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**TITLE:** Cost Recovery Policy for the Leaking  
Underground Storage Tank Trust Fund

**APPROVAL DATE:** October 7, 1988

**EFFECTIVE DATE:** October 7, 1988

**ORIGINATING OFFICE:** Office of Underground  
Storage Tanks (OUST)

**FINAL**

**DRAFT**

**STATUS:**

**REFERENCE (other documents):**

Supplemental Guidelines for FY89 LUST Trust Fund  
Cooperative Agreements; OSWER Directive 9650.7;  
April 7, 1988.

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United States Environmental Protection Agency  
Washington DC 20460

# OSWER Directive Initiation Request

1. Directive Number

9610.10

## 2. Originator Information

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## 3. Title

Cost Recovery Policy for the Leaking Underground Storage Tank Trust Fund

## 4. Summary of Directive (include brief statement of purpose)

This Directive is the first full statement for States and EPA Regional Offices of the policies, priorities, and procedures for cost recovery under the LUST Trust Fund. Special conditions that will incorporate the policy into Trust Fund cooperative agreements are included.

## 5. Keywords

Cost Recovery, LUST Trust Fund, Underground Storage Tanks, Cooperative Agreements, Special

## 6a. Does This Directive Supersede Previous Directive(s)?

No

Yes

What directive (number, title)

Conditions

## b. Does It Supplement Previous Directive(s)?

No

Yes

What directive (number, title) 9650.7;

Supplemental Guidelines for FY 89 LUST Trust Fund Cooperative Agreements (Replaces Cost

## 7. Draft Level

A - Signed by AA/DAA

B - Signed by Office Director

C - For Review & Comment

Recovery Section  
D - In Development

8. Document to be distributed to States by Headquarters?

Yes

No

## This Request Meets OSWER Directives System Format Standards.

### 9. Signature of Lead Office Directives Coordinator

*Beverly Thomas*

Beverly Thomas

Date

9/15/88

### 10. Name and Title of Approving Official

*Sharon Foote*  
Sharon Foote, OSWER Directives Officer

Date

10-7-88

EPA Form 1315-17 (Rev. 5-87) Previous editions are obsolete

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

OCT 7

OFFICE OF  
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

**SUBJECT:** LUST Trust Fund Cost Recovery Policy and Special Conditions

**FROM:** J. Winston Porter  
Assistant Administrator

**TO:** Regional Administrators  
Regions I-X

**ATTN:** Waste Management Division Directors,  
Regions I-III, V-IX  
Water Management Division Directors, Regions IV, X

Attached is the final Cost Recovery Policy for the Leaking Underground Storage Tank (LUST) Trust Fund. Also attached is a set of special conditions for LUST Trust Fund cooperative agreements that reflect the policy. Both are products of an intensive effort to develop a framework for cost recovery that incorporates the State-centered design of the Underground Storage Tank program.

The Office of Solid Waste and Emergency Response worked closely with the Office of General Counsel, the Office of the Comptroller, the Regional UST programs and other Headquarters offices over the last year to develop this innovative policy. These offices were also instrumental in helping us obtain concurrences on our approach from the Department of Justice (DOJ), the Office of Management and Budget, and Congressional staff.

The two most innovative aspects of the policy should provide States with the autonomy and incentive to pursue recoveries aggressively and efficiently. First, to streamline the recovery process, States will generally be able to litigate and settle cost recovery claims without the involvement of EPA or DOJ. Second, to provide incentives for pursuing cost recovery, States will retain recovered Trust Fund expenditures to perform additional cleanups or to satisfy their cost share requirements.

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This policy replaces the cost recovery section (Section II.I) of OSWER Directive 9650.7 (Supplemental Guidelines for FY 89 LUST Trust Fund Cooperative Agreements), dated April 7, 1988. This policy will also be incorporated into a set of consolidated LUST Trust Fund Guidelines that will be released in the next few weeks.

To encourage States to proceed with recoveries on cleanups now underway, Regions should amend all existing LUST Trust Fund cooperative agreements to include the attached special conditions. This will also eliminate inconsistencies in recordkeeping and recovery procedures that would otherwise make oversight of the program unnecessarily complex.

I am certain that this policy will help us continue to build strong State underground storage tank programs. I want to congratulate everyone who contributed to the development of the policy.

**Attachments**

cc: Charlie Grizzle  
Larry Jensen  
Dave Ryan  
Harvey Pippen  
Tony Musick  
Ron Bachand  
Howard Corcoran  
Louise Wise  
Regional UST Program Managers

**COST RECOVERY POLICY FOR THE LEAKING UNDERGROUND  
STORAGE TANK TRUST FUND**

**A. Overview**

This is EPA's first complete statement of its policies on cost recovery under the Leaking Underground Storage Tank (LUST) Trust Fund. It has required a year of coordinated effort by various EPA offices to develop and to secure necessary approvals within the Agency and from other agencies and officials in the executive and legislative branches of government. Working with and through States to implement this policy, EPA expects that it will help cost recovery to become a practical and effective tool that States will use to both stimulate and fund more cleanups of releases from underground storage tanks.

Objectives of Cost Recovery

The primary purpose of cost recovery under the LUST Trust Fund is to provide incentives for owners and operators to comply with technical and financial responsibility requirements, and most importantly to clean up releases from their own tanks. EPA expects that State-lead cleanups followed by cost recovery will continue to occur in a minority of cases, because the majority of cleanups are conducted by owners and operators. When cost recovery is necessary, it will generate income for additional cleanups.

Cost recovery as practiced under the LUST Trust Fund will depart significantly from the approaches taken in other Federal environmental response programs. Consistent with the State-centered design of the underground storage tank program, States will implement the cost recovery program, have considerable discretion in operating it, and benefit directly from their successful recoveries.

The two most innovative aspects of EPA's cost recovery policy for the LUST Trust Fund should provide States with the autonomy and the incentive necessary to pursue recoveries aggressively and efficiently. First, States with cooperative agreements will litigate and settle recovery claims without the routine involvement or concurrence of EPA or the Department of Justice. Second, States may retain any Trust Fund monies they recover for use on additional Fund-eligible cleanups and activities.

Legal Rationale

The legal rationale behind this approach was developed by the Agency in consultation with the Department of Justice.

Under 28 U.S.C. Section 516, the Department of Justice (DOJ) must conduct any litigation in which the United States has an interest unless there is an exception authorized by law. EPA interprets section 9003(h) of Subtitle I to be such an exception, allowing States under cooperative agreements that have the capabilities to carry out effective corrective actions and enforcement activities to exercise various program authorities, including the cost recovery authority provided in section 9003(h)(6). These States may also settle cost recovery litigation as part of the exercise of enforcement discretion conveyed by section 9003(h).

Additionally, EPA interprets section 9003(h) to provide authority for States to administratively settle cost recovery claims. EPA believes that this authority includes the ability to compromise or terminate Trust Fund claims based on considerations of equity as described in section 9003(h)(6)(B) (e.g., reducing the claim to the amount of required financial responsibility).

Finally, EPA has determined that, consistent with the "program income" concept described in OMB Circular A-102, that States may retain recovered Trust Fund monies to perform additional eligible activities under their cooperative agreements. Thus, appropriate requirements in 40 C.F.R. Parts 30 and 31 on the documentation and use of program income apply to recoveries of Trust Fund money.

#### Recovery Procedures

Variations in State recovery procedures can be expected, but generally States will be responsible for all of the following activities in cases that they deem to be high priorities:

- o Determination of a release
- o Notification of responsibility to the owner or operator
- o Negotiation for corrective action (in non-emergency situations)
- o Cleanup (if the owner or operator is incapable or unwilling to clean up)
- o Demand for payment
- o Negotiation for a settlement of the recovery claim

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- o Litigation (when demand for payment and efforts to reach an administrative settlement fail)
- o Collection and case closure

States are encouraged to tailor the specifics of these procedures to suit their individual programs and to save program resources. In addition, the detailed policy guidance that follows has been developed to help ensure that cost recovery resources are used efficiently and stimulate compliance by owners and operators.

**B. State and Federal Roles in Cost Recovery**

**Policy**

Under their cooperative agreements, States are responsible for all legal, programmatic, and administrative activities necessary to recover their expenditures from the LUST Trust Fund. This includes undertaking administrative and judicial recovery actions and settling claims. They are responsible for required reporting and recordkeeping including documenting that their Trust Fund recoveries are used for additional eligible activities under their cooperative agreements. EPA will provide general policy guidelines to States and make funding available for recovery programs through the States' cooperative agreements. EPA will also assess the performance of State cost recovery programs and provide support and assistance to States where they are needed to improve performance. The Agency will generally be bound by settlements and judgments reached in States, but reserves the right to pursue recoveries independently in the extreme case. Also, EPA may pursue recoveries in those rare cases where the Agency has performed a federal-lead response.

**Guidance**

States are expected to have adequate legal authorities to undertake cost recovery either by having or acquiring their own authorities, or certifying that they are able to use federal authorities. States with their own recovery authorities should also cite Subtitle I in their recovery actions (i.e., demand letters, administrative orders, and judicial complaints) to establish the liability of owners/operators to the federal government for Trust Fund expenditures.

EPA is currently formulating policies on a number of issues related to recovery litigation. One major unresolved issue is whether States should bring judicial recovery actions in State or federal courts. Until these issues are resolved, States should, within one week, notify EPA's Office of Regional Counsel when filing judicial recovery actions for sites where they have used Trust Fund money for cleanup or enforcement. This will give EPA the opportunity to consult with the State, determine whether the action might affect the scope of the Agency's Subtitle I authorities, and if necessary, provide technical or legal assistance to the State. However, EPA will not require States to delay recovery litigation while the Agency reviews complaints submitted by States.



States must maintain accounting and recordkeeping systems that will document all Trust Fund expenditures, support cost recovery with site-specific records, and demonstrate that recovered funds are retained and used for additional eligible activities or as matching funds under their cooperative agreements. State recordkeeping and accounting must conform to requirements in these guidelines and in the forthcoming IUST Trust Fund State Financial Management Handbook, when it becomes available.

States will have considerable discretion in prioritizing cases for cost recovery and determining an appropriate level of effort to devote to each case. At a minimum, in each case States should make reasonable efforts to contact owners and operators who are liable for releases, notify them of their liability for enforcement and corrective action costs, and demand payment. In those rare cases where equitable factors support compromise or termination<sup>1</sup> of the Trust Fund claim, States should ensure that the bases for any compromise or termination are adequately supported in the records of the State and reflect the efficient use of Trust Fund resources. States may compromise Trust Fund claims when, for example, an owner/operator demonstrates that he/she lacks the financial resources to pay the claim; the State determines that the likelihood of success on litigating the claim is small because of the absence of proof of liability or unavailability of required witnesses; or costs of judicial collection is disproportionately high. States should note that their ability to reduce claims based on the equities described in section 9003h(6)(B) is limited to cases where owners/operators have maintained required levels of financial assurance.

Because they are more cost effective, negotiated settlements are generally preferred over litigation. In many cases, however, EPA expects that it will be necessary for States to initiate and pursue judicial action to compel recalcitrant owners and operators to pay cleanup costs. In deciding whether to litigate individual cases States should consider the solvency of the owner/operator, the costs of cleanup, the likelihood of recovery, the case's deterrence value and the opportunity costs (the resources necessary to proceed that could otherwise be used in pursuing other cases or in other parts of the State's Trust Fund program).

<sup>1/</sup> As used here, the term "compromise" means accepting less than the full value of the claim. The term "termination" means forgoing any cost recovery whatsoever.

Even where no administrative or judicial settlement is reached, States must formally close out all cases and document the reasons for deciding not to proceed further. Factors justifying case closure include the situations where costs of pursuing a case further will approach or exceed the potential recovery, bankruptcy of the owner/operator, and other reasons. States should not allow the statute of limitation (SOL) to run and justify closure solely on that basis. States should generally pursue cases promptly and file actions in a timely manner to enhance the chances for recovery. States should revise their priorities for individual recovery cases as SOL deadlines approach. Until the issue is resolved by the courts, States relying solely on Subtitle I cost recovery authorities should be prudent and proceed assuming a three year limit applies, despite the fact that EPA believes that a six year limit is applicable. This is necessary because some courts have applied the three year limit to similar cases.

When States make successful recoveries at sites where Trust Fund monies were used, they may retain the Trust Fund share as program income consistent with OMB Circular A-102 and 40 CFR Parts 30.525 and 31.25. This means that States may use recovered federal Trust Fund monies for additional Fund-eligible cleanups and activities under their agreements. When States choose to do so, they must inform EPA, and keep appropriate records of how the recoveries were used. States may also use LUST Trust Fund recoveries to meet their cost share requirement under section 9003(h)(7)(B). If a State elects to do this, it must be specified in their cooperative agreement. In negotiating their cooperative agreements, States and Regions should develop contingency plans that will allow States to obligate their recoveries efficiently. States should calculate the federal Trust Fund share of their recoveries on a site-by-site, pro rata basis. For example, if a State spends 50 thousand dollars of LUST Trust Fund money at a site, and the State ultimately recovers 50 percent of all Federal and State money used at the site, it must redirect 25 thousand dollars of "program income" into Fund-eligible activities.

EPA expects States with cooperative agreements to adequately fund and staff recovery efforts to deal with anticipated case loads. Cost recovery activities are allowable costs under Subtitle I. Where the recovery program is dependent on the Attorney General's Office, the State should consider the need for formal funding arrangements (e.g., a memorandum of agreement) to ensure legal staffing for cost recovery referrals. When the Trust Fund is not used to pay for such legal staffing, States may wish to investigate the possibility of counting these legal services as "in-kind contributions" toward satisfying their match requirements under 40 C.F.R. Part 31.24.

EPA's principal responsibilities in cost recovery are to provide funding, policy, guidance, oversight, and assistance to States. The Agency's operational role in cost recovery will generally be limited to pursuing recoveries in those cases where EPA responds directly to a release, and in rare cases of overfiling.

EPA intends to make its expectations for the activities and performance of cost recovery programs reasonable and clear to States in advance. This will occur through policy, guidance, routine communications, program appraisal and reviews, and the negotiation of cooperative agreements. The oversight and assistance functions of EPA's program, grants, and financial management offices will accommodate variations in State procedures and capabilities to the maximum extent possible. The Agency's goals will be to help build State capabilities, particularly in developing recovery programs and to improve performance. At present, EPA has no numerical expectations for the performance of State recovery programs. Early in the recovery program it will focus on States' progress toward putting basic systems, policies, and procedures in place that will enable them to recover Trust Fund expenditures efficiently and effectively.

EPA is working with several States on pilot projects to develop realistic expectations for program performance, and to identify effective recovery procedures. The results will help EPA support State programs with tools and guidance. They will also help the Agency formulate and communicate more precise expectations for program performance.

Generally, EPA will be bound by States' judicial actions and settlements. However if EPA finds that a State is not effectively implementing cost recoveries, the Agency will offer the State necessary assistance in correcting any problems. The Office of Underground Storage Tanks will be most interested in seeing that States have adequate accounting and recordkeeping systems in place and that States identify, develop, and pursue appropriate recovery cases in a timely and sound manner. If problems in these or other areas persist, the Agency may take appropriate action under regulations governing cooperative agreements. In extreme cases, EPA may consider filing a recovery action against the owner/operator even though the State has the authority to initiate an action or has already done so.

## C. Recoverable Costs

### Policy

Owners and operators are liable for all costs of corrective action and enforcement, including interest, indirect and "management and support" costs associated with these activities that are paid for by the Trust Fund. States are not required to pursue Trust Fund expenditures for program management costs incurred by the U.S. E.P.A.

States will assess and may collect interest on Trust Fund expenditures used for corrective action and enforcement. Interest charges should provide incentives for responsible parties to settle cost recovery claims. Procedures for assessing interest charges are described separately in this document.

Owners and operators are also liable for Trust Fund expenditures made by States in overseeing responsible party cleanups. Generally, the costs of oversight are comparatively low and the number of cases is very large. Therefore, EPA expects that States will exercise discretion in determining an appropriate level of effort to devote to pursuing oversight costs.

### Guidance

In each case, States will exercise their discretion in determining exactly which costs they will pursue. EPA is more interested in a State's overall record in cost recovery than in retrospectively examining decisions to pursue particular costs in hundreds or thousands of cases. Direct costs are most easily documented and defended in litigation. However, EPA is developing, and will soon distribute a simple procedure which will allocate all non-site Trust Fund costs including "management and support" costs to individual sites. Using this methodology, States will have available to them the full cost of a particular site cleanup at the time of the cost recovery action. To the extent that they are legally able, States should allocate all Trust Fund expenditures to sites for the purpose of cost recovery. States may also develop their own systems for allocating non-site costs and/or include additional State overhead costs that are beyond the scope of their cooperative agreements.

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EPA expects that the costs of overseeing cleanups by cooperative owners and operators will usually be a lower priority for recovery because Fund expenditures for oversight of a typical cleanup will be comparatively small. In addition, States may wish to exercise their discretion and not pursue these costs in cases where this will provide valuable incentives for owners and operators to clean up releases from their tanks.

In some cases States will expend significant enforcement resources to compel reluctant owners or operators to cleanup or to pay cleanup costs (e.g., legal costs associated with cost recovery, protracted negotiations, issuance of cleanup orders and litigation). These costs are recoverable. Presenting these costs to liable owners and operators with the direct costs of cleanup will give States additional leverage in their attempts to reach agreements for responsible party cleanups and recovery of costs.

## D. Interest Charges

### Policy

Owners and operators are liable for interest charges on Trust Fund expenditures at their sites. States should assess interest on expenditures from the Fund in the cost recovery process. States are allowed to retain recovered interest for additional eligible activities.

### Guidance

Section 9003(h) of the Resource Conservation and Recovery Act (RCRA) describes the States' role in recovering LUST Trust Fund expenditures - but does not specifically address the collection of interest on those expenditures. However, EPA is entitled under the Debt Collection Act and common law authorities to collect interest on Trust Fund expenditures. Since States will have responsibility for recovering Trust Fund expenditures under section 9003(h), the States will also assess and are encouraged to pursue interest charges. Because States are permitted to retain recoverable Fund expenditures for additional cleanups and recoveries, they can also retain recovered interest for use on additional eligible activities. The States' collection of interest will deter responsible parties from resisting payment in order to gain an interest-free loan on the uncollected expenditures.

Before assessing interest, the State should notify the debtor through a written notice (demand letter explaining the agency's requirements concerning the debt and the interest). Interest shall accrue from the date on which notice of the debt and interest requirements is mailed or hand-delivered to the responsible party.

The minimum recommended rate of interest that States should assess for the current year is 6.00 percent. It is found in the Yearly Percentage Bulletin printed every December with the rate for the following fiscal year. The rate is equal to the average investment rate for the Treasury tax and loan accounts. It represents the current value of funds to the United States Treasury, and is published by the Treasury's Financial Management Service. EPA will notify States of the new rates each year.

EPA is examining the possibility of calculating a minimum interest rate that more closely approximates the yield on Trust Fund investments. The Agency will notify States if and when they are to use this type of minimum rate.

A State may assess a higher rate of interest if it reasonably determines that this is necessary to protect the expenditures from the Trust Fund. The rate of interest as initially assessed will remain fixed for the duration of the indebtedness, except where a debtor has defaulted on a repayment agreement and seeks to enter into a new agreement. New agreements should reflect the current value of funds to the Treasury at the time the new agreement is executed.

Interest should not be recovered if the amount due (Trust Fund expenditures) is paid within 30 days after the date from which the written notice was delivered to the responsible party. However, the State may decide, on a case-by-case basis, to extend the 30-day period for payment.

As part of their responsibility for settling claims, States may decide not to pursue the collection of interest on a debt entirely or in part once it has been assessed when they determine it is in the best interest of the program. States may decide not to pursue interest if the collection of interest puts the responsible party in financial distress, or the cost of collecting the interest will be more than the amount collected.

## E. Priorities For Cost Recovery

### Policy

Under their cooperative agreements States should have or should develop systems to set priorities for cost recovery cases. They should devote greatest efforts to cases where owners or operators are solvent but recalcitrant, and to cases where they fail to comply with applicable financial responsibility requirements. Some effort should be devoted to all cases involving Trust Fund cleanups or enforcement actions. This means, at a minimum, a search for responsible parties (RPs) and a demand for payment if an RP is located.

### Guidance

Where the State expends Trust Fund money for corrective action or enforcement, and "action thresholds" (see section "F") have triggered site-specific accounting, the State will pursue recovery of costs from responsible parties. Timely processing of cases (and litigation where necessary) increases the chances of successful recovery. However, the level of recovery effort that should be devoted to any case should be based on a weighing of the resources necessary to recover the claim against the amount that may be recovered and the prospects for recovery. The determination should be based on factors such as: the solvency of the RP, the cost of cleanup, the likelihood of recovery, the deterrent value of the case, and the opportunity costs (resources that could be used in pursuing other cases or in other parts of the State's Trust Fund program).

States will develop their own priority systems based on these and other relevant considerations, but there are general circumstances where cost recovery should be assigned a high priority, low priority, or is impracticable because owners or operators cannot be located.

- High priority - Solvent RPs who refuse to comply with corrective action orders or are otherwise recalcitrant should be pursued aggressively, to serve as a warning to the regulated community and to stimulate compliance by other RPs.



- High priority - Owners and operators who do not comply with financial responsibility requirements should be pursued vigorously. Although Section 9003 of RCRA generally allows consideration of whether pursuit of full cost recovery will significantly impair an RP's ability to continue in business, States are precluded by statute from considering this factor if the RP has not complied with financial responsibility requirements in effect at the time.
- Low priority - States should generally commit fewer resources to insolvent or financially distressed RPs, although selective pursuit within the class should be undertaken where the RP could afford lesser amounts, is hiding assets, fails to cooperate, or was negligent in allowing the release to occur. Whenever States perform corrective actions using the Trust Fund, the RP should, at a minimum, be sent a demand for payment. The level of additional State effort beyond this point should be based on an evaluation of the factors listed above. Where cooperative owners and operators perform cleanups, States may wish to make recovery of oversight costs a low priority, to encourage voluntary cleanups.
- Impracticable - Sites where a liable owner or operator cannot be identified will require expenditures from the Trust Fund for cleanup. Efforts to recover costs expended at these sites will rarely result in recovery of funds. However, States should make reasonable efforts to locate a liable owner or operator before assigning a low priority to cost recovery in these cases.

F. Documentation Of Costs

Policy

States are required to document all Trust Fund expenditures and all corrective action and enforcement costs on a site-specific basis at each site where they have met any one of the following "action thresholds": 1) performed an emergency response; 2) begun a detailed site investigation; or 3) determined that an owner or operator is or is likely to be recalcitrant.

Guidance

States must establish a financial cost accounting system that tracks the costs of cleanup and enforcement activities on a site-specific basis when any one of the specified "action thresholds" is met. States are normally not required to begin site-specific accounting until States or their contractors begin a Trust Fund-financed, detailed site investigation or an emergency response has begun. A detailed site investigation is an attempt to determine the source, extent and severity of a release. An initial site visit (e.g., to determine if a release has occurred) should generally not trigger site-specific accounting because not all sites will be candidates for significant Trust Fund expenditures and cost recovery. If an RP is clearly recalcitrant, however, site-specific accounting should begin as soon as costs are incurred. Generally, contractor activity at a site will trigger site-specific accounting.

Site-specific information needed on corrective action activities and costs for sites where Trust Fund monies are used includes:

- Site location and description
- Results of site investigations (including identification of responsible parties)
- Enforcement actions taken
- Documentation of responses taken and time frames
- Documentation of all costs, identifying Trust Fund monies expended including contractor invoices

Enforcement costs include all expenditures reasonably related to inducing a recalcitrant RP to comply and to recovering clean-up expenditures. They include the salaries and other expenses associated with case development, negotiations, and litigation.

States should establish cost-effective accounting systems to support recovery of Trust Fund monies in courts. Features of cost documentation that are essential to recovering costs in court include:

- Systems that are adequate for both cost recovery purposes (i.e., will support the State's claim in administrative or judicial action to recover) and audit purposes. At a minimum, the system should provide proof that the work or purchase was authorized by the State; the work or purchase was completed; the State was billed; and the bill was paid.
- In many cases, States may have to respond to arguments that the costs claimed are unreasonable and unnecessary.

The Financial Management Division of EPA's Office of the Comptroller is developing more detailed guidance for State accounting and recordkeeping. The LUST Trust Fund State Financial Management Handbook will be made available by early FY 1989 to help States meet these accounting requirements.

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Special Conditions

**REQUIREMENTS FOR INCLUSION  
IN LUST STATE COOPERATIVE AGREEMENTS**

1. State agrees to maintain a financial cost accounting system which meets the requirements of 40 CFR 30.510 or 40 CFR 31.20. For this and other requirements on grantees, Part 31 applies to all cooperative agreements with budget or project periods beginning on or after October 1, 1988. Part 31 also applies to all amendments of existing agreements in which all of the activities in the amendment's scope of work will be performed after October 1, 1988. Parts 30 and 33 (for procurement) apply to other cooperative agreements and amendments.
2. State agrees to organize and maintain site-specific information consistent with accounting thresholds and policies described in the Supplemental Guidelines for FY 89 LUST Trust Fund Cooperative Agreements (OSWER Directive 9650.7) where Trust Fund monies are used. Prior to making expenditures of Trust Fund monies for corrective and enforcement actions, a system must be in place to record these types of costs on a site-specific basis. When site-specific accounting is required, all costs that can be identified to a particular site should be charged accordingly and State contractors must bill costs on a site-specific basis for corrective action and enforcement work performed at those sites.
3. The State acknowledges that expenditures from the LUST Trust Fund constitute a liability of the owner/operator to the United States. The State agrees to retain recoveries of any LUST Trust Fund expenditures as program income, as described in OMB Directive A-102 and 40 C.F.R. Parts 30.525(a) or 31.25(g)(2), to be used for additional eligible Trust Fund activities. The State may also use LUST Trust Fund recoveries to meet its cost share requirements under RCRA Section 9003 (h)(7)(B), in accordance with 40 CRF 31.25 (g)(3).

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(CONTINUATION OF SPECIAL CONDITION 3 --  
INSERT 1 OR 2 BELOW)

(INSERT 1, for States which have State authority consistent with those in RCRA Section 9003(h) to recover response expenditures

The State therefore agrees that:

- (a) It will make reasonable efforts to recover these costs, including interest, from liable owners/operators. States must send a copy of their complaint to EPA's Office of Regional Counsel within one week of filing judicial recovery actions for Trust Fund expenditures.
- (b) It will report on any amounts received from the owner/operator as recovered costs, or agreed or adjudged to be owed by the owner/operator as settlements for site clean-up, in accordance with applicable guidance on Trust Fund Financial and Quarterly reporting; and
- (c) To the extent the State is successful in recovering these costs, it will dedicate and use these funds for additional Trust-Fund-eligible activities or for State cost share requirements, and maintain appropriate accounting of recovered funds in order to document the reuse of recovered funds in accordance with the requirements of 40 CFR 30.525 or 31.25, as appropriate, and in accordance with applicable requirements of this Cooperative Agreement.
- (d) If the State has not yet done so, the State will submit certification of its authorities to EPA within 120 days after the award of this Cooperative Agreement. The certification will be signed by: (1) the State's Attorney General, (2) someone designated by the Attorney General to sign such documents, or (3) the State's or Governor's General Counsel or other such official who is responsible for advising all executive branch agencies on the scope of their authority.
- (e) It will notify EPA promptly of any reduction in its authority to recover response expenditures (e.g., successful challenge to its State statutory authority).

(INSERT 2, for States lacking State authorities consistent with those in Section 9003(h) of RCRA to recover response expenditures

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The State therefore agrees that to the extent the State lacks the authority or procedure to recover response expenditures on behalf of the LUST Trust Fund (i.e., the authority to recover such costs from owners/operators and retain such monies for additional LUST Trust Fund corrective action and enforcement), the State will delay taking cost recovery action until the State:

- (a) Obtains legislative authority for cost recovery which is consistent with Section 9003(h)(6) of RCRA and provides to EPA certification of such authority from: (1) the State's Attorney General, (2) someone designated by the Attorney General to sign such certifications, or (3) the State's or Governor's General Counsel, or other such official who is responsible for advising all executive branch agencies on the scope of their authority. This certification should be provided by the end of the next legislative session. (The State understands that if it has not made a good faith effort to obtain this authority, EPA may decline to enter into subsequent cooperative agreements.)

OR

Provides EPA with certification from the State officials described above that State law permits it to exercise the authorities in Sections 9003(h)(6) of RCRA. (The State understands that if it has not provided this certification to EPA within 120 days after the award of this Cooperative Agreement EPA may withhold payment of LUST Trust Fund money consistent with 40 C.F.R. 30.902 or 31.43).

Once the State has obtained the legislative authority or made a certification under paragraph (a) above, the State agrees that:

- (i) It will make reasonable efforts to recover these costs, including interest, from liable owners/operators. States must send a copy of their complaint to EPA's Office of Regional Counsel within one week of filing judicial recovery actions for Trust Fund expenditures.
- (ii) It will report any amounts received from the owner/operator as recovered costs, or agreed or adjudged to be owed by the owner/operator as settlements for site clean-up in accordance with applicable guidance on Trust Fund Financial and Quarterly Reporting; and

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- (iii) To the extent the State is successful in recovering these costs, it will dedicate these funds for additional Trust-Fund-eligible activities or for State cost share requirements, and maintain appropriate accounting of recovered funds in order to document the reuse of recovered funds in accordance with the requirements of 40 CFR 30.525 or 31.25, as appropriate, and in accordance with applicable requirements of this cooperative agreement.
- (iv) It will notify EPA promptly of any reduction in its authority to recover response expenditures (e.g., successful challenge to its State statutory authority).

[END OF INSERT 2]

- 4. State agrees to maintain supporting documentation and appropriate records in support of any future cost recovery efforts. The State shall adhere to the principles of documentation and records retention specified in the OSWER Directive 9610.10 Cost Recovery Policy for the LUST Trust Fund (October, 1988). On topics not addressed by these guidelines, the State agrees to adhere to the principles of documentation and record retention specified in The State Superfund Financial Management and Recordkeeping Guidance until such time as the State and EPA agree to implement the requirements of The Leaking Underground Storage Tanks Trust Fund State Financial Management Handbook. The State agrees to make these records available to the federal government, as needed, on a case-by-case basis.
- 5. State agrees to provide reports as outlined in the Supplemental Guidelines for FY 89 LUST Trust Fund Cooperative Agreements: (April 7, 1988). These reports consist of Quarterly Progress Reports, Financial Status Reports (SF 269) Federal Cash Transactions Report (SF 272), and Exception Reports.
- 6. State agrees to identify Letter of Credit drawdowns under EPA's three major activity codes. The three codes are: "7" -- General Support and Management, "E"-- Site Cleanup Actions, and "4" -- Enforcement.