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Guidance To Regions For Implementing The LUST Provision Of The American Recovery And Reinvestment Act Of 2009

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Overview Of The LUST Provision Of The American Recovery And Reinvestment Act Guidance

Why Is EPA Issuing This Guidance?

The U.S. Environmental Protection Agency (EPA), in consultation with states¹, developed this guidance in response to the American Recovery and Reinvestment Act of 2009 (hereinafter “Recovery Act”). This program guidance will assist EPA Regional underground storage tank (UST) programs to negotiate and approve state leaking underground storage tank (LUST) Recovery Act assistance agreements and work with their EPA Regional grants management offices to expeditiously award funding to states.

The Recovery Act provides a supplemental appropriation of \$200 million from the LUST Trust Fund (Recovery Act funding) for LUST cleanup activities authorized by section 9003(h) of the Solid Waste Disposal Act (SWDA). On February 18, 2009² and April 3, 2009,³ the Office of Management and Budget (OMB) issued detailed guidances to agencies on implementing the Recovery Act. OMB plans to issue additional guidance that will assist in the implementation of Recovery Act activities. All recipients will need to adhere to the requirements contained in future OMB Recovery Act guidance. The Recovery Act carries with it a historic level of transparency, oversight, and accountability that will help ensure taxpayer dollars are spent wisely and Americans will see results for their investment.

This guidance applies to Recovery Act funded assistance agreements only, not agreements funded through annual LUST appropriations. These LUST Recovery Act assistance agreements are formula grants and are exempt from competition.⁴ Unless superseded by this guidance, the provisions in existing LUST Trust Fund guidance, policies, and practices also apply to the Recovery Act funded assistance agreements.

What Is In This Guidance?

This guidance describes what a state’s assistance agreement must contain in order for a state to comply with the requirements for LUST Recovery Act funding. This guidance includes: funding uses and priorities; eligible applicants and activities; ineligible activities; cost recovery; recipient reporting requirements; application of EPA-wide guidance to the LUST program; and LUST-specific terms and conditions.

¹ States as referenced throughout this document also include territories as described in the definition of “state” in the Solid Waste Disposal Act.

² See www.recovery.gov/files/Initial%20Recovery%20Act%20Implementing%20Guidance.pdf.

³ See www.whitehouse.gov/omb/assets/memoranda_fy2009/m09-15.pdf.

⁴ See www.epa.gov/ogd/competition/5700_5A1.pdf, EPA Order 5700.5A1, 6.c.1 – Exempt from Competition Policy.

When Does This Guidance Take Effect?

This guidance is effective immediately. EPA must obligate LUST Recovery Act resources by awarding assistance agreements, contracts, or interagency agreements by September 30, 2010. However, for the purpose of job creation/retention, EPA anticipates working with states to obligate funds in LUST Recovery Act assistance agreements by July 17, 2009.

Requirements Of The LUST Provision Of The Recovery Act

How Does LUST Recovery Act Funding Differ From Annual LUST Funding?

There are five main legal differences in the LUST Recovery Act funds. Each of these items is addressed in more detail in later sections of this guidance.

Cost Share – LUST Recovery Act funded assistance agreements are exempt from the 10 percent cost share required by SWDA section 9003(h)(7)(B).

Wage Rate Requirements – Certain LUST expenditures are subject to the prevailing wage requirements as determined by the Department of Labor under the Davis Bacon Act.⁵

Buy American – Certain LUST expenditures are subject to the Buy American provision contained in section 1605 of the General Provisions of the Recovery Act.

Time Limits On Obligations And Expenditures – Unlike assistance agreements funded with EPA's annual no year LUST appropriations, Recovery Act appropriations must be obligated by EPA and expended by states within specified periods of time.

Unique Reporting And Tracking – There are unique reporting and funds tracking requirements for Recovery Act funded assistance agreements.

Who Is Eligible For LUST Recovery Act Assistance Agreements?

These assistance agreements are only available to states that are eligible for Recovery Act funding. The regulations that govern the award and administration of LUST Recovery Act assistance agreements are the "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments" set forth at 40 CFR Part 31, http://www.access.gpo.gov/nara/cfr/waisidx_00/40cfr31_00.html.

What Is The Available Funding?

Of the \$200,000,000 FY 2009 LUST Recovery Act appropriation, EPA will obligate to states \$190,700,000, or 95 percent, through assistance agreements.

What Activities Are Eligible?

The Recovery Act neither expands nor limits eligible uses of LUST funds under section 9003(h)(7) assistance agreements, with the exception of prohibiting Recovery

⁵ See www.dol.gov/ESA/WHD/contracts/dbra.htm.

Act funds from uses relating to casinos and other gambling establishments, aquariums, zoos, golf courses, or swimming pools. The LUST Recovery Act assistance agreements will be awarded for corrective action activities, those that are traditionally funded by LUST cleanup dollars. The applicable provisions, set forth in RCRA Subtitle I, section 9003(h) and identified in OSWER Directive 9650.10A, "LUST Trust Fund Cooperative Agreement Guidelines", apply to states receiving funds under this program; see <http://www.epa.gov/OUST/directiv/d965010a.htm>. LUST Recovery Act funding may be used at a LUST site even if earlier stages of assessment or cleanup were funded from other sources.

What Are The Funding Priorities?

In accordance with section 9003(h)(3), states must give priority to eligible LUST sites that pose the greatest threat to human health and the environment. EPA wants to ensure these funds are used effectively to achieve the program's goal of LUST cleanups, while at the same time achieving the Recovery Act goals of maximizing job creation/retention and providing economic, health, and environmental benefits to the citizens of the United States and its territories. States may decide which sites best meet these program priorities provided their determinations are consistent with the scope of work and terms and conditions of their LUST Recovery Act assistance agreements. The assistance agreements will fund several activities, such as:

- Shovel-ready projects (sites ready for assessment and cleanup) that are typically orphaned or abandoned sites, where the owners/operators of the sites are unknown or unable to pay, and
- Staff management and oversight activities that will leverage additional cleanups.

What Activities Are Ineligible?

As with annual LUST appropriations, LUST Recovery Act funds may **not** be used for certain activities, such as:

- Leak prevention activities authorized by the Energy Policy Act of 2005, Title XV, Subtitle B, described in the "Office of Underground Storage Tanks (OUST) Program Guidance for FY 2008 Prevention Funding for Assistance Agreements Awarded under the Leaking Underground Storage Tank (LUST) Trust Fund Program," from Cliff Rothenstein, Director to UST/LUST Regional Division Directors, Regions I – X, dated May 8, 2008
- Redevelopment activities (e.g., construction of a new facility, marketing, or purchase of property)
- Replacement and repair of leaking tanks

- Removal of tanks, unless the tank removals are necessary to successfully undertake or complete assessment or cleanup activities⁶
- Costs that are unallowable under OMB Circular A-87 (2 CFR Part 225)⁷
- Matching any other federal funds without specific statutory authority; see 40 CFR 31.24, www.access.gpo.gov/nara/cfr/waisidx_00/40cfr31_00.html

How Will EPA Distribute The LUST Recovery Act Funds?

LUST Recovery Act funding is awarded non-competitively under section 9003(h)(7) of the Solid Waste Disposal Act and is subject to an allocation process developed by EPA, which provides at least 80 percent of the LUST Trust Funds to states. EPA will award new assistance agreements for LUST Recovery Act funding rather than amending LUST corrective action assistance agreements funded with annual LUST appropriations. The Agency has established a process for allocating funds to states based on such factors as cumulative number of confirmed UST releases, number of federally regulated petroleum tanks, cleanups initiated, cleanups completed, percentage of population using groundwater for drinking water, and number of states with approved UST programs.

While Regions maintain some discretion in reallocating funds among states in their Region, the Region may only reduce a state's allotment of LUST Recovery Act funds if:

- The Region determines a state cannot effectively and expeditiously use the full amount allotted that state to achieve LUST program and Recovery Act objectives;
- The Region consults with OUST; and
- The Region documents these decisions and maintains that documentation for future review.

Will A State Have To Cost Share?

No. As provided in Title VII of the Recovery Act, "Leaking Underground Storage Tank Trust Fund Program," "none of these funds shall be subject to cost share requirements under section 9003(h)(7)(B) of such Act."

⁶ October 15, 1999 memorandum from Sammy Ng, Acting Director, Office of Underground Storage Tanks, [see www.epa.gov/oust/rags/ng101599.pdf](http://www.epa.gov/oust/rags/ng101599.pdf).

⁷ See www.whitehouse.gov/omb/circulars/a087/a087-all.html.

How Long May States Use The Funds?

The conditions of the assistance agreement will determine the date by which states must expend resources. The terms of the assistance agreement shall be determined at the time of award by the Regions. OUST recommends assistance agreements be awarded on a two and one-half year performance and budget period (e.g., 4/1/2009 to 9/30/2011). The budget and performance period may be extended through no-cost extensions to allow work to be performed on eligible sites. Legally, the funds remain available for expenditure until September 30, 2017. However, in the spirit of rapid job creation, Regions should consider no-cost extensions only on a case-by-case basis. Regions may only grant extensions after consultation with OUST. To receive an extension, a state must submit adequate justification. Follow the appropriate provisions in 40 CFR Part 31.

Does Cost Recovery Apply?

It does apply. For cost recovery, OSWER Directive 9610.10A, "Cost Recovery Policy for the Leaking Underground Storage Tank Trust Fund," May 24, 1994, is fully applicable to these assistance agreements; see www.epa.gov/swerust1/directiv/d961010a.htm.

If states cost recover Recovery Act funds while their Recovery Act assistance agreement is still in effect, the funds become program income and are to be added to the Recovery Act agreement and used under the same terms and conditions as the Recovery Act assistance agreement. Per 40 CFR 31.21(f)(2) states must expend program income before requesting additional Recovery Act funds from EPA. Per 40 CFR 31.50(c)(2) Regions may authorize states to retain any accrued program income that remains unexpended when their Recovery Act assistance agreement is closed for use under their existing LUST assistance agreement. If states cost recover Recovery Act funds after their Recovery Act assistance agreement is closed, they must use the recovered funds for activities authorized in their non-Recovery Act LUST program cleanup assistance agreement.

State Recovery Act Reporting Requirements

What Are The LUST Recovery Act Program Performance Measures?

There are eight LUST Recovery Act program performance measures. The definitions of the performance measures are listed below.

Site Assessments Initiated

- Direct Site Assessments Initiated
- Indirect Site Assessments Initiated

Site Assessments Completed

- Direct Site Assessments Completed
- Indirect Site Assessments Completed

Cleanups Initiated

- Direct Cleanups Initiated
- Indirect Cleanups Initiated

Cleanups Completed

- Direct Cleanups Completed
- Indirect Cleanups Completed

How Are These Terms Defined?

- **Direct** – means a state funded the site work (e.g., drilling, lab work, corrective action plan development) with LUST Recovery Act funds, regardless of the funding source for the oversight. Typically, states have contractors perform such work, although some states may conduct these activities with their own staff/equipment. **Note:** To avoid double counting, any activity (e.g., site assessment) counted as direct work should not be counted as indirect work.
- **Indirect** – means a state used LUST Recovery Act funds to pay for the oversight of the site work, but the site work itself was **not** funded with LUST Recovery Act funds. Oversight activities might include enforcement actions to compel the tank owner to perform work or the review of corrective action reports. **Note:** To avoid double counting, any activity (e.g., site assessment) counted as indirect work should not be counted as direct work.

- **Site Assessments Initiated/Completed** – the initiation and then the completion of a determination of the extent and location of soil and groundwater contaminated by a release from a federally regulated petroleum UST, as required by state site assessment rules and/or guidelines. **Note:** If multiple tiers of site assessment are needed/performed at a given site, a state should only report the assessment once the final tier is completed and may only count these activities as one site assessment.
- **Cleanups Initiated** – see <http://www.epa.gov/oust/cat/PMDefinitions.pdf>
- **Cleanups Completed** – see <http://www.epa.gov/oust/cat/PMDefinitions.pdf>

For some sites, states will likely use multiple funding sources. For example, a state may have used non-Recovery Act funds to initiate cleanup, and use Recovery Act funds to complete the cleanup. If any amount of money spent on a site assessment or cleanup is from Recovery Act funds, then the state shall report the site assessment or cleanup as an accomplishment under the Recovery Act measures. **Note:** Since site assessments initiated and cleanups initiated represent a point in time (rather than a body of work performed over time), no such multiple funding situations should apply for those reporting measures.

When Must States Report Their LUST Recovery Act Program Performance Measures Results?

Each state must report the eight program performance measures reflecting cumulative totals within 10 days after the end of each calendar quarter, starting with the quarter ending June 30, 2009 and reporting by July 10, 2009.

Are There Other State Recovery Act Reporting Requirements?

Yes. Section 1512 of the Recovery Act requires recipients and subrecipients to report financial and job-related measures as outlined in OMB regulations at 2 CFR Part 176.50. See Stimulus Grants Administrative Award Conditions for 40 CFR Part 31, available in EPA's Integrated Grants Management System (IGMS) Administrative Database (see National, Administrative). Recipients must report on the use of LUST Recovery Act funds not later than 10 days after the end of each calendar quarter, as outlined in section 1512(c) of the Transparency and Accountability provisions of the Recovery Act and in accordance with OMB regulations at 2 CFR 176.50.

Where Must States Report These Results?

For the LUST Recovery Act Program Performance Measures, states must report their results to EPA.

For section 1512 reporting requirements, all Recovery Act recipients must report their financial and job-related results as identified in OMB's guidance.

What Are The Data Quality Requirements For States?

Each of EPA's program and regional offices affected by the Recovery Act will follow EPA's Office of Environmental Information's Management Action Plan (MAP I) to certify that records maintained and performance results reported to information systems for Recovery Act reporting are complete, accurate, and comply with the Agency's Quality Policy and Information Quality Guidelines.

As with non-Recovery Act assistance agreements, states must develop and implement quality assurance practices in accordance with EPA's Uniform Administrative Requirements for Grants and Cooperative Agreements, 40 CFR Part 31.45. The regulation requires developing and implementing quality assurance practices that will "produce data of quality adequate to meet project objectives and to minimize loss of data to out-of-control conditions or malfunctions"; see www.epa.gov/oust/directiv/d965010a.htm#sec11 .

What Are The Recordkeeping Requirements?

States must maintain accurate records in a readily accessible manner and/or location documenting their expenditures of 2009 American Recovery and Reinvestment Act funds in compliance with 40 CFR 31.42. When LUST Recovery funds are used for direct site work, states must maintain records on a site-specific basis. LUST Recovery Act funds must be tracked separately from other LUST funds.

In addition, when states use LUST Recovery Act funds for direct or indirect assessment or cleanup work, they must maintain a record of locational information (latitude/longitude). States must provide this information to EPA upon request.

Assistance Agreement Provisions

Is There EPA-Wide Assistance Agreement Guidance?

EPA's Office of Grants and Debarment (OGD) has developed Recovery Act guidance⁸ that is applicable to all EPA assistance agreements. This guidance includes requirements, such as: pre-award costs, Congressional and White House notifications, intergovernmental review, types of awards (work plans), open grant findings, and Governor's certification. Where applicable, the Agency's Recovery Act guidance will supersede the provisions in existing LUST Trust Fund guidance, policies, and practices not otherwise addressed in this guidance.

In addition, section 2(c) of President Obama's March 20, 2009 memorandum "Ensuring Responsible Spending of Recovery Act Funds",⁹ requires EPA to decide, prior to awarding LUST Recovery Act assistance agreements, that a state's use of LUST Recovery Act funds is prudent and consistent with the Recovery Act by affirmatively determining that a state receiving funds has a demonstrated or potential ability to: (i) deliver programmatic results; (ii) achieve economic stimulus by optimizing economic activity and the number of jobs created or saved in relation to the federal dollars obligated; (iii) achieve long-term public benefits by improving the quality of life and furthering environmental protection and provide long-term economic benefits; and (iv) satisfy the Recovery Act's transparency and accountability objectives.

Finally, EPA encourages states to incorporate sustainable practices into their Recovery Act activities, particularly with respect to greener cleanup practices and environmental justice; see <http://www.epa.gov/recovery/resources.html#f>.

What LUST Recovery Act Specific Terms And Conditions Must Appear In The Assistance Agreements With States?

Regions are required to include the following program terms and conditions in their LUST Recovery Act assistance agreements.

To ensure expeditious use of LUST Recovery Act funds:

"The recipient shall obligate funds for contracts, subgrants, or similar transactions for at least 35 percent of funds, and expend at least 15 percent of funds within nine months of this award. EPA will consider the recipient's failure to comply with this requirement as a material failure to perform, which may warrant appropriate enforcement action under 40 CFR 31.43."

⁸ See www.epa.gov/ogd/.

⁹ See www.whitehouse.gov/the_press_office/Memorandum-for-the-heads-of-Executive-Departments-and-Agencies-3-20-09/.

Note: The term obligate means that a state has entered into a legally binding contract, subgrant, or other transaction that requires a state to pay or reimburse another organization for service or products necessary to carry out the LUST Recovery Act assistance agreement. For example, if a state has a contract that is structured for incremental work, the obligation occurs when the work is actually ordered. The term expend means an actual outlay of funds to liquidate obligations or to compensate state personnel.

To ensure cost recovered LUST Recovery Act funds are properly utilized:

“If the recipient receives Recovery Act cost recovered funds after its Recovery Act assistance agreement is closed, the recipient must use the recovered funds for activities authorized in its non-Recovery Act LUST program cleanup assistance agreement.”

To ensure states acknowledge the statutory requirement to meet the applicable Energy Policy Act provisions:

“The recipient understands that it is subject to requirements described in current EPA guidelines implementing Subtitle B, Underground Storage Tank Compliance Act, of Title XV of the Energy Policy Act that are effective as of the date of this award.”

Note: The Energy Policy Act of 2005 (EPAct) required any state receiving LUST funding to conduct certain activities. That requirement applies to LUST Recovery Act funds as well. To remain eligible for LUST funding, states must follow all EPAct assistance agreement related provisions. These provisions include states' certifying compliance/progress as part of their assistance agreement application, and Regions consulting with OUST on states' EPAct implementation status before issuing assistance agreements.

What Other Terms And Conditions Apply?

EPA's Office of Grants and Debarment has provided terms and conditions for 40 CFR Part 31 in the Agency's IGMS Administrative Database (see National, Administrative) that, in most instances, apply to the LUST Recovery Act assistance agreements. Regions may include their standard terms and conditions that are used for the LUST cleanups assistance agreements. However, no new terms and conditions shall be included, beyond those addressed in this guidance.

The following paragraphs provide program specific applications of these Agency terms and conditions.

Section 1512 Reporting

Based on OMB guidance, states must include a term and condition requiring the reporting of information under section 1512 of the Recovery Act. OMB's interim final regulations for implementing the Recovery Act, (2 CFR 176.20(c)) provide that EPA "shall" take "appropriate" enforcement or termination action under 40 CFR 31.43 if recipients of Recovery Act funds fail to comply with reporting requirements or other terms and conditions. OMB's interim final regulations provide EPA with some discretion in deciding what enforcement action, including not taking any action, is appropriate. However, it is clear that OMB expects agencies to effectively address non-compliance by recipients of Recovery Act funds and that enforcement or termination actions are to be taken promptly if informal efforts to ensure compliance are not successful.

At the time of publication of this guidance, Section 1512 recipient reporting guidance has not yet been issued. When it is issued, EPA will provide supplemental guidance specific to LUST recipients as appropriate.

Davis Bacon Act

After consultation with the U.S. Department of Labor, EPA has determined that for LUST Recovery Act assistance agreements, the Davis Bacon Act (DBA) prevailing wage requirement applies when the LUST project includes:

- Installing piping to connect households or businesses to public water systems or replacing public water system supply well(s) and associated piping due to groundwater contamination,
- Soil excavation/replacement when undertaken in conjunction with the installation of public water lines/wells described above, or
- Soil excavation/replacement, tank removal, and restoring the area by paving or pouring concrete when the soil excavation/replacement occurs in conjunction with both tank removal and paving or concrete replacement.

In the above circumstances, all the laborers and mechanics employed by contractors and subcontractors will be covered by the DBA requirements for all construction work performed on the site. Other LUST funded activities, such as site assessments, in situ remediation, and soil excavation/replacement and tank removal when not in conjunction with paving or concrete replacement, will normally not trigger DBA requirements. However, if a state encounters a unique situation at a site (e.g., unusually extensive excavation) that presents uncertainties regarding DBA applicability, the state must discuss the situation with EPA's project officer before authorizing work on that site. The project officer must refer determinations to the award official.

EPA's terms and conditions on DBA will require that states obtain, or require their contractors or subcontractors obtain, appropriate wage determinations from Department of Labor's (DOL) wage determination web site at www.wdol.gov and include the labor standards clauses contained in 29 CFR 5.5, as well as other provisions applicable to Recovery Act funds. To the extent that states contract for the activities described above, states must include a term and condition requiring compliance with the DBA in procurement contracts and sub-grants that include these activities. In addition, should these procurement contractors and sub-grantees accomplish these activities through the use of subcontracts or other lower tiered transactions, then these procurement contractors and sub-grantees must establish an equivalent term and condition in all such subcontracts and other lower tiered transactions.

Although states will ensure that contracts include appropriate wage determinations and labor standards clauses, will monitor weekly payroll reports, and will verify that laborers and mechanics are paid properly, EPA remains responsible for overseeing compliance with the DBA. The Office of Grants and Debarment will issue additional guidance on oversight of DBA compliance. In addition, if EPA receives a Freedom of Information Act (FOIA) or other inquiry relating to the payment of Davis Bacon wages, Regions must obtain documents as authorized by 40 CFR 31.42(e).

Infrastructure

EPA has determined that the term infrastructure refers to the substructure or underlying foundation or network used for providing goods and services, especially the basic installations and facilities on which the continuance and growth of a community, state, etc., depend. Examples include roads, water systems, communications facilities, sewers, sidewalks, cable, wiring, schools, power plants, and transportation and communication systems. The Recovery Act provides funding for cleanup activities that do not generally meet the definition of infrastructure. However, a limited amount of funding under the program is occasionally used to install piping to connect households or businesses to public water systems or replace public water system supply well(s) and associated piping due to groundwater contamination. These connection/replacement activities fall into the category of an infrastructure investment.

Buy American

EPA has determined that the Buy American provision contained in section 1605 of the General Provisions of the Recovery Act only applies to the following projects:

- Installing piping to connect households or businesses to public water systems or replacing public water system supply well(s) and associated piping due to groundwater contamination, or
- Construction related activities associated with site restoration, including paving or concrete replacement.

However, if a state encounters a unique situation at a site that presents uncertainties regarding Buy American applicability, the state must discuss the situation with EPA's project officer before authorizing work on that site. The project officer must refer determinations to the award official.

Is A LUST Recovery Act Assistance Agreement Eligible For Performance Partnership Agreements?

No. This financial assistance program is not eligible for inclusion in Performance Partnership Assistance agreements under 40 CFR 35.133.

Is There A Model Funding Recommendation?

Yes. Regions are to use EPA's IGMS LUST Recovery Act Funding Recommendation (FR) model to ensure consistency for all LUST Recovery Act assistance agreements. The model FR is available in the IGMS Awards Working Database under Funding Recommendation ("2L-992STIM4-0: ARRA Leaking Underground Storage Tank Trust Fund"). Regions are to follow the Agency's directions for copying the model FR.

What Accounting Information Should Regions Use In IGMS?

Treasury Symbol: 68-9/0 8196

Regional Site Codes for LUST Recovery Act (same as for LUST Cleanup):

0100G
0200G
0300G
0400G
0500G
0600G
0700G
0800G
0900G
1000G

Object Class: 41.88

PRC: 302D87E

Program Code: 2L - ARRA Leaking Underground Storage Tank Trust Fund
Program

Appropriation Code: F

Fund Code: FS

Cost Category Codes: 7 -- General Support and Management
E -- Site Cleanup Actions
4 -- Enforcement

Budget Fiscal Years: 2009/2010 (two-year appropriation)

NPM Code: D

What Are Other Assistance Agreement Details?

Catalog Of Federal Domestic Assistance (CFDA) Number

Regions are to use CFDA 66.805, Leaking Underground Storage Tank Program.

Statutory Authority

Solid Waste Disposal Act of 1976 (SWDA), as amended, section 9003(h); see <http://www.epa.gov/swrust1/fedlaws/sttlitxt.htm>, American Recovery and Reinvestment Act of 2009, (Public Law 111-005).

Delegation Of Authority

Delegation 8-38 authorizes Regional Administrators to take all necessary actions to approve, award, and administer assistance agreements with states using LUST Recovery Act funds under section 9003(h).