



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

JAN 24 2007

SUBJECT: Superfund Oversight Guidance

FROM: Susan E. Bromm, Director *Susan E Bromm*
Office of Site Remediation Enforcement

TO: Office of Regional Counsel Superfund Branch Chiefs
Regional CERCLA Program Branch Chiefs
Regional Finance Office Branch Chiefs

The purpose of this memo is to transmit two guidance documents regarding Superfund oversight. These guidance documents reflect the coordinated efforts of the Office of Solid Waste and Emergency Response, the Office of the Chief Financial Officer, and my office, the Office of Enforcement and Compliance Assurance. By disseminating these guidance documents at the same time it confirms EPA's commitment to promote transparency in determination of oversight amounts.

The first, "Using RCRA's 'Results-Based Approaches and Tailored Oversight Guidance' when Performing Superfund PRP Oversight" should assist regions in determining the proper level of oversight to perform at a site based on site specific conditions.

The second, "Additional Guidance on Prepayment of Oversight and Special Accounts" provides additional guidance on obtaining prepayment of oversight and the benefits of depositing such payments into special accounts.

If you have any questions, please contact Vince Velez, (202) 564-4972, or Melissa Franolich, (202) 564-6300, of my staff.

Attachments

cc: Superfund Program Enforcement Contacts



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

DEC 22 2006

MEMORANDUM

SUBJECT: Using RCRA's "Results-Based Approaches and Tailored Oversight Guidance" when Performing Superfund PRP Oversight

FROM: Susan E. Bromm, Director *Susan E Bromm*
Office of Site Remediation Enforcement

Barnes Johnson, Acting Director *Barnes Johnson*
Office of Superfund Remediation and Technology Innovation

TO: Superfund National Policy Managers, Regions I-X
Regional Counsel, Regions I-X

The purpose of this memorandum is to provide you with additional information in support of Superfund's Administrative Reform on PRP oversight. Attached is a copy of the Office of Solid Waste's "Results-Based Approaches and Tailored Oversight Guidance," dated September 2003, for facilities subject to corrective action under Subtitle C of the Resource Conservation and Recovery Act (RCRA). We ask that Superfund program managers consider the principles contained in Section III, Tailored Oversight, when developing oversight plans with PRPs for their Superfund sites.

As most of you already know, the Agency announced several new Superfund Reforms in October 1995. Among these reforms was an initiative to address the cost of oversight activities at sites where the responsible parties are performing work. In the intervening years, the Agency has taken steps to implement the PRP oversight reform. On May 17, 2000, we issued the current guidance entitled, "Interim Guidance on Implementing the Superfund Administrative Reform on PRP Oversight," OSWER Directive No. 9200.0-32P. This document emphasizes the need for open dialogue between EPA and PRPs who have settled with EPA as a way to foster improved relationships and to attain appropriate levels of oversight. This guidance recommends that EPA offer settling PRPs the opportunity to discuss their oversight expectations and to provide suggestions on how to conduct oversight. It also states that where PRPs have entered into agreements to pay EPA's oversight costs, EPA will strive to issue timely oversight bills.

More recently, EPA issued its “Results-Based Approaches and Tailored Oversight Guidance” for RCRA corrective action facilities which expands the “Corrective Action Oversight” guidance issued in January 1992. The Tailored Oversight guidance in Section III promotes flexibility and the use of different oversight levels within the corrective action program based on facility specific conditions “rather than a pre-determined *one size fits all* process.” We recommend that Superfund program managers use this approach to compliment the current Superfund oversight guidance when considering the level of oversight to perform at a particular site.

If you have any questions, please contact Vince Velez, (202) 564-4972, or Sharon Cullen, (202) 564-6037, of OSRE. If you need a copy of the January 1992 “Corrective Action Oversight” guidance, please contact Vince or Sharon.

Attachment

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Results-Based Approaches and Tailored Oversight Guidance

for Facilities Subject to Corrective Action Under
Subtitle C of the Resource Conservation and
Recovery Act

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I. Background

Why did EPA write this guidance?

In its ongoing effort to improve the RCRA Corrective Action Program¹, EPA, with the assistance of interested stakeholders, identified several improvements to increase the efficiency and cost-effectiveness of facility cleanups. One of those improvements, as outlined under the RCRA Cleanup Reforms announcement (EPA, 1999), was to issue guidance on results-based² approaches that emphasizes the importance of outcomes and eliminating unnecessary procedural steps. This guidance document provides an overview (Section II) of specific results-based approaches regulators and facility owners and operators can use to improve cleanups of hazardous waste facilities. This guidance also describes the benefits of “tailoring” regulatory oversight (Section III) of RCRA cleanups and specific recommendations with respect to the level of oversight that might be appropriate in a given situation.

EPA also wrote this guidance because we believe greater use of results-based approaches will help us achieve our short-term goals established in response to the Government Performance and Results Act (GPRA - see Highlight Box), as well as our long-term goals associated with facility-wide cleanups.

Who should use this guidance?

We wrote this guidance to help State and EPA regulators, owners and operators of facilities subject to RCRA corrective action, and members of the public better understand EPA’s results-based strategy for RCRA corrective action. Throughout the rest of this guidance, we will refer to these three

RCRA Corrective Action GPRA Goals

The GPRA goals for the RCRA corrective action program are that, by 2005, EPA and authorized states will have verified that 95% of 1,714 RCRA GPRA Cleanup Baseline facilities have met the Current Human Exposures Under Control environmental indicator and that 70% of baseline facilities have met the Migration of Contaminated Groundwater Under Control environmental indicator.

For more information regarding the RCRA Cleanup Baseline, refer to <http://www.epa.gov/correctiveaction/facility.htm>. For more information concerning environmental indicators, refer to <http://www.epa.gov/correctiveaction/eis.htm>.

¹ Activities at permitted and/or interim status facilities that treat, store or dispose of hazardous wastes (TSD facilities) have sometimes resulted in releases of hazardous waste or hazardous constituents into soil, groundwater, surface water, sediments, or air. The RCRA Corrective Action Program requires such facilities to conduct investigations and cleanup actions as necessary to protect human health and the environment. See, e.g., RCRA Sections 3004(u)(v), and 3008(h) and 40 C.F.R. Section 264.101.

² Results-based approaches was a fundamental message of the 1996 Advanced Notice of Proposed Rulemaking (ANPR; EPA, 1996) which the Agency still views as key operating guidance for the RCRA Corrective Action Program.

groups as regulators, facilities, and the public, respectively. Sometimes, we will refer to all three groups collectively as “stakeholders.”

This document provides guidance to EPA Regional and State corrective action authorities, as well as to facility owners or operators, and the general public on how EPA intends to exercise its discretion in implementing the statutory and regulatory provisions that concern RCRA corrective action. The RCRA statutory provisions and EPA regulations described in this document contain legally binding requirements. This document does not substitute for those provisions or regulations, nor is it a regulation itself. Thus, it does not impose legally-binding requirements on EPA, States, or the regulated community, and may not apply to a particular situation based upon the circumstances. EPA and State decisionmakers retain the discretion to adopt approaches on a case-by-case basis that differ from this guidance where appropriate. Any decisions regarding a particular facility will be made based on the applicable statutes and regulations. Therefore, interested parties are free to raise questions and objections about the substance of this guidance, and the appropriateness of the application of this guidance to a particular situation. EPA will consider whether or not the recommendations or interpretations in the guidance are appropriate in that situation.

II. Results-Based Approaches for RCRA Corrective Action

What do we mean by “results-based approaches” for RCRA Corrective Action?

The purpose of the Corrective Action program is to address releases of hazardous waste and hazardous constituents at RCRA facilities in a timely and protective manner. Results-based approaches emphasize outcomes, or results, in cleaning up releases, and strive to tailor process requirements to the characteristics of the specific corrective action. Results-based approaches involve, where appropriate, setting goals, providing procedural flexibility in how goals are met, inviting innovative technical approaches, focusing data collections, and letting owner/operators undertake cleanup action with reduced Agency oversight. Under such approaches, facilities are held fully accountable for the results they agree to achieve.

EPA's results-based strategy conveyed in this guidance provides a recommended framework for RCRA program implementors to run programs that effectively use available corrective action cleanup tools and private party and regulatory agency resources to address environmental problems. We recommend regulators weigh the facility-specific circumstances, including the cooperativeness and technical capability of the facilities, in deciding the specific approaches to be taken at a given facility.

What are the benefits of results-based corrective action?

- U Encourages regulators and facilities to design approaches and processes that are appropriate for their particular facilities;
- U Generally achieves faster environmental results;
- U Provides opportunities for resource savings to both the facility and regulatory agency; and
- U Maximizes efficiency of a cleanup

What are EPA's expected program results?

The overarching goal of the corrective action program is to clean up contaminated facilities as necessary to protect human health and the environment.

In the short-term, the corrective action program generally focuses on preventing unacceptable exposures to humans and prevent the further migration of contaminated groundwater. To ensure long-term protection, EPA recommends that regulators and facilities use the following threshold criteria as general goals for final cleanups and as screening tools for potential remedies:

1. Achieve media cleanup objectives³; and
2. Control the source(s) of release so as to reduce or eliminate, to the extent practicable, further releases of hazardous waste or hazardous constituents that may pose a threat to human health and the environment.

Protecting human health and the environment is the mandate of the RCRA statute and regulations; therefore, it is appropriate that remedies should meet the criteria outlined above as a means to demonstrate progress toward achieving the overall mandate to protect human health and the environment.

For further information with regards to RCRA guidance documents, Section VI has a listing of specific reference documents which are available on-line.

What are some approaches to results-based corrective action?

Below are brief descriptions of five core results-based approaches that we recommend facilities and regulators consider at any corrective action site to promote results-based corrective action. Also described are four supplemental results-based approaches that may expedite cleanups. Because they are more dependent on the presence of specific site factors, the supplemental approaches are not expected to be applicable as often as the core approaches. Section III of this document provides more detailed guidance on "Tailored Oversight" because we believe this concept is generally a very effective approach to expediting cleanups and ensuring that facilities achieve cleanup goals. We recommend that any tailored oversight approach chosen be consistent with any permit, order or other enforceable mechanism that

³ Media cleanup objectives for final remedies typically includes the more specific concepts of media cleanup levels, points of compliance, and cleanup time frames. In previous guidance (EPA, 1996a - page 19449), EPA referred to media cleanup objectives as media cleanup standards; we now use media cleanup objectives to avoid confusion over the term "standard" that is often associated just with numeric values.

applies to a facility.

Results-Based Approaches We Recommend Considering at All Corrective Action Facilities

Tailored oversight - Oversight, in general, is the responsibility of the lead regulator⁴ to ensure the facility implements corrective action. Tailored oversight is an oversight plan developed based on facility-specific conditions such as site complexity, compliance history, and financial and technical capability of the facility. In addition to discussing and using results-based approaches with facilities, we recommend regulators evaluate the facility-specific conditions and develop a plan with an appropriate level of oversight that will enhance timely, efficient, and protective cleanups. Tailored oversight may result in the elimination of administrative or technical steps, usually for facilities who have agreed to, and have demonstrated that they are capable of, meeting the environmental objectives and specific requirements established for their facility. In some instances, an analysis of facility capabilities may result in greater oversight to ensure environmental results are achieved in a timely manner.

Holistic Approach - The 1996 ANPR states, “In general, EPA believes that a holistic approach to corrective action, could increase cleanup efficiency and reduce transaction costs.” (61 FR 19432, May 1, 1996, 19456). The term “holistic” in this context means taking a “big picture” look so facility representatives and regulators can prioritize their resources based on risk⁵ to human health and the environment. For example, in a situation where there are many on-site sources of contamination contributing to an off-site plume of contaminated groundwater, a holistic approach could first focus on identifying and controlling, in the near-term, current risks to humans from the site as a whole. Subsequent to controlling these risks, the facility could then conduct additional focused investigations to help evaluate additional cleanup activities needed to achieve other short- and long-term cleanup objectives associated with individual sources. EPA believes that viewing corrective action sites holistically is particularly appropriate to help meet Environmental Indicator goals. Ultimately, the facility would still be responsible for meeting final remedy corrective action goals.

Procedural flexibility - Regulators and facilities place their primary focus on environmental results and ensure that each corrective action-related activity at a given facility directly supports cleanup goals at that site. Corrective action is generally structured around seven elements common to most cleanups: initial facility assessment, site characterization, short-term (interim) actions, remedy evaluation and selection, remedy implementation, remedy completion and public participation. EPA emphasizes that no individual results-based approach that implements these

⁴ A “lead regulator” is typically the first-line staff person for the government authority that is responsible for ensuring that a facility implements corrective action as necessary to meet facility-specific corrective action goals. The lead regulator, could depending on the circumstances, either be a federal employee working in an EPA regional office or an employee of a particular State or Territory (EPA, 2001).

⁵ “Risk-based decision making is especially important in the corrective action program, where it should be used to ensure that corrective action activities are fully protective given reasonable exposure assumptions and consistent with the degree of threat to human health and the environment at a given facility.” (EPA, 1996; page 19441)

cleanup elements is likely to be appropriate for all corrective action facilities. EPA continues to encourage regulators and facilities to focus on the desired result of cleanup rather than a predetermined (or “generic”) step-by-step cleanup process that does not reflect site-specific circumstances. We recommend these seven elements be viewed as evaluations generally necessary to make good cleanup decisions. By focusing on results, regulators are encouraged to use the most effective approaches for facility management and oversight.

Performance Standards - The regulator, working (as appropriate) with the facility, develops general performance standards to prescribe the scientific, technical, and administrative requirements the facility must fulfill in order to implement and ultimately complete corrective action. Under this approach, it is anticipated that the facility, not the regulator, is responsible for determining the methods by which the performance standards are attained, *e.g.*, designing a remedy that will meet the required performance standard. That is, the regulator establishes clear, reasonable, and protective performance standards, while the facility (with an appropriate level of regulatory oversight) determines how those standards are met.

Targeted (or Focused) Data Collection - As described in the 1996 ANPR, there are a variety of results-based approaches that regulators and facilities might use to focus data gathering efforts to identify and implement appropriate responses at a corrective action facility. For example, EPA encourages facilities and regulators to develop and use a conceptual site model⁶ (CSM) to identify and prioritize data needs based on a particular corrective action goal. Additionally, facilities might dramatically improve the effectiveness and efficiency of data collection by taking advantage of numerous innovative site characterization techniques.⁷ Also, EPA recommends using data quality objectives⁸ (DQOs) to identify the amount, type, and quality of data needed to support corrective action decisions (EPA, 1994; page 19445).

Supplemental Results-Based Approaches

Presumptive Remedies - As EPA worked through hundreds of individual cleanups, the Superfund program found that similar remedies were successfully used to address many similar sites. This makes sense because certain types of sites, such as wood treater sites, used similar processes which resulted in similar contamination problems. EPA calls the similar approaches used to address these similar sites “presumptive remedies”⁹ and has developed a series of presumptive remedy guidance documents for particular categories of sites (*e.g.*, landfills, metals

⁶ A Conceptual Site Model is a three-dimensional representation of what is known or suspected about the sources, releases, and release mechanisms, contaminant fate and transport, exposure pathways and potential receptors, and risk.

⁷ To access detailed information, guidance and other resources pertaining to innovative site characterization tools and approaches, see <http://www.clu-in.org/char1.cfm>.

⁸ The overall degree of data quality or uncertainty that a decision maker is willing to accept is referred to as the Data Quality Objective (DQO) for a decision.

⁹ EPA defines presumptive remedies as preferred technologies for common categories of sites, based on historical patterns of remedy selection and EPA’s scientific and engineering evaluation of how well technologies perform (EPA, 1993).

in soils, volatile organics in soils, contaminated groundwater, wood treaters). As stated in the 1996 ANPR, EPA recommends presumptive remedies be used at “...appropriate sites, including RCRA facilities, to help ensure consistency in remedy selection and implementation, and to reduce the cost and time required to investigate and cleanup similar types of sites.” EPA’s guidance on presumptive remedies is available at

<http://www.epa.gov/superfund/resources/presump/index.htm>.

Innovative Technologies - EPA recommends regulators and facilities use innovative technologies when they offer the potential for comparable or superior treatment performance or implementability, fewer adverse impacts, or lower costs for equivalent levels of performance when compared to more conventional technologies. When results-based cleanups allow for innovative approaches, we recommend the overseeing agency require the owner or operator to document the agreed-upon results. We believe that results-based approaches can provide for this kind of flexibility to incorporate many different technical solutions and approaches to facility management. EPA’s Office of Superfund Remediation and Technology Innovation maintains a website (<http://www.clu-in.org/>) that offers a number of resources related to innovative technologies.

Phased Approach - Facilities and regulators may improve efficiencies by phasing corrective action to focus first on areas that represent the greatest short-term threat to human health and/or the environment. For example, a phased approach might first focus the facility on meeting corrective action environmental indicators (EIs), then after meeting EIs, the regulator and facility can discuss cleanup time frames and how to achieve intermediate milestones, where appropriate, or final cleanup goals using a phased approach. Phased approaches may also benefit situations where the facility is interested in selling or redeveloping parts of their property.

Facility-Lead (or Voluntary) Corrective Action Agreements - A facility-lead corrective action agreement is typically a letter from the regulatory agency to the facility that generally (1) outlines the intent of the facility to undertake corrective action, and (2) contains broad performance standards that provide a framework to guide corrective action. The advantage of this approach is that it can provide an opportunity to expedite corrective action activities and reduce the amount of resources expended by facilities and regulators. In the normal case, this letter is non-binding, but may appeal to a facility who wants to sell its property or conduct corrective action requirements prior to a permit, order or other enforceable mechanism being implemented. Facilities interested in a facility-lead approach should contact the regulator if they are interested in this option. Under facility-lead corrective action, as in any corrective action approach, it is important for all parties to understand what environmental results are expected by the regulator and how the facility should go about meeting the results with the appropriate level of oversight. We recommend the facility provide meaningful opportunities for public participation. In our experience, this is typically crucial in order for it to be a success. In particular, we recommend the public be provided an opportunity to review and comment on the cleanup activities.

III. Tailored Oversight

What is tailored oversight?

As stated previously, oversight, in general, is the responsibility of the lead regulator to ensure the facility implements corrective action in accordance with applicable requirements. Under a tailored oversight approach, regulators and facilities (where appropriate) develop a plan that allows for the appropriate level of oversight for a particular facility rather than a pre-determined “one size fits all” process. We recommend the regulator base the oversight plan on, among other appropriate factors, facility-specific conditions and facility capabilities.

We recommend that state and federal regulators, as appropriate, evaluate and implement tailored oversight at facilities requiring corrective action. Tailored oversight is a significant tool in the overall diversified strategy of results-based project management. EPA recommends program implementers use tailored oversight to help run programs that effectively and efficiently use resources to address environmental problems.

This guidance does not supersede EPA’s previous guidance (January 1992) that addressed the subject of tailored oversight at corrective action facilities; rather, it reaffirms and expands the previous guidance to recommend that regulators tailor oversight to facility-specific circumstances. Both this and the 1992 guidance stress that there are flexible approaches to oversee cleanups.

What are the benefits of tailored oversight?

The potential benefits of tailored oversight are:

- U Focuses stakeholders on goals;
- U Provides an opportunity for resource savings for both the implementing agency and the facility;
- U May lead to faster results because expectations are clearly communicated and documented;
- U Streamlines administrative steps such as interim deliverables and duplicative federal/state reviews;
- U Tailors oversight resources to site-specific factors; and
- U Provides a high level of certainty to stakeholders because corrective action objectives and the oversight approach is discussed at the beginning of corrective action activities.

Does tailored oversight result in less protective cleanups?

No. EPA’s goal remains the same – that is, protection of human health and the environment. Tailored oversight does not change the overall expected results of the RCRA Corrective Action program. It simply offers opportunities, where appropriate, for a facility to reach those results faster. Achieving protection of human health and the environment more efficiently is a benefit to all stakeholders.

How does a regulator use tailored oversight?

EPA recommends that regulators consider the following factors¹⁰ when tailoring their

¹⁰ Recommended factors are based on experience of EPA regional and state personnel overseeing corrective action, and previous EPA guidance (EPA, 1992; EPA, 1996b; EPA, 1997a; and, EPA 2001e)

oversight at a particular facility.

- Severity of risk (see Highlight box) to human health and/or the environment;
- Site complexity;
- Compliance history of the facility;
- Public interest or facility's record on public involvement;
- Existence of incentives and motivation to expeditiously and willingly clean up the facility; and
- Demonstrated technical capability of facility

In determining the appropriate level of oversight, we recommend regulators consider each factor against the site-specific conditions that exist at the facility. For example, a reduced oversight approach might be appropriate for even a complex site where the facility is undertaking significant stakeholder outreach, has gained the trust of the community, is cooperative with the overseeing agency, and has a good compliance record.

In our experience, compliance history has been a key factor regulators use in determining the level of oversight for a given corrective action facility. For example, oversight might be reduced where a facility has demonstrated a willingness and ability to cooperatively perform necessary cleanup activities. For non-compliant facilities, oversight might need to be increased to help bring these parties back into, or ensure future compliance.

Another element in analyzing how to tailor oversight is the facility's active participation in developing a tailored oversight approach. In addition, in our experience, a facility's willingness and motivation to achieve short term measures or final cleanup increase the likelihood of a successful outcome using tailored oversight. Again, we recommend regulators determine an appropriate level of oversight based on the previously recommended factors.

What are some of the general questions we generally ask when we evaluate risk at a facility?

What is/are the:

- actual or potential exposures of nearby populations, animals, or plants to hazardous constituents
- actual or potential contamination of drinking water supplies or sensitive ecosystems
- other situations that may pose threats to human health or the environment.
- presence of hazardous wastes or hazardous constituents in drums, barrels, or bulk storage containers that may pose a threat of release
- risks of fire or explosion or the potential for exposure to hazardous constituents as a result of an accident or failure of a container or handling system
- presence of high levels of hazardous constituents in soils at or near the surface that may migrate
- further degradation of the affected media that may occur if remedial action is not initiated expeditiously
- weather conditions that may cause releases of hazardous constituents or migration of existing contamination
- the time required to develop and implement a final remedy

Regardless of the level of oversight used at a facility, we recommend that the overseeing agency ensure that the facility is required to attain and document results. Clear and measurable results (e.g., Environmental Indicators, final cleanup levels, public participation opportunities, performance standards), established at the beginning, should help the facility demonstrate that the remedy meets RCRA requirements.

How does EPA recommend results-based corrective action objectives be established under

tailored oversight approaches?

In EPA's experience, the cornerstone of effective oversight of corrective action activities is a clear – and documented – understanding of facility-specific cleanup goals¹¹. Clear goals can greatly enhance the prospect of achieving results that will satisfy EPA or the State. We recommend that regulators and facilities describe goals in all key decision documents and reports, and ensure that the public has access to this information. Tailored oversight, without clearly defined goals, is susceptible to unfocused investigations, irrelevant data, slow cleanups, and added costs.

What are some examples of situations where a regulator might tailor his/her oversight?

Regulators and facilities should be aware that the level of needed oversight might change throughout the course of corrective action based on facility-specific issues. Furthermore, we recommend that regulators and facilities, where appropriate, balance streamlining objectives with public information needs when developing tailored oversight plans. Once the overall level of oversight is established, specific levels of oversight can be determined for specific activities. For example, general expectations for low, medium, and high levels of oversight might be:

Low Oversight - minimal role of the regulator that primarily consists of establishing performance standards and verifying that the facility has achieved these standards, after certification by the facility. When there are compliance schedules in a permit that extend beyond a year, refer to 40CFR § 264.100.

Medium Oversight - increased role of regulator, including increased informal discussions, facility visits, inspections, and more stringent review and verification of an increased number of submittals.

High Oversight - the regulator directly oversees an intensive effort during which all documents are reviewed and discussed with the facility.

The following is a list of some oversight reducing activities that regulators might adapt as appropriate based on facility-specific circumstances. These include, but are not limited to:

- Eliminating duplicative state/federal reviews of documents;
- Eliminating interim deliverables while maintaining accountability of the facility to produce a measurable end product;
- Limiting review where agency approval is not required for the facility to proceed;
- Increasing the use of meetings, briefings, and other communication methods to identify and resolve issues early on rather than requiring formal documents be submitted and reviewed by the Agency;
- Limiting the number of facility visits for routine field activities when the facility demonstrates competence in achieving remedial results;
- Establishing performance standards that define clear and attainable results;
- Using briefings, conversations, and progress reports from the facility to replace some of the

¹¹ Refer to Section II of this document for an overview of short- and long-term cleanup goals for RCRA Corrective Action.

formal interim deliverables while still making this information publicly available where appropriate; and,

- Encouraging communication among the regulator, facility and the community (e.g., make up-to-date facility information available at publically accessible locations). EPA believes public participation is a key component of the corrective action process

How does tailored oversight affect formal reporting?

Under a tailored oversight approach, the regulator might modify the number of formal reports a facility submits to the agency based on facility-specific factors and the facility's capabilities. For example, the regulator might replace some of the traditional formal reporting requirements, with informal communication approaches. In such a case, we recommend the permit, order or other enforceable mechanism be written to allow informal communication and reporting. If, however, a regulator tailors oversight at this level and the facility does not achieve the stated or agreed-upon results, the regulator might find it appropriate to alter the oversight plan (and implementing mechanism), if necessary, to include more formal reporting requirements and a higher level of oversight.

Although EPA generally expects a facility to submit a reduced number of documents when tailored oversight is implemented, the administrative record requirements for such corrective actions remain the same for any corrective action. Agency staff should consult with their Office of Regional Counsel regarding appropriate documentation for the Agency's corrective action decisions.

The Guidance on Enforcement Approaches for Expediting RCRA Corrective Action (EPA, 2001c) provides examples of how an Agency might limit time spent negotiating consent orders and permits, establish time limits to negotiate work plans, consider fixed and flexible schedules of compliance, and limit a facility's revision opportunities.

Does tailored oversight mean reduced data quality?

No. Under the tailored oversight discussed in this guidance, the regulator works with the facility to ensure the appropriate level of oversight. Part of tailoring oversight is defining the problem that the facility needs to address. Once the regulator defines the problem, he or she can help the facility develop a data gathering plan to obtain sufficient high quality data that will allow for remedy decisions. Regardless of the level of oversight, the facility has the responsibility to provide sufficient quality data to verify that the agreed upon results have been met. Documentation allows the regulator and the public to assess the decisions that the facility

performed during corrective action. EPA recommends facilities use the data quality objectives as a framework to explain their data and decisions in the context of facility goals (see EPA, 1994a).

Does tailored oversight mean less communication between the facility and the regulator?

No. In fact, the tailored oversight approach is designed to result in more effective and timely communication between the regulator and the facility. As previously stated in this guidance, we generally expect that reduced oversight approaches will lead to an increase in less formal meetings, briefings and other communication methods to identify and resolve issues. This informal approach reduces the amount of formal procedure, but may provide more frequent contact between the regulator and the facility.

What general activities occur during a cleanup that EPA recommends a regulator discuss with a facility before, during, and after developing a tailored oversight plan?

The general activities listed below are typically discussed in characterizing and remediating a facility. The activities do not distinguish between the regulator's or the facility's responsibility, but rather what usually happens when both work together. They may seem overly simplified, but we think that recognizing and understanding each one is a good starting point for regulators and facilities involved in a facility cleanup.

General Cleanup Activities

- Review site history;
- Determine the nature and extent of environmental contamination;
- Stabilize (i.e., control) problems if they represent a near-term unacceptable threat to human health or the environment;
- Notify and solicit input from the public at the beginning of corrective action, at key junctures, and as appropriate given site-specific circumstances;
- Work with appropriate parties to determine how decisions will be made for the following:
 - relative priority of problems
 - future land use
 - establishing cleanup goals and risk levels
- Develop reasonable alternatives to clean up priority areas of contamination, which might include consideration of appropriate presumptive remedies that might eliminate the need to evaluate multiple remedy alternatives;
- Evaluate remedy alternatives;
- Make decisions (e.g., relative priority, land use, cleanup goals and risk levels, remedy selection) using the rules you developed above that include consideration of all key stakeholder opinions and values;
- Implement the remedy; and
- Keep good records and document all key decisions throughout corrective action implementation

Can tailored oversight lead to resource savings?

Yes. While the actual remedy cost (e.g., excavation and treatment) may not change,

innovative technologies, presumptive remedies, tailored interim deliverables, and other results-based tools may provide substantial cost savings in the total costs expended by the regulatory agency and facility.

How does tailored oversight ensure public involvement?

EPA is committed to substantial and meaningful involvement of communities throughout RCRA corrective action activities. We recommend regulators and facilities develop and maintain effective community involvement by developing a public participation strategy at the beginning of the corrective action process.

Timely and meaningful public participation is generally key to community acceptance of the remedy. In addition to establishing the typical mandatory public involvement at critical stages of decision making in corrective action activities, EPA continues to recommend frequent, meaningful public involvement for corrective action activities in general.

EPA's general expectations for public participation, as conveyed in Chapters four and five of *The RCRA Public Participation Manual* (EPA, 1996a), are that facilities and regulators should involve the public early in corrective action and share responsibilities for public participation activities. Another rule on public participation is the *RCRA Expanded Public Participation Rule* (EPA, 1995) which contains many of the same concepts and ideas as the Public Participation Manual. Note that it might be appropriate, based on site-specific circumstances, to include additional public participation in situations where there is less regulatory oversight.

In general, we recommend regulators and facilities provide opportunities for meaningful public participation throughout corrective action, as appropriate, given site-specific circumstances and community interest. We recommend public participation generally occur at the:

- Initiation of corrective action;
- Selection of significant interim measures, as appropriate;
- Selection of final remedy; and,
- Completion of corrective action

How will the regulatory agency use enforcement under tailored oversight approaches?

If a facility has not met deadlines or the agreed upon results, then there are a number of enforcement options. Identifying enforcement options is likely to be especially important when tailored oversight is extended over a long period of time. For non-compliance, enforcement options might include taking formal enforcement action (e.g., enforcing the corrective action provisions of the permit, issuing an order, referring a case to the Department of Justice), collecting stipulated penalties, and putting facilities on strict oversight and compliance schedules. For additional guidance on enforcement, refer to EPA, 2001c.

What are some examples of activities that facilities might conduct under a tailored oversight approach?

Initial Site Assessments	Where RCRA Facility Assessments (RFAs) have not yet been completed, the regulator might allow facilities to choose to conduct their own site assessment or characterization, and submit the report for regulatory review. If the regulator believes the site assessment is adequate, they might approve and adopt it as the RFA for the facility.
Evaluate Environmental Indicators	Under a tailored oversight plan, the regulator might allow the facility to complete evaluations for the Current Human Exposures Under Control and Migration of Contaminated Groundwater Under Control environmental indicators and then submit it for Agency review and ultimate decision-making.
Interim (or Short-Term) Measures	The nature and scope of the interim measure may allow us to rely on simple confirmation sampling or self-documentation of achieving a particular performance standard without involving ourselves heavily in the design phase or may allow the facility to prove their capability and earn reduced oversight on later, larger project components.
Public Involvement	Stakeholder involvement is typically extremely important in corrective action cleanups, regardless of the levels of oversight used.
Final Remedy Selection and Implementation	Using a tailored oversight approach, EPA expects remedies to protect human health and the environment. Cleanup goals are generally conveyed terms of media cleanup levels, points of compliance, cleanup time frames, and source control. Public comments should be taken into account in the remedy decision.

Once a regulator develops a tailored oversight plan for a facility, what goals and milestones does EPA recommend regulators require them to use to measure progress?

The goal of the corrective action program is to protect human health and the environment. We recommend the specific goals and milestones that regulators, as well as facilities use to measure progress be linked to the major corrective action activities (e.g., facility-wide assessments, evaluating whether cleanup actions are needed for all releases, selecting final remedies within an acceptable risk range and hazard index, public participation throughout corrective action, and a preference for treatment of principle threats). In protecting human health and the environment, we recommend that regulators select a remedy that attains appropriate media clean-up standards, controls, where necessary, the source(s) of releases to reduce or eliminate further releases of hazardous waste, and complies with applicable standards for waste management. We recommend that regulators and the facility state these goals and milestones, where appropriate, in all key decision documents and reports.

For the near-term, we recommend the regulator and the facility focus on the two environmental indicators which are the primary short-term goals of the corrective action program. Because environmental indicators focus on results, they might, where appropriate, serve well as short-term results measures for remedial activities. While meeting these indicators is an appropriate near-term goal, we recommend regulators emphasize that final cleanup is the ultimate goal for corrective action. Additionally, we recommend the regulator and the facility establish, at the beginning, public participation milestones throughout the corrective action process.

IV. Conclusion

By focusing on tailoring process requirements to site-specific circumstances, regulators and facilities may more efficiently and cost-effectively manage facility-wide clean ups that protect human health and the environment. Results-based approaches provide the RCRA program with tools to address environmental contamination in ways that protect human health and the environment while tailoring the approaches to facility-specific factors. We recommend regulators use the results-based approaches outlined in this guidance, where appropriate, to help facilities fulfill their corrective action obligations.

Tailored oversight is an integral part of results-based corrective action. We recommend regulators look at their oversight levels on a facility-specific basis and make the appropriate adjustments. Using tailored oversight approaches, regulators eliminate administrative or technical steps, as appropriate, for facilities that have shown they are capable of meeting the environmental objectives established for their facilities. Tailored oversight is designed to help focus activities on environmental results rather than “one-site-fits-all” process steps and ensure that each corrective action-related activity, at any given facility, directly supports cleanup goals at that facility.

V. Contacts

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

DEC 22 2006

MEMORANDUM

SUBJECT: Additional Guidance on Prepayment of Oversight Costs and Special Accounts

FROM: Susan E. Bromm, Director *Susan E Bromm*
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Office of Enforcement and Compliance Assurance

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TO: Superfund National Policy Managers, Regions I-X
Regional Counsel, Regions I-X
Regional Comptrollers, Regions I-X

I. INTRODUCTION

The purpose of this memorandum is to provide additional guidance on the prepayment of oversight costs discussed in the October 4, 2002 "Consolidated Guidance on the Establishment, Management and Use of CERCLA Special Accounts" ("Consolidated Guidance"). Attached to this memorandum is sample settlement language for the prepayment of oversight costs.¹ This language was developed in consultation with the Department of Justice Environmental Enforcement Section.

¹ While the sample language in Attachment 1 is for an RD/RA Consent Decree, it may be modified to accommodate other types of settlements for performance of work (e.g., RI/FS, removal action).

II. BACKGROUND

Section 122(b)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9622(b)(3), authorizes EPA to retain and use funds received through an agreement to pay for response actions contemplated in the agreement. EPA retains these funds in site-specific accounts, called “special accounts,” which are subaccounts within the EPA Hazardous Substance Superfund (“Trust Fund”). EPA uses these funds to address response actions at a site.² EPA considers oversight of work performed by a PRP to be a response action.³ The Consolidated Guidance generally discusses issues relevant to special accounts and money received for EPA oversight of PRP work.⁴

In most agreements under which PRPs agree to perform work, the PRPs also agree to reimburse the Agency for all EPA “future costs.” Future costs include the “direct” and “indirect” costs the Agency incurs for oversight of the PRPs’ activities.⁵ It has been the Agency’s general practice to use appropriated Trust Fund money to pay for EPA’s oversight, and periodically bill the PRPs. Payments received are then deposited in the Trust Fund. In the past several years, however, the Agency has been placing the amounts received into a special account (in accordance with language in the settlement agreements), which it has been using to fund oversight costs. The Region still continues to bill the PRPs for oversight while using the special account to fund those activities. The chief benefit of this approach is that it ensures that oversight will be immediately available for the site while, at the same time, conserving appropriated Trust Fund money for use at other sites where there are no viable PRPs.

III. PREPAYMENT OF OVERSIGHT COSTS

The Consolidated Guidance generally discusses negotiating with PRPs to prepay oversight costs.⁶ As a means to save additional appropriated Trust Fund dollars, Regions should, in appropriate cases, request that PRPs prepay the first installment of oversight costs under any settlement where the PRPs have agreed to perform a response action (e.g. RI/FS, RD/RA, or removal actions) and pay future oversight costs. Oversight is a necessary part of a PRP-lead response action, and it is appropriate, as part of that response action, to ask the PRPs to prepay a certain amount up front so that the Agency does not have to expend Trust Fund money.

² See the 2001 Model RD/RA Consent Decree (“Model RD/RA CD”) for language concerning the establishment and use of special accounts.

³ October 4, 2002 “Consolidated Guidance on the Establishment, Management and Use of CERCLA Special Accounts.”

⁴ See Consolidated Guidance, section III.E “Oversight Payments,” at 4-5.

⁵ See Consolidated Guidance, at 2.

⁶ See Consolidated Guidance at 5.

Requiring PRPs to prepay the first year of estimated oversight costs also does not significantly burden PRPs because cost payments are not increased, but are merely accelerated. We acknowledge that the PRPs would lose the use of, or interest on, the prepaid funds.

For a number of situations, it will be unnecessary to seek prepayment of oversight costs. For example, at sites for which there is already an established special account, the Agency will already have access to special account dollars as an additional funding source so there is no need to request prepayment of oversight. Prepayment may also be unnecessary if, as part of the settlement agreement, the PRPs will be paying past costs that can be placed into a special account that can be used to initially fund oversight.⁷ In addition, it may not be cost-effective to request prepayment of oversight costs where the overall amount of oversight costs is expected to be minimal (e.g., less than \$25,000), or the duration of the response action will be relatively short (e.g., less than 9 months). Further, prepayment may be inappropriate where there is a significant orphan share compromise in the form of an initial reduced oversight bill. Finally, the case team may, within its discretion, determine that requesting prepayment of oversight is inappropriate based on site-specific circumstances.

A. Establishing the Amount

When seeking prepayment of oversight costs, a Region should first estimate the dollar amount necessary to fund the cost of oversight. Often, the decision document (e.g., Action Memorandum or Record of Decision) will be useful to determine the amount necessary to fund oversight costs. Similarly, historic oversight costs at the site or estimates from other operable units at similar sites may be useful to determine these costs.⁸ Regions may estimate an amount to address both direct and indirect costs, but at a minimum, should seek an amount to fund expected direct oversight costs.

After establishing the total dollar amount of oversight, the Region will need to determine the amount of oversight dollars to be prepaid prior to the commencement of the response action. If the response action is a longer term action, like a remedial action, the prepaid amount should typically be for the portion of the full amount the Region anticipates it will need to cover costs from the commencement of the work until the estimated date it would likely receive payment for the first bill. For shorter term actions, like a removal action, Regions may request that the PRPs prepay the total amount of oversight. Regions may also consider requesting an amount that includes an additional amount to offset the possibility that costs could be higher than expected. This approach ensures that Trust Fund dollars will not have to be used for oversight at that site.

⁷ If the existing funds in the special account or the past costs obtained under a settlement are earmarked for a specific purpose or need to be retained for other activities at the site then negotiating for the prepayment of oversight costs may be appropriate.

⁸ See *A Guide to Developing and Documenting Cost Estimates During the Feasibility Study*, OSWER Directive 9355.0-75, July 2000.

B. Accounting for and Managing the Prepaid Funds and Other Oversight Payments

When the Agency receives funds prior to work being performed, for financial and reporting purposes, the Agency classifies the funds received as a “cashout.” Oversight amounts that are prepaid would be categorized as a cashout, and entered into the financial management system as “unearned” (TR2) revenue, because the funds are being collected in anticipation of future costs to be incurred.⁹ In the situation where it is necessary to obligate and/or expend funds prior to receipt of the prepaid amount, Regions can still obligate appropriated Trust Fund dollars (“T”), but should then reclassify any expended amounts once the prepaid amount is received.¹⁰ Any open obligations (unliquidated) recorded in the “T” appropriation should be modified to reflect the TR2B special account fund code.

After receiving the prepaid amount, the Regions should use their existing oversight billing procedures for all future billings to PRPs.¹¹ This means that for the initial billing after the receipt of the prepaid amount, and all subsequent billings, the Region will seek payment of all actual direct and indirect costs incurred in that billing period.¹² Amounts received, which are considered as a cost recovery, would then be deposited into the special account (TR2B) for that site as provided in the settlement document. These amounts are considered “earned revenue” because it is the collection of costs previously incurred during that period.¹³ This process would be repeated for each subsequent payment.¹⁴ For the shorter term actions where the region receives the full amount prepaid, the region would still bill the PRPs for any costs (e.g., unpaid indirect costs) associated with that action that exceed the prepayment amount.

⁹ See *Superfund Special Account Guidance*, (OCFO) July 16, 2002, at Attachment 1, p. 7. Typically oversight costs are coded as TR2B or “earned” revenue because they are costs that are being collected or have already been incurred.

¹⁰ See discussion in *Superfund Special Account Guidance*, July 16, 2002, at Attachment 4, p. 2, for proper steps to undertake for the reclassification process; see also *Consolidated Guidance*, at p. 7, for general reclassification discussion.

¹¹ In July 1999, the Office of the Chief Financial Officer created a new performance measure for the timely, periodic billing of future response costs and further defined “periodic billing” as annual billings of such costs (for purposes of the measure only). Oversight bills are to be billed in accordance with the terms of individual settlement agreements. See CERCLA Future Response Costs: Settlement, Billing and Collection, June 20, 2002, at p.5. See also Model RD/RA CD, Section XVI, Payments for Response Costs, ¶ 55, which states “...on a periodic basis the United States will send Settling Defendants a bill requiring payment....”

¹² These monies should be treated as cost recovery (TR2B) dollars because such amounts are considered earned revenue.

¹³ See *Superfund Special Account Guidance*, July 16, 2002, at Attachment 1, p. 3.

¹⁴ A bill would still be sent to PRPs at the end of the first year for all the oversight costs incurred in that year in order to ensure available funding for the second year’s oversight.

Once the Region receives the first reimbursement payment for future costs, the Region should cease drawing down on the prepaid amounts (TR2) (the cashout funds),¹⁵ and instead should start using the reimbursed amounts (TR2B) (the cost recovery or reimbursed funds) to fund oversight for the remainder of the response action.¹⁶ It is not necessary to establish a separate special account to accomplish this task. To accommodate this, Regions should modify any open obligations (unliquidated) recorded in TR2 to reflect the TR2B special account fund code.

C. Addressing a Shortfall

There may be situations where it becomes clear that the prepaid amount will be exhausted before receipt of the first reimbursement payment from the PRPs. In this case, the Region may want to consider sending the first oversight bill early to avoid running out of prepayment funds. In addition, at the time of settlement negotiations, the Regions should consider including a provision that allows the Agency to request additional funds if it becomes apparent that the prepaid amount will be insufficient to fund the oversight prior to the receipt of the first reimbursement payment. If the settlement provides for a one-time payment of oversight costs, the Regions may wish to include a provision that would allow the Agency to: (1) request a set additional amount, (2) issue one or more requests for the estimated amount necessary to complete the oversight of the project, or (3) begin to send future oversight bills based on the amount actually spent above the original payment. If the settlement provides for periodic billing of future costs, the additional payment provision could require the PRPs to pay a set amount that is expected to be significant enough to cover all expenses until the first billing period. Alternatively, the language could be drafted to allow EPA to estimate at the time of demand what will be needed to fund oversight until receipt of the first reimbursement payment. In either case, the “trigger” for a new payment should be established when a negotiated dollar balance remains from the prepaid amount.

D. Remainder of Prepaid Funds

When work parties agree to pay oversight costs, the parties usually only agree to pay the actual direct and indirect costs of EPA oversight. In the prepayment situation, this may result in prepaid amounts remaining in the special account after the completion of the response action. As a result, after completion of the work any remaining prepaid dollars plus any interest earned may be used to reduce the PRPs’ last payment for oversight once EPA has accounted for all of its direct and indirect oversight costs. In the alternative, as long as it is negotiated in advance, it is also acceptable for those funds to be transferred to a different special account at the site for use by the Agency to address other response actions for which the same PRPs are also liable. In that

¹⁵ This allows the Agency to keep a reserve of funds if necessary to use if oversight funds for the site fall short between billing periods and maximizes interest accrued on the prepaid amounts.

¹⁶ See Attachment 2 for an example of how the prepayment scenario of oversight may work.

situation, the Region should consider providing a credit against future liability for amounts already paid. If none of these options is selected, the remaining prepaid amount should be returned to the PRPs (See Attachment 2).

IV. CONCLUSION

It is important to maximize the use of available mechanisms to finance work. Prepayment of PRP oversight costs contributes toward this goal. This memorandum is intended to encourage EPA personnel to include this model language in ongoing and upcoming settlement negotiations.

This guidance and any internal procedures adopted for 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 the guidance to any particular site will depend on the facts at the site. EPA may periodically review the implementation of this guidance to evaluate settling parties' compliance with the terms of the consent decree and NCP cleanup requirements.

Questions or comments regarding this memorandum should be directed to Melissa Franolich in OSRE at (202) 564-6300, Leslie Kelley-Huffman in OCFO at (202) 564-4805, or Kevin Hollingsworth in OSRTI at (703) 603-9058.

Attachments

ATTACHMENT 1
DRAFT PREPAYMENT LANGUAGE FOR MODEL RD/RA CD

XVI. PAYMENTS FOR RESPONSE COSTS

[NOTE: If the Settling Defendants will be prepaying any part of EPA's Future Response Costs, include the following language]

55. Payment of Future Response Costs.

a. Within 30 days of the Effective Date, Settling Defendants shall pay to EPA \$_____ in prepayment of Future Response Costs. The total amount paid shall be deposited by EPA in the **(Site Name)** Future Response Costs Special Account, within the EPA Hazardous Substance Superfund. These funds shall be retained and used by EPA to conduct or finance Future Response Actions. Payment shall be made by FedWire Electronic Funds Transfer ("EFT"), to the U.S. Department of Justice account in accordance with current EFT procedures, referencing the civil action number, EPA Site/Spill ID Number ____, and DOJ Case Number _____. Payment shall be made in accordance with instructions provided to the Settling Defendants by the Financial Litigation Unit of the United States Attorney's Office for the District of ____ following lodging of the Consent Decree. Any payment received by the Department of Justice after 4:00 p.m. (Eastern Time) will be credited on the next business day. [If the payment amount is less than \$10,000, use the language in Paragraph 54.a of the Model RD/RA Decree for certified or cashier's check.] Any amounts received under this Subparagraph will be credited to Settling Defendants in the final accounting pursuant to Subparagraph 55.e.

b. At the time of payment, Settling Defendants shall send notice that payment has been made to the United States, to the EPA Project Coordinator and to the Servicing Financing Office, in accordance with Section XXVI (Notices and Submissions).

c. Settling Defendants shall pay to EPA all Future Response Costs not inconsistent with the National Contingency Plan. On a periodic basis, the United States will send Settling Defendants a bill requiring payment that includes a **[insert name of standard Regionally-prepared costs summary, which includes the direct and indirect costs incurred by EPA and its contractors, and name of DOJ-prepared cost summary, which reflects costs incurred by DOJ and its contractors, if any]**. Settling Defendants shall make all payments within 30 days of Settling Defendants' receipt of each bill requiring payment, except as otherwise provided in Paragraph 56. Settling Defendants shall make all payments required by this Paragraph in the manner required by Subparagraph 55.a., with notice as required by Subparagraph 55.b. The total amount paid will be deposited by EPA in the **(Site Name)** Future Response Costs Special Account within the EPA Hazardous Substance Superfund. These funds will be retained and used by EPA to conduct or finance Future Response Costs. Any amounts remaining in the **(Site Name)** Future Response Costs Special Account, will be disbursed or credited in accordance with Subparagraph 55.e.

[NOTE: Subparagraph 55.d. below is an optional provision to address shortfalls.]

d. In the event that EPA's use of the **(Site Name)** Future Response Costs Special Account results in there being \$_____ or less in the **(Site Name)** Future Response Costs Special Account at any time, Settling Defendants agree, within [] days of EPA's notice that the **(Site Name)** Future Response Costs Special Account has reached \$____ or less, to remit to EPA \$ _____ for deposit in the **(Site Name)** Future Response Costs Special Account, in accordance with the payment procedure described in Subparagraph 55.a and 55.b. Any amounts received under this Subparagraph will be credited to Settling Defendants in the final accounting in Subparagraph 55.e.

e. After EPA issues its written Certification of Completion of Work and EPA has performed a final accounting of Future Response Costs, EPA shall **(choose one or more provisions from the following language: "offset the final bill for Future Response Costs by the unused amount paid by the Settling Defendants pursuant to Subparagraphs 55.a. or 55.d"; "apply any unused amount paid by the Settling Defendants pursuant to Subparagraphs 55.a. or 55.d to any other unreimbursed response costs or response actions remaining at the Site for which the Settling Defendants are liable," or "remit and return to Settling Defendants any unused amount of the funds paid by Settling Defendants pursuant to Subparagraphs 55.a or 55.d.")**

56. Settling Defendants may contest payment of any Future Response Costs under Paragraph 55 that were incurred during the time period that any prepaid amounts were received under Subparagraph 55.c., with the exception of amounts due under Paragraphs 55.a and 55.d., if they determine that the United States [or the State] has made a mathematical error or if they allege that a cost item that is included represents costs that are inconsistent with the NCP or outside the definition of Future Response Costs.

ATTACHMENT 2

An Example of How Prepayment of Oversight May Work

- Oversight Estimate for Remedial Action: \$300,000 per billing period. PRP enters into CD under which it agrees to prepay \$450,000 (base amount plus 50% premium) 30 days after entry of CD. The appropriate servicing finance office records a billing document using the TR2 fund code in the amount of \$450,000.
- Region obligates and begins expending, in advance of prepayment receipt, \$100,000 of appropriated Trust Fund money (T) to bring on oversight contractor at entry of CD. Once prepayment amount of \$450,000 is received and deposited to TR2, the \$100,000 is reclassified from T to TR2 (the freed up T funds are then available, through the regional budget office, for regional use at this or other sites). Any remaining open obligations attributable to the T appropriation should be modified to reflect the TR2 special account fund code. In this example, the total \$100,000 was obligated and expended, so only the reclassification of the \$100,000 is necessary.
- Region spends \$300,000 of the prepaid amount (TR2) for oversight during the first billing period (consisting of the \$100,000 reclassification and \$200,000 in direct costs expended, both recorded in TR2). Region's actual bill to PRPs is \$420,000 (\$300,000 direct costs plus \$120,000 indirect costs, assuming a 40% indirect rate). Amount received is deposited in the special account using the TR2B fund code, since these receipts are classified as earned. At the time the payment is received, the remaining prepaid amount (TR2) is \$150,000 (consisting of original \$450,000 prepaid amount less the \$100,000 reclassified amount, and the \$200,000 direct costs expended during the 1st billing period above). The Region then stops using the prepaid amount (TR2) to fund oversight and starts using the reimbursed amounts, as explained in Section III, B of this guidance.
- Region continues to bill and use reimbursed amounts (TR2B) in subsequent years.
- At completion of RA, the bill for oversight for that billing period (direct and indirect costs) is \$420,000 (\$300,000 direct costs plus \$120,000 indirect costs). Before sending this final bill, the Region should perform a reconciliation of the special account to determine what the PRPs have paid and what costs the Agency incurred. The reconciliation will allow for indirect costs paid but not charged in the IFMS system to be accounted for. This will allow the Region to determine if there are any amounts the PRP overpaid and is eligible to receive, or in the alternative, will need to be billed for.¹⁷ In this example, the \$150,000 available amount to the TR2 special

¹⁷See *OCFO Superfund Special Account Guidance*, Attachment 5, for handling indirect costs under pre-paid future costs special accounts. This is especially important where, as applicable, remaining pre-paid amounts are to be refunded to a PRP in accordance with settlement agreement provisions, or applied to a final oversight bill.

account should be reduced by \$120,000 for the indirect costs (\$300,000 @ 40%). In addition, the \$120,000 available amount to the TR2B special account (\$420,000 less the \$300,000 direct cost at completion) should be reduced by \$120,000 (\$300,000 @ 40%). Thus a total of \$30,000 is available for refunding to the PRP or handling otherwise in accordance with the terms of the settlement agreement.