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

SEP 30 2003

MEMORANDUM

SUBJECT: Transmittal of Interim Guidance on Financial Responsibility for Facilities Subject to RCRA Corrective Action

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

Robert Springer
Director, Office of Solid Waste

TO: RCRA Senior Policy Advisors, Regions I - X
RCRA Enforcement Managers, Regions I - X
RCRA Key Contacts, Regions I - X

This memorandum transmits the attached document entitled "Interim Guidance on Financial Responsibility for Facilities Subject to RCRA Corrective Action." Financial assurance is an important aspect of the corrective action program. This document provides decision makers guidance in the implementation of financial responsibility requirements to ensure that owners and operators provide evidence of financial responsibility for corrective action that may become necessary in the future. This guidance will also assist the states that are authorized for corrective action in the implementation of financial assurance requirements, *so* please share it with them as appropriate.

In some cases there may be some facility owners and operators that are unable or fail to provide financial assurance. Prompt enforcement action against non-compliant, financially viable entities is generally appropriate. We recognize that facility owners and operators that are bankrupt or have other financial problems may have difficulty securing financial assurance. We encourage innovative and site-specific approaches to address the difficulties financially stressed companies have in meeting financial assurance requirements. This guidance does not prescribe the use of any particular approach. Decision makers have the discretion to use approaches described here, or on a case-by case basis adopt a different approach as appropriate.

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We appreciate the input we received from the Regional and State representatives who helped shape this document. Thank you to those of you who allowed members of your staffs to work on it. Some of them participated on the workgroup, and some reviewed drafts of the guidance and provided comments. We received input from all 10 Regions as well as from ASTSWMO's Corrective Action and Permitting Task Force and the States of Arkansas, California, Florida, Illinois, Michigan, New York, Ohio, Virginia, and Washington.

Our offices are working on several projects in the area of financial assurance. We are forming work groups with your staffs and interested states to facilitate communication by sharing case studies and best practices. In addition, financial assurance training modules and courses are under development, as are efforts to include financial assurance data in RCRAInfo. For more information regarding financial assurance for corrective action, please contact Mary Bell at (202) 564-2256 or Dale Ruhter at (703) 308-8192.

Attachment

cc:
Regional Counsels (Regions I - X)
Paul Connor, OECA/OSRE
Neilima Senjalia, OECA/OSRE
Sandra Connors, OECA/OSRE
Monica Gardner, OECA/OSRE
Bruce Kulpan, OECA/OSRE
Peter Neves, OECA/OSRE
Mary Bell, OECA/OSRE
Tracy Gipson, OECA/OSRE
Matthew Hale, OSWER/OSW
Bob Hall, OSWER/OSW
Desi Crouther, OSWER/OSW
Tom Rinehart, OSWER/OSW
Betsy Devlin, OSWER/OSW
Dale Ruhter, OSWER/OSW
Brian Grant, OGC
Mary Beth Gleaves, OGC
Rosemarie Kelley, OECA/ORE
Lynn Holloway, OECA/ORE
Tom Kennedy, ASTSWMO

Interim Guidance on Financial Responsibility for Facilities Subject to RCRA Corrective Action

Table of Contents

		Page
Section 1:	Introduction	2
Section 2:	Statutory and Regulatory Requirements for Providing Financial Assurance for Corrective Action at Hazardous Waste Treatment, Storage and Disposal Facilities	4
Section 3:	Implementation of Financial Assurance Requirements for Corrective Action	5
	3.1 Timing and Cost Estimating	6
	3.2 Mechanisms	8
Section 4:	Responding to Facilities that Claim an Inability to Provide Financial Assurance for Corrective Action	
	4.1 Evaluating the Financial Health of a Facility Where the Owner/Operator Claims a Limited Ability to Provide Sufficient Financial Assurance	10
	4.2 Environmental Claims in Bankruptcy Filings	12
Section 5:	Conclusion	14
Section 6:	Use and Purpose of this Document	14

Section 1: Introduction

The purpose of this document is to provide guidance to EPA Regions and States authorized for corrective action ("authorized states") regarding corrective action financial responsibility requirements at hazardous waste facilities subject to the Resource Conservation and Recovery Act (RCRA). This guidance addresses RCRA corrective action financial responsibility provisions at hazardous waste treatment, storage and disposal facilities (TSDFs) that are permitted or subject to RCRA § 3008(h) orders. [1]

This document does not address financial responsibility requirements for closure, post-closure care or third-party liability. [2] In addition, this document does not address every available option or approach; and some of the ideas suggested in this document may not be appropriate for all facilities. Finally, regulators should be aware that state laws and regulations may differ from federal requirements and may affect how the regulatory agency handles financial responsibility requirements.

Corrective action entails conducting cleanup activities to address all unacceptable risks to human health or the environment from the release of hazardous waste or hazardous constituents at TSDFs. [3] The corrective action process generally includes the following elements: initial site assessment, site characterization, environmental indicators, selection and implementation of the remedy. [4]

If corrective action, when necessary, cannot be completed prior to the issuance of a permit to an owner or operator of a TSDF by the Administrator or an authorized State, the permit must contain a schedule of compliance for completing such corrective action and assurances of financial responsibility. [5] Thus, both EPA and authorized States must include assurance of financial responsibility for corrective action in permits that require corrective action. EPA is

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[1] Advance Notice of Proposed Rulemaking, Scope and Definitions, 61 Fed. Reg. 19432, at 19441 (May 1, 1996) (hereinafter "the 1996 ANPR").

[2] Regulations for closure, post-closure care and third-party liability are found in 40 CFR Part 264, Subpart H for owners and operators of permitted hazardous waste facilities, and 40 CFR. Part 265, Subpart H for owners and operators of facilities operating under interim status.

[3] See, e.g., discussion of corrective action authority in the context of permitting and Section 3008(h) orders in the 1996 ANPR at 19442-43 and 19453-54 (discussion of the definitions of "release" and "solid waste management unit").

[4] The 1996 ANPR at 19436 and 19443; Environmental Indicators for Corrective Action and Corrective Action Process. RCRA Cleanup Reforms (www.epa.gov/correctiveaction).

[5] RCRA § 3004(u), 42 U.S.C. § 6924(u).

authorized to issue administrative orders or file civil judicial actions that impose corrective action financial responsibility requirements on facilities subject to 3008(h) orders. [6]

The primary purpose of the financial responsibility requirements for corrective action is to assure that funds will be available when needed to conduct necessary corrective action measures. [7] The intent of the RCRA financial responsibility requirements is, in part, to reduce the number of TSDFs that are insolvent or abandoned by their owners and operators, leaving the costs of corrective action to be borne by the public. [8]

Congress intended that facility owners and operators ensure that adequate funds would be available to complete the required corrective action so contaminated TSDFs do not become the responsibility of the federal Superfund or State cleanup programs. [9] It is important for regulators to require facility owners and operators to obtain financial assurance when the companies are financially healthy, so that resources are set aside in the event a company hits a financial decline.

The Agency recognizes that there may be some facility owners and operators that are unable or fail to provide financial assurance. Prompt enforcement action against non-compliant, financially viable entities is generally appropriate. In cases where the owner or operator is insolvent or bankrupt and is having difficulty securing financial assurance, regulators could consider requiring the owner or operator on a case-by-case basis to provide financial assurance pursuant to a compliance schedule as part of an enforcement action, while also performing the necessary corrective action. Regulators are encouraged to work with financially distressed facility owners and operators to develop practical facility-specific cleanup goals that protect human health and the environment, and to assure, using all appropriate tools, that the regulated community complies with financial assurance requirements.

EPA has not promulgated detailed regulations for financial assurance for corrective action. EPA codified the statutory requirements for owners and operators of permitted facilities, but did not codify requirements for owners and operators of facilities operating under interim status. Regions and authorized States have discretion in determining how to address the corrective action financial assurance requirements at each RCRA TSDF to meet the regulatory and statutory requirements in light of the specific circumstances at that facility.

EPA recognizes that the main goal of regulators in implementing the corrective action

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[6] RCRA § 3008(h), 42 U.S.C. § 6928(h); see e.g., 63 Fed. Reg. 56710, at 56716 (Oct. 22, 1998) and 65 Fed. Reg. 70954, at 70966 (Nov. 28, 2000).

[7] Interim final rule with request for comments, Future Regulatory Activity, 47 Fed Reg. 32274, at 32279 (July 26, 1982).

[8] The 1996 ANPR at 19434, Statutory and Regulatory Requirements.

[9] The 1996 ANPR at 19434, Statutory and Regulatory Requirements.

requirements is to protect human health and the environment presented by releases at RCRA facilities, and that financial assurance involves matters with which regulators are sometimes not familiar. By this guidance, EPA hopes to assist regulators in understanding the purpose and importance of financial assurance for corrective action and the regulator's role in ensuring that financial assurance is sufficient.

This guidance document does not address all issues related to financial responsibility for facilities subject to RCRA corrective action. We expect to issue follow-up guidance to address some of the outstanding issues, such as model language options for administrative orders.

Section 2: Statutory and Regulatory Requirements for Providing Financial Assurance for Corrective Action at Hazardous Waste Treatment, Storage and Disposal Facilities

RCRA TSDF owners and operators are required to demonstrate financial responsibility for corrective action as may be necessary to protect human health and the environment primarily to ensure adequate funds are available to undertake the necessary corrective action at the facility in the event, for example, the facility owners and operators are unable or fail to do so. Under RCRA § 3004(u), permits issued by the Administrator or a State "shall contain schedules of compliance for such corrective action (where such corrective action cannot be completed prior to issuance of the permit) and assurance of financial responsibility for completing such corrective action."

RCRA § 3004(v) further requires that corrective action be taken beyond the facility boundary where necessary to protect human health and the environment unless the facility owner or operator concerned demonstrates to the satisfaction of the Administrator that, despite its best efforts, it was unable to obtain the necessary permission to undertake off-site corrective action.

Federal regulations at 40 CFR § 264.101 codify the requirements of RCRA § 3004(u) and (v). "The owner or operator of a facility seeking a permit for the treatment, storage or disposal of hazardous waste must institute corrective action as necessary to protect human health and the environment for all releases of hazardous waste or constituents from any solid waste management unit" and "the permit will contain assurances of financial responsibility for completing such corrective action." Further, "[t]he owner or operator must implement corrective actions beyond the facility property boundary, where necessary . . . "; and "[a]ssurances of financial responsibility for such corrective action must be provided."

At permitted TSDFs, financial assurance requirements for corrective action are imposed through the permit. The part of the permit that includes requirements for financial assurance for corrective action may be issued by an authorized State, or where States are not authorized, by EPA.

At facilities that are issued RCRA § 3008(h) orders, EPA may rely on its administrative order authority, rather than on permits, to impose financial assurance requirements. Under RCRA §

3008(h), EPA may issue administrative orders requiring corrective action or such other response measures as EPA may deem necessary to protect human health or the environment. EPA's authority under this section includes, among other things, the authority to require financial assurance for corrective action. Most authorized States have § 3008(h)-like authority. Regulators are encouraged to include financial responsibility requirements in corrective action orders issued to TSDF owners and operators.

RCRA regulations authorize the use of various mechanisms to provide financial assurance for closure, post- closure, and third-party liability including any one, or a combination of, if appropriate, trust fund, surety bond, letter of credit, insurance, corporate guarantee, or qualification as a self-insurer by means of a financial test. EPA may allow these financial mechanisms to establish financial assurance for corrective action under either permits or administrative orders. EPA may allow other financial mechanisms as well if the facility owner or operator demonstrates to the satisfaction of the Agency, that such mechanisms provide an acceptable level of financial assurance, and the mechanism is otherwise consistent with federal law. [10] Authorized States may allow these or other financial assurance mechanisms that are consistent with the requirements of their own laws and provide adequate assurance. [11]

Section 3: Implementation of Financial Assurance Requirements for Corrective Action: Timing, Cost Estimating and Mechanisms

In the legislative history of RCRA § 3004(u), Congress expressed concern that unless all hazardous constituents released from solid waste management units at permitted facilities are addressed and cleaned up more sites will be added to the Superfund program in the future, with little prospect for control or cleanup. [12] Although detailed regulations to govern financial assurance for corrective action were proposed by the Agency, they were not finalized. Instead, EPA codified the statutory requirements for owners and operators of permitted facilities. The Agency has emphasized that regulators should ensure that financial assurance requirements are applied appropriately to ensure remedies proceed expeditiously and facility owners and operators have the necessary funds to implement corrective action. [13]

3.1 Timing and Cost Estimating

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[10] For further discussion of this subject, see preamble to the Proposed Rule, Allowable Mechanisms, 55 Fed. Reg. 30799, at 30856 (July 27, 1990), and RCRA § 3004(a) & (t), 42 U.S.C. § 6924(a) & (t); 40 CFR Parts 264, Subpart H & 265, Subpart H.

[11] RCRA § 3009, 42 CFR § U.S.C. § 6929.

[12] The 1996 ANPR at 19434, citing H.R. Rep. No. 198, 98th Cong., 1st Sess., part 1, 61 (1983).

[13] The 1996 ANPR at 19455.

The Agency has acknowledged the difficulties regulators face in determining when financial assurance for corrective action should be established and the amount of financial assurance to require. In the 1996 ANPR, EPA stated that financial assurance demonstrations have been ordinarily required at the time of remedy selection. [14] The Agency has also said the degree of investigation and subsequent corrective action necessary to protect human health and the environment varies significantly across facilities. Since few cleanups will follow exactly the same course, decision makers should have significant latitude to structure the corrective action process, develop cleanup objectives, and select remedies appropriate for facility-specific circumstances.[15] Since no final rule was issued by the Agency concerning the timing of financial assurance for corrective action, regulators have the flexibility to tailor the timing and requirements for financial responsibility to facility-specific circumstances. [16]

In determining the timing and the amount of financial assurance at a particular site, there are several approaches for regulators to consider. One approach is to require financial assurance for known releases at the time of final remedy selection, and the associated cost estimates are known. The advantage of this approach is that the regulator can use this cost to determine the amount of financial assurance to require. However, a disadvantage to this approach is that funds are set aside relatively late in the process, often not before major costs are incurred. [17] Since it frequently takes several years from the time a facility becomes subject to corrective action for the facility to reach the final corrective measures selection stage of the process, there is a risk that a facility owner or operator's financial situation could deteriorate during that time. If the owner or operator's financial health declines and there is not sufficient financial assurance in place, the responsibility to fund the cleanup may shift to the regulating agency and/or taxpayers.

Another approach in determining the timing and amount of financial assurance at a particular facility is to require owners and operators to demonstrate financial assurance once it is determined corrective action is necessary, but before the corrective measures are selected and corrective action costs are known. This approach would require a facility owner or operator or the regulator to make an early estimate of the likely cost of corrective action at the facility, and require the facility owner or operator to provide financial assurance for that cost. After the corrective measures are determined and better cost estimates are known, the financial assurance could be adjusted up or down, consistent with the revised cost estimate. This approach would set aside funds for corrective action costs at an earlier stage. However, it may be difficult to

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[14] The 1996 ANPR at 19454, Financial Assurance.

[15] The 1996 ANPR at 19440, Program Management Philosophy.

[16] The 1996 ANPR at 19454, Financial Assurance.

[17] The 1986 ANPR at 37860, Timing and Amount of Financial Assurance.

determine a reasonable amount for some facilities.[18]

Regulators also should consider the nature of the cleanup involved at a particular site. Although early implementation of the corrective action program focused on final cleanups, more recently the trend has been towards ensuring interim measures and stabilization. [19] Since final remedy implementation may be delayed at some facilities, based on information available at the beginning of the corrective action process, it may make sense to require TSDF owners and operators to demonstrate financial assurance for early stages of the corrective action process on a site-specific basis. For example, where it is known that the costs of the investigation are certain to be quite substantial and/or when the facility is in poor financial condition, regulators may wish to consider requiring financial assurance to cover the estimated cost of the investigation. At other facilities, regulators may determine it is necessary and appropriate to require financial assurance for significant interim measures as well. An example of such an interim measure is installing and maintaining a groundwater well system to stop a plume of contamination from further migration.

Initially, the financial assurance required could be limited to those activities, such as the investigation and interim measures, that are deemed necessary at the beginning of the process. Later, if it is determined that additional corrective measures are required and what those corrective measures will be, regulators could require financial assurance to be established for those corrective measures. Regulators could structure the financial assurance requirements in the permit or administrative order so that the facility owner or operator could demonstrate financial assurance incrementally. The financial assurance could be adjusted as the work is conducted, and as the costs of subsequent stages become known. Some financial assurance mechanisms might be better suited to this approach than others.

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[18] The 1986 ANPR at 37860, Timing and Amount of Financial Assurance.

[19] As the corrective action program began to mature it became clear to regulators that final cleanups were difficult and time consuming to achieve, and an emphasis on final remedies at just a few facilities could divert limited resources from addressing ongoing releases and environmental threats at many other facilities. As a result, the Agency established the Stabilization Initiative in 1991 which increased the rate of corrective actions by focusing on near-term activities to control or abate threats to human health and the environment and prevent or minimize the further spread of contamination. In addition, in response to the Government Performance and Results Act of 1993 (GPRA) and criticism that the agency focused too much on administrative process rather than actual cleanups, EPA developed two specific environmental indicators for the corrective action program: Human Exposures Controlled Determination and Groundwater Releases Controlled Determination. The indicators are facility-wide measures that are obtained when there are no unacceptable risks to humans due to contaminants or when migration of contaminated groundwater is controlled. Thus, the current approach to corrective action focuses on ensuring interim measures and stabilization actions (The 1996 ANPR at 19436).

There are potential advantages in requiring TSDF owners and operators to demonstrate financial assurance earlier and incrementally, rather than at final remedy selection. This approach could assure that funding will be available for stabilization activities so that the facility does not present an unacceptable risk in the near-term if it defaults. Demonstrating financial assurance incrementally could increase the amount of resources available for cleanup work while reducing the financial burden on the facility owners and operators of providing a large amount of financial assurance for remedy implementation.

Depending on the mechanism selected, it is possible for the regulator to structure the requirement for financial assurance so that the amount set aside is reduced or increased at specified intervals as the corrective action work is characterized and conducted. Permits or administrative orders would be modified accordingly. Regulators may structure the financial assurance so the amount is reconsidered at regular intervals (e.g., annually) corresponding with completion of the various stages of corrective action at a particular facility. The amount of financial assurance should also account for inflation.

We recommend that estimates be based on costs that would be incurred by an independent, third-party in order to ensure that the full costs of corrective action will be covered in the event an owner or operator is not able to fulfill its obligations. EPA's 1986 proposed rule for financial assurance for corrective action contains some discussion of some of the elements that may be relevant to a cost estimate. [20] Often, however, regulators will need to rely on the institutional knowledge that exists in their Region or State to estimate the costs of some of these activities when actual costs are not known.

The language of the permit or administrative order should be crafted carefully to ensure that the financial assurance requirements are clearly set forth and that the amount necessary for the particular facility is established and maintained. Regulators may also consider including a provision in an order providing that if the facility owner or operator fails to establish and maintain the financial assurance as required, the facility owner or operator may be subject to enforcement action, including civil penalties. In addition, clear definitions of operative terms, such as "failure to fulfill corrective action obligations" will help insure compliance.

3.2 Mechanisms

Since EPA has not promulgated specific regulations for financial assurance for corrective action, regulators have the flexibility to determine which mechanism an owner or operator may use to satisfy the financial assurance requirements. Often regulators look to other regulatory provisions pertaining to financial assurance for guidance such as the regulations for closure and post-closure care and third-party liability at TSDFs at 40 CFR Part 264, Subpart H. These provisions allow owners and operators of TSDFs to demonstrate financial responsibility through a trust fund,

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[20] Advance Notice of Proposed Rulemaking, 51 Fed Reg, 37854, at 37862 (Oct. 24, 1986) (hereinafter "the 1986 ANPR").

surety bond, a letter of credit, insurance, corporate guarantee, or qualification as a self-insurer by means of a financial test. Any one, or any combination of these mechanisms may be used if appropriate, to satisfy the financial assurance requirements for corrective action given the specific circumstances. EPA may allow other mechanisms to provide financial assurance for corrective action as well, if the facility owner or operator demonstrates to the satisfaction of the Agency that such mechanisms provide an acceptable level of financial assurance, and the mechanisms are otherwise consistent with federal law. [21] States may use these or other financial assurance mechanisms, provided they are permissible under their own laws and provide adequate levels of assurance. Each mechanism has unique characteristics so regulators should carefully evaluate the advantages and disadvantages of each when determining which should be used.

Regulators may also look to the regulations for municipal solid waste landfill facilities at 40 CFR Part 258.74, Subpart H, and the regulations for underground storage tanks at 40 CFR Part 280.90, Subpart G for guidance as well. [22]

EPA urges regulators to exercise caution in drafting the actual language of the mechanism to be used for a specific facility. For example, regulators should not necessarily rely on the exact language in the regulations because that language does not relate specifically to corrective action. The language of the mechanism or instrument for financial assurance should be drafted for the specific purpose of providing financial assurance for corrective action at the specific facility being addressed in order to ensure its availability in the event that the owner or operator fails to fulfill its obligations.

The permit or administrative order can be drafted to include provisions to help ensure the adequacy of the financial assurance mechanism. For example, the document could be drafted to include the specific mechanism the facility owner or operator must provide or a specific range of options that would be acceptable to the regulating agency. For administrative orders, the selected mechanism would require approval by the regulating agency. In addition, the administrative order could set forth consequences in the event the owner or operator fails to establish and maintain the financial assurance as required.

Use of each mechanism implicates a specialized area of law and finance. Regulators should work with experts in those fields in reviewing the mechanisms proposed prior to approval to ensure sufficiency. Once a mechanism is selected, there are various techniques to ensure the mechanism remains effective. In the regulations mentioned above, for example, mechanisms such as the financial test are monitored to ensure the company continues to meet both the financial and the record keeping and reporting requirements. Monitoring of third-party mechanisms, such as surety

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[21] Proposed Rule, Allowable Mechanisms, 55 Fed. Reg. 30799, at 30856 (July 27, 1990).

[22] The financial assurance regulations referenced above are available electronically at www.epa.gov/epahome/cfr40 (Title 40, Chapter I, Subchapter I Solid Wastes (Parts 239-299), Part 264 p.64; Parts 258.74 p.47; Parts 280.90 p.36).

bonds also ensures the surety remains financially viable. This can be done, for example, by confirming that the surety continues to be included in the U.S. Treasury's Circular 570. Monitoring by regulators can be facilitated by, for example, imposing regular reporting requirements on the owner or operator.

As important as regular monitoring are requirements for reporting any termination or cancellation of the financial assurance instrument. The regulatory authority could require notice of the intent to cancel, terminate or fail to renew an instrument. This notice could provide sufficient time for the owner or operator to obtain a replacement or, if one is not available, allow the regulator enough time to call in the instrument and ensure that funds will be available for the work. In addition, when a corporate guarantee is used, the corporate guarantor could be required to provide immediate notice whenever it no longer meets the financial test. When this occurs, the facility owner or operator could be required to provide an alternative financial assurance mechanism. The financial assurance regulations referenced above provide examples of how this can be structured.

In sum, regulators have considerable discretion in determining how to address financial assurance requirements that are protective of human health and the environment. The Agency suggests using the approach that is best suited to the particular facility being addressed. Practical cleanup requirements should be developed that enhance timely, efficient and protective cleanups based on facility-specific circumstances.

Section 4: Responding to Facilities that Claim an Inability to Provide Financial Assurance for Corrective Action

4.1 Evaluating the Financial Health of a Facility Where the Owner/Operator Claims a Limited Ability to Provide Sufficient Financial Assurance

Where financial assurance for corrective action has not yet been provided by the owner or operator of a TSDF, an owner or operator could claim, at the time the financial assurance must be provided, that it cannot afford the required financial assurance or claim that no one is willing to provide it for them. Where corrective action cannot be completed prior to issuance of the permit RCRA and current federal regulations explicitly mandate permits issued to owners and operators of TSDFs must contain schedules of compliance for corrective action and assurances of financial responsibility for completing such corrective action. [23] Likewise, owners and operators of facilities subject to RCRA 3008(h) administrative orders are typically required to provide financial assurance. In cases where the facility owner or operator claims it is unable to afford the required financial assurance, EPA recommends that regulators evaluate the financial health of the owner or operator to determine whether the claim is valid. Regulators should obtain the expertise of a financial analyst when making this determination.

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[23] RCRA § 3004(u), 40 CFR § 6924(u); 40 CFR § 264.101.

A good starting point for reviewing the financial condition of an owner or operator would be the individual or company's financial statements and tax returns. Generally, reviewing a company's records from the last five years will be sufficient. The facility owner or operator should not have any difficulty voluntarily providing such information to document a legitimate claim.

Regulators should keep in mind that the value of an entity's financial statements and tax returns is limited because these documents generally reflect past financial performance from which future performance may only be predicted. They do not provide certainty about an owner or operator's future financial situation.

Regulators should also keep in mind that an owner or operator that submits financial information generally will have the expectation that such information will be retained as confidential and not released to the public. EPA has specific procedures that must be followed in the event that an entity that submits financial information claims that the information is confidential. [24] Each State regulator is encouraged to review his or her State's rules regarding such information.

Besides financial information provided by the owner or operator, regulators may also find useful information from other sources, such as Dun & Bradstreet (D&B), the Securities and Exchange Commission (SEC), and LEXIS-NEXIS. In addition, both Moody's and Standard & Poor's provide bond ratings. These services may have information that may be helpful in predicting a company's future performance, and therefore, its ability to provide financial assurance.

D&B can provide a broad range of information such as bankruptcy filings, suits and liens, and credit opinions. Regulators can use D&B to identify and group entities within an organization, and link parents with subsidiaries. D&B also provides business deterioration and high risk alerts.

Private services, such as D&B, provide useful reference tools, but the costs of collecting and analyzing the data from these services can be high, so regulators may not have access to them. Access to EDGAR, SEC's online database is publicly available at no cost. EDGAR is available at www.sec.gov/index/htm. However, the SEC only has financial information on publicly traded companies, with assets of $10 million or higher. It is important to note that previous analysis by EPA found significantly higher bankruptcy rates for owners and operators that have a net worth less than $10 million. [25]

If the regulator determines that the owner or operator's claim is valid, the regulator must decide the best course of action to try to bring the owner or operator into compliance with financial assurance requirements during the period leading up to final remedy selection. If the facility owner or operator concerned demonstrates that it is working toward complying with the requirements, and that there is a reasonable prospect of providing financial assurance in the near

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[24] 40 CFR Part 2.208, Subpart B.

[25] Notice of Proposed Rulemaking, 59 Fed. Reg. 51523, at 51527 (Oct. 12, 1994).

future, the regulator may consider requiring the owner or operator to provide the financial assurance in accordance with a schedule, while also performing the necessary corrective action. The compliance schedule should clearly set forth, in detail, what the owner or operator must do, when the owner or operator must do it, and the milestones and reporting requirements. In addition, the compliance schedule should require the owner or operator to submit updates on its financial situation. For interim status facilities, regulators should consider including such terms in an administrative order. For permitted facilities, the regulators may need to modify the permit to accomplish the same result.

If the regulator determines that the facility owner or operator's claim is not valid, a variety of options are available to the regulator to ensure that the owner or operator complies with the financial assurance requirements. For example, depending upon the circumstance the regulator could issue an administrative order requiring compliance with RCRA financial assurance requirements and/or seek penalties for noncompliance, or file an action for injunctive relief in court.

4.2 Environmental Claims in Bankruptcy Filings

When the owner or operator of a facility subject to RCRA corrective action requirements files for bankruptcy, financial assurance issues become further complicated. While bankruptcy law is generally favorable to the government in enforcing corrective action and financial assurance requirements against debtors, there are often other considerations that should be evaluated pragmatically.

Typically, a financially distressed business will continue to operate and will file a Chapter 11 bankruptcy case, which provides an opportunity for the company to restructure its debts. If the company cannot solve its financial problems, it may seek to liquidate by filing a Chapter 7 bankruptcy case or by having its Chapter 11 case converted to Chapter 7 liquidation. Issues relating to financial assurance vary depending upon whether the bankruptcy case is a Chapter 11 or Chapter 7 case.

In a Chapter 11 bankruptcy case, the debtor usually remains in possession and control of its property and continues to operate its business while seeking a solution to its financial problems. A Chapter 11 debtor is not excused from its obligation to comply with environmental laws and regulations in the operation of its business, including financial assurance requirements.[26] The regulating agency may take appropriate enforcement action to compel compliance or to assess a

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[26] In Safety-Kleen, Inc. (Pinewood) v. Wyche, 274 F.3d 846 (4th Cir. 2001), the court held that in a Chapter 11 case a state administrative order requiring compliance with RCRA financial assurance requirements remains in effect, notwithstanding the filing of a Chapter 11 petition by the debtor because the primary purpose of financial assurance requirements is to deter environmental misconduct.

civil penalty.[27] Environmental enforcement actions brought by the government against companies in bankruptcy are generally excepted from the bankruptcy automatic stay pursuant to the "police power" exemption in 11 U.S.C. §362 (b)(4).

The regulating agency's response to a Chapter 11 bankruptcy may differ depending on the situation. For example, if the facility owner or operator has established and is maintaining adequate financial assurance at the time that it declares bankruptcy, then the regulating agency could act to secure that financial assurance by whatever means is appropriate given the particular financial assurance mechanism. It is possible that, upon notice of bankruptcy, the issuer may attempt to terminate an instrument established for financial assurance. In such a case, the regulating agency will have to act swiftly to decide whether to make a demand for payment to secure the funds before the termination of the specific financial assurance instrument occurs. Such demand for payment would typically direct payment of the secured amount into an already established standby trust, where the funds would be available to finance the ongoing corrective action work. This approach works best where the mechanism for demanding such payment is specified in the language of the specific instrument that established the financial assurance. Ultimately, the party responsible for payment on the financial assurance will be forced to bring a claim in the bankruptcy proceeding against the debtor for any payment required by the regulating agency under a financial assurance mechanism established prior to the filing of bankruptcy (such claims are considered "contingent claims" and are subject to bankruptcy).

Where the facility owner or operator has not established financial assurance or an appropriate amount of financial assurance for corrective action, it is important for the regulating agency to assert itself in the bankruptcy proceeding to ensure that the resources of the owner or operator are available to address the necessary corrective action. Facilities that file for Chapter 11 bankruptcy protection and plan to emerge from bankruptcy as an operating TSDF could be required as part of the bankruptcy process, to establish and maintain financial assurance for corrective action. Regulating agencies need to be involved in the bankruptcy proceeding to ensure that this is the case. Where an owner or operator that has declared Chapter 11 bankruptcy does not intend to continue operating as a TSDF and will, therefore, no longer receive hazardous waste, the regulating agency should endeavor to ensure that sufficient resources are made available to complete the necessary corrective action at the facility.

Regulators should also be aware that some bankruptcy courts allow Chapter 11 liquidations where the debtor remains in possession, no trustee is appointed, and the debtor proposes and the creditors vote on and approve a plan of liquidation. Abandonment of contaminated property may occur in such Chapter 11 liquidations.

In a Chapter 7 bankruptcy case, the debtor ceases operations and its business is liquidated. A Chapter 7 trustee is appointed who sells the assets of the debtor and distributes any proceeds to

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[27] Once a penalty is assessed or a judgment on the penalty is obtained, the automatic stay prohibits collection activities other than through the bankruptcy process.

creditors in accordance with the priority scheme set forth in the Bankruptcy Code. The Chapter 7 trustee may seek to abandon contaminated property that cannot be sold. While the debtor's obligations for cleaning up the contaminated property are not discharged by the bankruptcy, the debtor rarely has the resources to perform such work. More often than not, the financial assurance previously established by the debtor may be the only significant source of funding for corrective action.

Issues that arise when a regulated entity files for bankruptcy are complex. In some instances the law is unsettled or may vary depending upon the jurisdiction. Regulators must consult with legal counsel when cases involving bankruptcy arise in order to ensure that their regulating agency's rights are preserved.

Section 5: Conclusion

RCRA requires permits issued to owners and operators of hazardous waste TSDFs to provide assurances of financial responsibility for completing corrective action as may be necessary to protect human health and the environment. In addition, financial assurance requirements should generally be included in corrective action administrative orders issued under Section 3008(h) of RCRA, 42 U.S.C. § 6928(h). Regulators have flexibility to tailor financial responsibility requirements to facility-specific circumstances. EPA recommends structuring the governing document, either permit or administrative order to ensure that facility owners and operators obtain an appropriate mechanism to satisfy the financial responsibility requirements for corrective action. The mechanism should ensure that sufficient funds are available to undertake the necessary corrective action at the facility in the event the facility owner or operator is unable or fails to so do. Failure of a facility owner or operator to comply with financial responsibility requirements may put human health and the environment at risk.

Section 6: Use and Purpose of this Document

This document is not a regulation nor does it change or substitute for the statutory provisions described in this document. Moreover, this document does not confer legal rights or impose legal obligations upon any member of the public.

While EPA has made every effort to ensure the accuracy of the discussion in this document, the obligations of the regulated community are determined by statutes, regulations, or other legally binding requirements. In the event of a conflict between the discussion in this document and any statute or regulation, this document would not be controlling. Because this document cannot impose legally-binding requirements EPA and State decision-makers retain the discretion to adopt approaches on a case-by-case basis that differ from this guidance where appropriate.

The general description provided here may not apply to a particular situation based upon the circumstances. Interested parties are free to raise questions and objections about the substance of this document and the appropriateness of the application of this document to a particular situation. EPA and other decision-makers retain the discretion to adopt approaches on a case-by-case basis

that differ from those described in this document where appropriate.

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For additional information contact: Mary Bell at (202) 564-2256, bell.mary@epa.gov, or Dale Ruhter at (703) 308-8192, ruhter.dale@epa.gov.