs) who undertake EPA-selected CERCLA response actions pursuant to an agreement under CERCLA. Additionally, special account funds may be disbursed, as a means of

¹ The SASMC serves as the oversight body for the Agency's management and use of special accounts. The SASMC is comprised of senior managers from the Office of Superfund Remediation and Technology Innovation, Office of Site Remediation Enforcement, Office of the Chief Financial Officer, and lead Regions for both Superfund and Management.

incentivizing cleanup, to bona fide prospective purchasers (BFPPs)² who undertake EPA-selected CERCLA response actions pursuant to an agreement. Regions should make disbursement decisions on a case-by-case basis, but must receive *prior written approval* from the Headquarters Office of Site Remediation Enforcement (OSRE) before making an offer of special account disbursement to a PRP. Regions must *consult* with OSRE prior to making an offer of a special account disbursement to a BFPP.³

This guidance supersedes both the November 3, 1998, *Interim Final Guidance on Disbursement of Funds from EPA Special Accounts to CERCLA Potentially Responsible Parties* and the January 26, 2012, *Use of Special Account Funds to Facilitate Work Settlements with Potentially Responsible Parties and to Expedite the Cleanup of Superfund Sites*. This guidance also supersedes Section IV.C “Disbursements as Settlement Incentives to PRPs” and Attachment 2 of the October 4, 2002, *Consolidated Guidance on the Establishment, Management, and Use of CERCLA Special Accounts*.⁴

The model Remedial Design/Remedial Action Consent Decree (RD/RA CD)⁵ contains language for special account disbursements to PRPs in a RD/RA context. This language can be adapted for special account disbursements to PRPs in the context of removal actions, and for special account disbursements to BFPPs.⁶ Please consult with the OSRE Special Accounts Team for assistance with drafting disbursement provisions in these situations.

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² In addition to BFPPs, other similarly-situated parties (e.g., those who are subject to a statutory exemption or defense) may be eligible, at EPA’s discretion, to receive special account funds when they conduct CERCLA response actions at a site pursuant to an agreement.

³ See OSRE “Roles Chart” at https://cfint.rtpnc.epa.gov/ioic/osre_roles/.

⁴ The *Consolidated Guidance on the Establishment, Management, and Use of CERCLA Special Accounts* can be found at <https://www.epa.gov/enforcement/guidance-establishment-management-and-use-superfund-special-accounts>.

⁵ The current model RD/RA CD is available at https://cfpub.epa.gov/compliance/models/view.cfm?model_ID=81.

⁶ EPA’s guidance and model documents related to BFPPs and other parties are available on EPA’s website at <https://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund/>.

II. BACKGROUND

A Superfund special account is a site-specific, interest-bearing subaccount within the Hazardous Substance Superfund (Superfund Trust Fund). Special accounts are maintained by EPA and 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 EPA to retain and use funds received through agreements under CERCLA for purposes of carrying out CERCLA response actions contemplated by the agreement.

Special account funds are received through administrative settlement agreements, consent decrees (CDs), and other types of agreements. For example, EPA may enter into a settlement agreement whereby *de minimis* parties make payments to EPA that the Agency deposits into a special account to fund response activities at that site; or EPA may receive funds pursuant to a bankruptcy settlement that addresses a PRP's CERCLA liability.

Disbursements from special accounts to PRPs and BFPPs are different from preauthorized mixed funding to parties performing a response action pursuant to Section 122(b)(1) of CERCLA, 42 U.S.C. § 9622(b)(1). Under Section 122(b)(1), EPA may enter into a settlement agreement in which the Agency agrees to reimburse parties to that settlement agreement from the Superfund Trust Fund for certain costs of the response action that the parties have agreed to perform. Procedures for filing claims against the Superfund Trust Fund pursuant to a preauthorization agreement are found at 40 C.F.R. Part 307.⁷

CERCLA § 122 – Settlements . . . (b) Agreements with [PRPs] . . . (3) Retention of Funds

If, as part of any agreement, the President will be carrying out any action and the parties will be paying amounts to the President, the President may, notwithstanding any other provision of law, retain and use such amounts for purposes of carrying out the agreement.

III. DISBURSEMENTS FROM SPECIAL ACCOUNTS TO ENTITIES OTHER THAN PRPs

A. Disbursements to Federal Agencies through Interagency Agreements

The Superfund program uses interagency agreements (IAs) to request federal agencies' assistance with site cleanups and associated activities, and to provide ongoing support or services.⁸ If a federal agency will be performing response actions at the behest of EPA (i.e., not as a performing PRP at the site) then EPA may make payments from a special account to the servicing agency for the response action services provided through an IA. Each IA should specify the services required and identify the method of payment. The Regional program offices generally initiate and manage site-specific IAs.

⁷ EPA is not required to follow the procedures set out for preauthorized mixed funding when disbursing special account funds to PRPs or BFPPs. However, EPA recognizes that there is the same need for adequate fiscal controls in disbursing funds from a special account, and provides for such controls through enforceable settlement terms.

⁸ For the purposes of this guidance, an IA is an agreement between federal agencies that defines supplies or services needed from a requesting agency and obtained from a servicing agency on a reimbursable basis. At Superfund sites, the servicing agency can directly perform the response action that EPA requests, or the servicing agency can contract out the work on EPA's behalf.

B. Disbursements to States or Indian Tribes through Cooperative Agreements

States, political subdivisions of states, and federally-recognized Indian tribes may be eligible to receive special account funds when they act as the lead agency at a site, provide support activities, or agree to perform cleanup work.⁹ Where the state, political subdivision, or Indian tribe is not a PRP at the site, such a disbursement can be done through a cooperative agreement (CA) under Section 104(d) of CERCLA, 42 U.S.C. § 9604(d). The use of a CA in such a situation is governed by the EPA regulation titled *Cooperative Agreements and Superfund State Contracts for Superfund Response Actions* (40 C.F.R. Part 35, Subpart O).¹⁰

If a state, political subdivision, or Indian tribe is performing work as a PRP, the Region should analyze whether the entity is eligible to receive a special account disbursement in its capacity as a PRP, as outlined below in Section IV, “Disbursements from Special Accounts to PRPs.” Any such disbursement should be done through a settlement agreement, not a CA.

C. Disbursements to Community Groups through Technical Assistance Grants

The Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499 (October 17, 1986), authorized the award of grants to eligible community groups enabling them to obtain technical assistance and support.¹¹ Grants may be provided to qualified community groups so that they can contract with independent technical advisors for that advisor to interpret technical information about a site and to explain that information to the community. Grants are available for Superfund sites on the National Priorities List (NPL) and sites proposed to the NPL. EPA project officers in the Regions manage grants, and coordinators are available in each Region to assist communities.¹² Funding of these grants qualifies as a response cost, and the grants may be funded with special account funds or annually appropriated funds at eligible Superfund sites.

D. Disbursements to BFPPs to Incentivize Cleanup

BFPPs may be eligible, at EPA’s discretion, to receive special account funds when they conduct CERCLA response actions at a site pursuant to an agreement. Special account disbursements to BFPPs are intended to help incentivize such parties to agree to conduct EPA-selected response actions at a site. Providing special account funding to BFPPs to facilitate cleanup accomplishes several goals, including promoting enforcement fairness by compensating a BFPP for costs it will incur in performing work that other parties would otherwise be expected to undertake or to fund, expediting cleanup and reuse of sites, and allowing EPA to conserve its annually appropriated Superfund Trust Fund money for use at other sites where viable PRPs do not exist.

BFPPs may be eligible to receive funds to cover a portion of their costs for response actions, including removal actions, remedial design, and remedial actions. Special account funds should only be disbursed to BFPPs for expenses related to the implementation of an EPA-selected response action. Ancillary redevelopment costs at the site which are wholly unrelated to implementation of an EPA-selected response action are not eligible for reimbursement. Disbursements of special account funds to a BFPP

⁹ See the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) at 40 C.F.R. § 330.5 for descriptions of the roles of “lead” and “support” agencies.

¹⁰ The final rule and preamble can be found at [72 Fed. Reg. 24,496](#) (May 2, 2007).

¹¹ See 42 U.S.C. § 9617(e) and 40 C.F.R. § 35, subpt. M.

¹² Information about technical assistance grants (TAGs), including the application process, can be found at <https://www.epa.gov/superfund/technical-assistance-communities>.

should not be provided before work is performed; instead a disbursement should be provided as reimbursement for costs incurred for work performed pursuant to the agreement.

Section V, “Provisions Applicable to PRP and BFPP Disbursement Agreements,” discusses in detail additional provisions that are applicable to BFPPs when EPA intends to disburse special account funds to such parties. Regions are required to *consult* with the Director of the Regional Support Division (RSD)/OSRE prior to offering a special account disbursement to a BFPP.¹³

The availability of funds for disbursement to a BFPP may depend on several factors at the site, including the specific terms of the settlement agreement pursuant to which EPA placed funds into a special account and competing funding needs for work at or related to the site. For example, a disbursement to a BFPP may not be feasible when a settlement agreement specifically earmarks the use of special account funds for a competing purpose, or a Region may need to retain special account funds for additional cleanup activities at a site or at a certain operable unit (OU), for EPA oversight costs, or for additional enforcement costs. Since the actual amount of funds available in the special account may limit or preclude the achievement of these funding needs, Regions should balance these priorities and make disbursement decisions on a case-by-case basis.

IV. DISBURSEMENTS FROM SPECIAL ACCOUNTS TO PRPs

PRPs may be eligible, at EPA’s discretion, to receive special account funds when they conduct EPA-selected CERCLA response actions at a site pursuant to an agreement under CERCLA. EPA prioritizes use of special account funds to facilitate such settlements.¹⁴ As part of enforcement fairness, special account disbursements are meant to incentivize PRPs to agree to conduct response actions by providing them funding that EPA has obtained from other liable parties. EPA will generally not provide special account funds to a PRP as a settlement incentive if those funds were received from the same PRP.

Providing special account funding to PRPs as a settlement incentive accomplishes several goals, including expediting settlement negotiations, expediting cleanup and reuse of sites, promoting enforcement fairness, and allowing for annually appropriated Superfund Trust Fund money to be used at other sites where there are no viable PRPs. While such a strategy may not be appropriate in all instances, the Regions should conduct a thorough analysis of potential candidates and take steps to implement this strategy whenever practicable.

As a matter of policy, the Agency should generally not provide special account funds to a PRP performing a response action pursuant to a 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. It would defeat the policy goal of fostering settlement if special account proceeds were made available to parties performing work pursuant to a UAO, given the PRP’s unwillingness to perform the work under a consensual agreement. Additionally, when parties perform response actions under a UAO there is less certainty that the complying PRP will continue to perform the work. Providing funds to a PRP in such a situation may present an unacceptable fiscal risk to the Agency, especially if the Agency were to disburse funds and then later make a determination to take over the work.

¹³ See OSRE “Roles Chart” at https://cfint.rtpnc.epa.gov/ioic/osre_roles/.

¹⁴ See “Guidance on the Planning and Use of Special Accounts,” (Planning and Use Guidance) Sept. 28, 2010 (OSWER Directive No. 9275.1-20) <https://www.epa.gov/enforcement/guidance-planning-and-use-superfund-special-account-funds>.

In limited circumstances, as a matter of fairness, EPA may make a special account disbursement available to PRPs who are already conducting work pursuant to a settlement agreement. Any such disbursement should be memorialized in a new or amended settlement agreement with the PRPs that includes the terms and conditions outlined in Section V.D, “Necessary Settlement Provisions.” For example, if a group of PRPs are conducting work at a site, and one of the PRPs declares bankruptcy and settles its liability with EPA in a bankruptcy settlement by providing funds that EPA places into a special account, EPA may earmark a portion of those funds to disburse to the remaining PRPs at the site to cover a portion of costs that the bankrupt PRP would otherwise have contributed, if a new or amended settlement can be reached. A new settlement may be preferable if many of the PRPs who signed the original settlement agreement are no longer available (e.g., bankrupt or defunct) to sign an amended settlement agreement.¹⁵

Section V., “Provisions Applicable to PRP and BFPP Disbursement Agreements,” discusses in detail additional provisions that are applicable to PRPs when EPA intends to disburse special account funds to such parties. Regions are required to get *prior written approval* from the Director of the RSD/OSRE before offering a special account disbursement to a PRP.¹⁶

The availability of funds for disbursement to a PRP will depend on a number of factors at the site, including the specific terms of the settlement agreement pursuant to which EPA placed funds into a special account and competing funding needs for work at or related to the site. For example, a disbursement to a PRP may not be feasible when a settlement specifically earmarks the use of special account funds for a competing purpose, or a Region may need to retain special account funds for additional cleanup activities at a site or at a certain OU, for EPA oversight costs, or for additional enforcement costs. Since the actual amount of funds available in the special account may limit or preclude the achievement of these funding needs, Regions should balance these priorities and make disbursement decisions on a case-by-case basis.

A. Determining Whether a Disbursement to a PRP as a Settlement Incentive is Appropriate

It may be appropriate for EPA to provide special account funds to a PRP as a settlement incentive if EPA has selected the response action, the settling PRP is not the sole party liable for site costs, and the proposed special account disbursement would be sufficient to provide a meaningful settlement incentive.

1. EPA has selected a response action for the site.

For any response costs to be eligible for reimbursement from a special account, the response action must be selected by EPA. Utilizing special account funds as an incentive for a PRP to conduct a response action at a site provides a cost benefit to EPA. Typically, a removal action where no subsequent remedial action (RA) is anticipated or a remedial design/remedial action (RD/RA) will be the costliest portion of an overall cleanup response, and it is in these instances that a settlement incentive can be most effective to help defray those costs.

¹⁵ Another option in such a situation would be for the PRP group doing the work to assert its own claim in the bankruptcy, which may allow it receive funds directly pursuant to a bankruptcy settlement, which would obviate the need to amend an existing agreement and for EPA to provide funds to the PRPs.

¹⁶ See OSRE “Roles Chart” at https://cfint.rtpnc.epa.gov/ioic/osre_roles/.

If a Region decides to bifurcate the RD/RA (meaning to have one settlement agreement for the performance of RD, with a separate settlement agreement for RA), any disbursement for RD-related work should be contingent upon the PRP agreeing to conduct the RA pursuant to a CD, if EPA expects the same PRP to conduct both the RD and RA. In other words, when the RD and RA are bifurcated, the trigger for disbursement of funds under the RD settlement agreement should be no sooner than the entry of a related RA CD. Consequently, if the PRP fails to agree to conduct the RA pursuant to a CD, it should not receive any disbursement for RD-related work. This strategy ensures that the disbursement of special account funds serves to incentivize the PRP to conduct the ultimate cleanup response (i.e., the RA).

2. The settling PRP is not the sole party liable for site costs (i.e., the Region must ensure that other viable or non-viable PRPs exist).

Special account disbursements are intended to incentivize PRPs to agree to conduct EPA-selected response actions by providing them funding that EPA has obtained from other liable parties. For this reason, a PRP that is the sole party liable for all costs at a site (i.e., no other party contributed to the contamination at the site) is not a proper candidate for a special account disbursement, since any disbursement of funds would effectively be refunding that PRP, and thereby diminishing the value of past settlements to EPA.

EPA may consider disbursing funds as a settlement incentive to the same PRP that provided those funds to EPA if the PRP is the sole remaining viable PRP at the site, and there is a significant orphan share at the site which the PRP would otherwise be expected to fund. In such a case, the PRP may be eligible to receive funds that it has paid pursuant to prior settlement agreements but not funds that it will be paying to EPA pursuant to the settlement agreement under which it will receive a special account disbursement.

3. The proposed special account disbursement would be sufficient to provide a meaningful settlement incentive.

The amount of funds necessary to provide a settlement incentive will vary site-specifically from case to case. Determining the amount of a potential disbursement for this purpose is a two-step process. A Region must first determine the *availability* of special account funds for use as a settlement incentive. If such funds are available, the Region must then determine the amount, if any, of those funds that a particular PRP is *eligible* to receive.

- a. Determining the Amount of Special Account Funds Available for Disbursement as a Settlement Incentive.

The Region should review the prior settlement agreements that resulted in payment of funds to the special account to verify that there are no specific restrictions that prohibit disbursement of the funds (e.g., to determine whether the funds are earmarked for a specific response cost).

Regions should also consider upcoming funding needs at that site. Generally, there are many competing uses for special account funds. For example, a Region may need to retain special account funds for additional cleanup activities at a site or at a certain OU, for EPA oversight costs, or for additional enforcement costs. Since the actual amount of funds available in the special account may limit or preclude the achievement of all of these funding needs, Regions should balance these priorities and make disbursement decisions on a case-by-case basis that will ultimately achieve the goal of completing response actions and making sites available for reuse more quickly.

To determine the amount of funds available as a settlement incentive for a particular PRP, a Region must determine the amount of funds in a special account that have been provided by other PRPs. For example, if EPA has \$500,000 in a special account, but a particular PRP has provided \$300,000 of that amount pursuant to past settlement agreements, then the amount of special account funds available as a settlement incentive for that particular PRP is, at most, \$200,000, the amount provided by other PRPs.

b. Determining the Amount of Special Account Funds a PRP is Eligible to Receive as a Settlement Incentive.

To determine the amount of funds a PRP is eligible to receive as a settlement incentive, a Region must determine that the PRP will not receive an undue benefit. The PRP should be contributing at least its share of response costs at a site. This means that in negotiating a settlement that provides for disbursement from a special account, EPA will need to consider, in addition to the PRP's estimated share of site costs, any funds that the PRP receives from other PRPs, and any other consideration provided by EPA (e.g., orphan share compensation or other cost forgiveness).

If no formal allocation has been conducted, the Region should make a rough calculation of the particular PRP's share of liability at a site, if possible. The Region should then determine the estimated total site costs (past and future costs) and how much of the estimated total site costs the PRP has incurred, and is expected to incur, pursuant to the settlement agreement being negotiated.¹⁷ If the PRP's estimated share of the estimated total site costs is less than the aggregate amount of site costs it has incurred, and/or will be obligated to incur under the settlement agreement with EPA, then the PRP is eligible for a disbursement not to exceed the difference between those amounts.

In Table 1, "Determining Amount of Special Account Disbursement," below, there are two examples of how this analysis may work. In Example A, the PRP is not eligible for a special account disbursement because it is not expected to incur costs beyond its share of site costs. In this instance, the PRP would receive an undue benefit if it were to receive a disbursement of special account funds. In Example B, the PRP is eligible for a maximum disbursement of \$3,000,000 because it is anticipated to incur costs beyond its share of site costs. The actual disbursement amount is subject to the availability of special account funds. Consequently, in Example B, where the PRP is eligible for a maximum disbursement of \$3,000,000, but there is only \$1,000,000 available to be provided as a settlement incentive, the maximum amount the PRP could receive would be \$1,000,000.

¹⁷ Determining total site costs and a PRP's estimated share of those costs, may not be possible in some situations given the phase of the response and enforcement actions (e.g., liability for some elements of a site may not have been established yet for a site with many different OUs or different contaminated media). In such situations, the Region should base its determination of costs and liability share on known information, such as the cost of response actions to date, the estimated cost of the response action in question, and the PRP's known liability for such costs.

Table 1. Example - Determining Amount of Special Account Disbursement			
Example A		Example B	
Estimated Cost of Response Action	\$4,000,000	Estimated Cost of Response Action	\$4,000,000
PRP Past Costs	\$500,000	PRP Past Costs	\$500,000
EPA Past Costs	\$3,000,000	EPA Past Costs	\$3,000,000
EPA Estimated Oversight Costs	\$500,000	EPA Estimated Oversight Costs	\$500,000
Estimated Total Site Costs	\$8,000,000	Estimated Total Site Costs	\$8,000,000
PRP's Estimated Share of Liability	75%	PRP's Estimated Share of Liability	25%
PRP's Estimated Share of Site Costs	\$6,000,000	PRP's Estimated Share of Site Costs	\$2,000,000
PRP's Total Site Costs Incurred/To Be Incurred (Past costs, costs associated with current response action (including EPA oversight))	\$5,000,000	PRP's Total Site Costs Incurred/To Be Incurred (Past costs, costs associated with current response action (including EPA oversight))	\$5,000,000
Maximum Eligible Disbursement Amount	- \$1,000,000	Maximum Eligible Disbursement Amount	\$3,000,000

B. Requirement for Prior Written Approval

Regions are required to obtain prior written approval (PWA) from the director of OSRE's Regional Support Division (RSD) before making an offer or oral commitment or before providing non-model settlement language to a PRP regarding the disbursement of special account funds. Prior to obtaining PWA, a Region may discuss a special account disbursement conceptually with a PRP, but should emphasize that ultimately the decision to provide a special account disbursement as a settlement incentive must be approved by Headquarters. The RSD director's review will focus on making sure that a PRP does not receive an undue benefit from the receipt of a special account disbursement as a settlement incentive. Additionally, the review will assess the impact of the proposed special account disbursement on achieving the goal of the settlement and on any other Agency policy or guidance.

As part of the PWA process, while negotiating with a PRP and drafting the special account disbursement provisions, the Regional attorney should continue to consult with the OSRE Special Accounts Team (or other OSRE staff assigned to the specific settlement). This consultation provides Headquarters the opportunity to provide input on the ongoing negotiations and ensure national consistency. The final draft of the settlement agreement should be submitted to the OSRE Special Account Team, for review to ensure that the draft settlement agreement conforms to the terms of the RSD director's PWA.

C. Special Notice Letters

If a Region has determined in advance of settlement negotiations that it may seek to provide a special account disbursement as a settlement incentive to PRPs, the Region may incorporate the following, or similar, language in the special notice letter to PRPs:

“Under Section 122(b)(3) of CERCLA, EPA has established a special account for this site containing settlement proceeds previously received at this site. The special account funds are intended to be used to conduct or finance response actions at this site. EPA anticipates there may be special account funds available for disbursement to settling work parties if the parties can reach a settlement with EPA to perform response actions at the site. Special account funds will not be available to unilateral order recipients. The disbursement of special account proceeds is solely at the discretion of EPA. If EPA receives a good faith offer to perform the work, EPA will discuss, during the ensuing settlement negotiations, the actual amount of special account funds the Agency may make available to settling work parties.”

Since a number of settlement issues are unresolved at this stage in the negotiations, the letter should not specify the amount available for disbursement. Regions do not need to have received PWA before including this general language in a special notice letter.

V. PROVISIONS APPLICABLE TO PRP AND BFPP DISBURSEMENT AGREEMENTS

This section provides guidance on subjects that EPA must consider when disbursing special account funds to both PRPs and BFPPs.

A. Timing and Manner of PRP and BFPP Disbursements

1. When to Disburse Funds

EPA will only provide special account disbursements to a party as reimbursement for response costs incurred. In other words, Regions should not provide funding to a PRP or a BFPP before the work is performed. Disbursement after completion of the work provides greater assurance that the work will be performed to the Agency’s satisfaction, and it provides an additional incentive for parties to complete the work in a timely manner.

Regions generally should seek to disburse special account funds to a party after the Agency has provided written certification of completion of the work at the site. Where there are distinct phases of work, phased disbursement 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 party completes a certain percentage or phase of the site work, submits the requisite certified cost summary to the Agency for that phase, and receives a written Agency determination that the work is complete and has been performed in accordance with the settlement. Phased disbursements also may be tied to completion of major performance milestones such as completion of the RD, completion of a percentage or phase of the RA, or time milestones. Even in a phased disbursement plan, Regions should consider retaining a considerable amount of funds for disbursement upon ultimate completion of the work.

Under any disbursement plan, Regions also should consider making the availability of the full incentive contingent upon timely completion of the work. For example, if the Region determines that a party is eligible to receive \$1,000,000 as a settlement incentive, the Region may agree to disburse \$900,000, with the remaining \$100,000 available for disbursement only if the work is completed by a certain date.

2. Manner of Disbursement

For PRPs, Regions should seek to disburse special account funds in an amount equal to a percentage of the actual cost of the response action addressed by the agreement not to exceed a set amount from the special account.¹⁸ This disbursement structure protects the Agency in the event the actual cost of the response action is less than originally contemplated while ensuring that the PRPs receive a set amount for disbursement. For example, assuming (a) a PRP is eligible for a disbursement of \$1,000,000 as a settlement incentive and (b) a response action is expected to cost \$4,000,000, the Region may offer to disburse an amount equivalent to 25% of the cost of the removal, not to exceed \$1,000,000, rather than merely offering the set amount of \$1,000,000. Notwithstanding the foregoing, Regions may agree to provide a set amount of funds 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.

For BFPPs, in most cases, Regions may agree to provide a set amount of funds not to exceed a specific amount without the percentage provision.

Regions must specify a funding limit in the disbursement agreement (i.e., no more than the amount of funds available in the special account) to avoid potential Anti-Deficiency Act violations. Regardless of the disbursement structure, the Agency will not provide a party special account funds in excess of the actual costs expended by the party pursuant to the agreement.

3. Creation of a Disbursement Special Account

Regions should clearly identify in the disbursement agreement the special account from which disbursements will be made to the PRP or BFPP. Typically, a Region should create a separate special account for the specific purpose of retaining funds that EPA has agreed to disburse to a PRP or BFPP. Creating a specific “disbursement special account” helps EPA safeguard against inadvertent use of the disbursement funds for other purposes, and allows the Agency to easily track the interest earned on the disbursement funds and make that interest available to the PRP or BFPP as part of the agreement.

4. Disposition of Special Account Funds After Completion of Work

If funds remain in a disbursement special account after EPA has made all required disbursements pursuant to an agreement, the Region should follow the general hierarchy for special account use to determine the proper use of those funds.¹⁹ Generally, the Region may consider whether the funds should be (a) left in the special account to be used to perform other response actions at the site, (b) reclassified for previous EPA site expenditures, or (c) transferred to the Superfund Trust Fund for future appropriation by Congress.

¹⁸ The set amount also may include any interest earned on special account funds from the date of the agreement to the date of the PRP submittal for disbursement.

¹⁹ See EPA’s Planning and Use Guidance at <https://www.epa.gov/enforcement/guidance-planning-and-use-superfund-special-account-funds>.

B. Disbursement Process

1. Submittal of a Certified Cost Summary

Generally, Regions should require a party to submit a certified cost summary/summaries documenting the response costs incurred for performance of the work to the appropriate EPA Regional program office (RPO) as part of the party's request for disbursement of funds pursuant to the settlement agreement. The information contained in the cost summary should be certified as true, accurate, and complete by the party's chief financial officer (CFO). A CFO is the appropriate person to make such a certification because he or she is responsible for the financial accounting system of the party's organization and usually will have had no involvement with the day-to-day decisions concerning the performance of the response action.²⁰ The party project manager is typically not an appropriate person to provide this certification because the project manager may be too closely involved with the response action to provide an independent review and is generally not an expert on financial accounting practices. The certification also should acknowledge that the party will be subject to penalties for submission of false information.

2. Review of the Cost Summary

The RPO, in consultation with the remedial project manager (RPM) and Office of Regional Counsel, should review the cost summary as well as the terms of the underlying settlement agreement to determine whether the expenses claimed by the party are appropriate. Appropriate costs are generally the costs of implementing the site cleanup which are consistent with the National Oil and Hazardous Substances Contingency Plan (NCP), and for which the PRP is not otherwise excluded from seeking reimbursement pursuant to the terms of the settlement agreement. Costs excluded from disbursement include, but are not limited to, oversight costs incurred under the settlement agreement, attorneys' fees and costs, and litigation costs. Costs excluded from disbursement are discussed in greater detail in EPA's Model RD/RA CD available from the "Cleanup Enforcement Model Language and Sample Documents" database page at <https://cfpub.epa.gov/compliance/models/>.

3. Approval and Disbursal of Funds

Regions may vary in the specific procedures and forms used to receive approval to disburse funds. In general, Regional staff will prepare a form to receive approval to obligate and disburse funds (hereinafter "commitment form").²¹ Upon approval of the commitment form, a portion of the Region's special account allowance will be reserved for the future disbursement to the party. When it is time to initiate disbursement, Regional staff should prepare a miscellaneous obligation document (MOD).²² The Regional Superfund division director (DD) should review the MOD, the commitment form, the party's certified cost summary, and the relevant settlement agreement. If the DD gives approval, the commitment form and MOD can be sent to the Cincinnati Finance Center (CFC) with a cover memo signed by the DD for disbursal of funds to the PRP. The cover memo should include a clear declaration of who the funds are being disbursed to, the amount, the name of the party, the routing number and bank

²⁰ 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, or other independent person acceptable to the Agency, to provide the certification.

²¹ Some Regions may use Commitment Notice, EPA Form 2550-9.

²² Some Regions may use Miscellaneous Obligation Document, EPA Form 2550-10.

account number the funds will be disbursed to, and the Tax ID for the party. Financial guidance is contained in Resource Management Directive System 2550D-15, Financial Management of the Superfund Program, Financial Management of Special available at <http://intranet.epa.gov/ocfo/policies/resource.htm>.

C. Termination and Recapture of Special Account Funds

EPA's obligation to provide a special account disbursement to a party may be terminated for various reasons. For example, termination would occur if EPA triggers the work takeover provision of a settlement agreement, if EPA determines that a party knowingly submitted a materially false or misleading cost summary and certification, or if EPA determines that a party has submitted a materially inaccurate or incomplete cost summary and certification and the party fails to correct the submission. An example of a materially incomplete submission would be where the costs incurred were unsupported by documentation. An example of a materially false submission would be where cost information was provided for work that was never performed or if it is determined that the cost of performing an activity was improperly inflated.²³ Like other EPA actions under the settlement agreement, any decision by EPA to terminate the disbursement of funds is generally subject to the dispute resolution provisions in the settlement agreement.

Termination of eligibility for special account disbursement has several impacts. If termination occurs prior to the disbursement of any funds, the party should generally no longer be eligible for any disbursement under the settlement agreement. If termination occurs after some funds have been disbursed, the Agency may pursue reimbursement for that portion of previously disbursed special account funds related to the reason for the termination, plus interest from the date of disbursement of the funds to the date of repayment, pursuant to the terms of the settlement agreement.

D. Necessary Settlement Provisions

For a PRP or BFPP to receive a disbursement of special account, the party must agree to perform a response action pursuant to an agreement that includes necessary provisions and conditions concerning special accounts disbursements. Necessary provisions concerning special account disbursement provisions can be found in EPA's Model RD/RA CD on the "Cleanup Enforcement Model Language and Sample Documents" database at <https://cfpub.epa.gov/compliance/models/>.

VI. PURPOSE AND USE OF THIS GUIDANCE

This guidance and any internal procedures adopted for its implementation are intended exclusively as guidance for employees of EPA. 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 specific facts at the site.

Questions concerning this guidance may be directed to Manuel Ronquillo, (202) 564-6065, Team Leader of OSRE's Special Accounts Team.

²³ An 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.

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