



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

June 17, 2022

OFFICE OF
LAND AND EMERGENCY
MANAGEMENT

MEMORANDUM

SUBJECT: Overseeing the Validity of Financial Assurance Mechanisms

FROM: Carolyn Hoskinson, Director
Office of Resource Conservation and Recovery

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Digitally signed by
CAROLYN
HOSKINSON
Date: 2022.06.17
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TO: Land, Chemicals, and Redevelopment Division Directors, Regions 1-10
Enforcement and Compliance Assurance Division Directors, Regions 1-10

Today, I am writing to communicate existing guidance and new standard operating procedures (SOPs) that are an important component to overseeing the validity of financial assurance required under the Resource Conservation and Recovery Act (RCRA) hazardous waste regulations. Specifically, included as an attachment to this memo are SOPs related to overseeing the validity of RCRA financial assurance instruments, which include checking with other regions or states when facilities/sites with multiple self-insured liabilities exist, and steps to take when an invalid financial assurance instrument (expired, insufficient in dollar amount, or not provided) is identified, including how to collect and document causes of invalid financial assurance.

Background:

Financial assurance is an integral component of the RCRA hazardous waste program. It provides assurance to EPA and the states that resources will be available for closure, post-closure care and corrective action at hazardous waste treatment, storage, and disposal facilities to protect human health and the environment. In addition, financial assurance provides third party liability coverage for accidental occurrences arising from the facility's operations. Financial assurance also serves as an important incentive for responsible management of hazardous waste.

The validity of financial assurance mechanisms provided by owners and operators of RCRA hazardous waste facilities is critical to ensure the effectiveness of the program. The Office of Inspector General (OIG) suggested in their 2017 report titled "*Self-insurance for Companies with Multiple Cleanup Liabilities Presents Financial and Environmental Risks for EPA and the Public*" that invalid financial assurance mechanisms in the RCRA program are a source of risk to EPA and the taxpayer. In response to that report and to foster greater consistency in the oversight of the validity of financial assurance mechanisms nationwide, the Office of Resource Conservation and Recovery (ORCR) inventoried and assessed existing guidance and developed additional SOPs for overseeing financial assurance mechanism validity.

Methodology:

In this process, ORCR identified the existing guidance and SOPs that spoke most directly to overseeing the validity of financial assurance mechanisms. In addition to general direction on mechanism validity, ORCR sought to identify guidance or SOPs related to checking with other regions or states when

facilities/sites with multiple self-insured liabilities exist, and recommended steps to take when an invalid financial assurance instrument (e.g., expired, insufficient in dollar amount, or not provided) is identified. The relevant existing guidance materials ORCR identified in this process are described in the attachment under the heading “Additional Guidance and Resources.” Within the attachment, web links to each of the documents are provided for easy reference.

ORCR extracted the most important SOPs for overseeing the validity of FA from these existing guidance documents and resources, and developed additional SOPs, as appropriate. In particular, ORCR developed SOPs related to checking with other regions or states when facilities/sites with multiple self-insured liabilities exist, and steps to take when an invalid financial assurance instrument (e.g., expired, insufficient in dollar amount, or not provided) is identified, including how to collect and document causes of invalid financial assurance. These additional SOPs will establish nationally recommended procedures to help ensure consistent oversight of financial test and corporate guarantee mechanisms as well as tracking of invalid financial assurance.

For this need, ORCR leveraged the RCRAInfo version 6 Financial Assurance module design process to add additional capabilities and highlighted the most relevant features from the resulting new module. In this way, the newly developed SOPs take advantage of the RCRA hazardous waste program’s national database including a variety of queries, audits and other tools available within the system. The most relevant features of the RCRAInfo Financial Assurance module are identified and described in the attachment under the heading “RCRAInfo Tools and Resources.”

Finally, ORCR identified the most important SOPs for regulators to follow in assessing the validity of an FA submission. These SOPs are presented in the attachment under the heading “Recommended SOPs for Overseeing the Validity of Financial Assurance mechanisms.”

Next Steps:

Going forward, the attached SOPs will serve as standards for overseeing the validity of RCRA Subtitle C Financial Assurance instruments across EPA Regions. Use of the included SOPs by states that operate financial assurance programs is encouraged and would enhance the effectiveness of efforts to identify when facilities/sites may have multiple self-insured liabilities in multiple regions or states. With this aim, I request that EPA Regions share this memo and the attached SOPs with their state partners for their consideration. We also anticipate in the near future holding a webinar for EPA Regions and states to review these SOPs.

If you have any questions about this effort, you may contact Anna Krueger (krueger.anna@epa.gov, 202-566-1363) or Michael Pease (pease.michael@epa.gov, 202-566-0351) of my staff.

Attachment: Overseeing the Validity of Financial Assurance Mechanisms

cc: Rosemarie Kelley
Director, Office of Civil Enforcement, OECA

Cyndy Mackey
Director, Office of Site Remediation Enforcement, OECA

Overseeing the Validity of Financial Assurance Mechanisms

Routine review and oversight of Financial Assurance (FA) mechanisms is critical to ensure that FA instruments are available for use when needed. RCRA programs in EPA Regions, as well as authorized states and territories, should have processes in place for overseeing the validity of financial assurance mechanisms. The following are standard operating procedures (SOPs) that leverage existing guidance and resources for inclusion in such internal processes. These SOPs will provide a robust framework for FA oversight.

Recommended SOPs for Overseeing the Validity of Financial Assurance mechanisms

1. Confirm that all the required documentation has been submitted, including any required updates.
2. Proofread all documents to ensure that the language conforms to the stipulated regulatory wording.
3. Confirm that the provider of the mechanism meets the stipulated regulatory qualifications.
4. Ensure the value of the financial assurance mechanism, or sum of mechanisms (if applicable), is at least as great as the most current cost estimate.
5. Be aware of name changes due to mergers and acquisitions and promptly make necessary changes to records, including RCRAInfo. Delay in or lack of recognition of name changes may hinder identification of liabilities across multiple facilities.
6. Review the appropriate instrument-specific fact sheet(s) for additional best practices and FAQs which may be applicable to the submission. [See Additional Guidance and Resources below for links to the fact sheets.]
7. Implement the instrument-specific “Regional Office Responsibilities” section in the closure and post-closure care FA guidance manual. [See Additional Guidance and Resources below for a link to the guidance.]
8. For financial test and corporate guarantee submissions for facilities or sites with multiple self-insured liabilities, additional review steps for checking with other states, regions, and programs are recommended:
 - Use RCRAInfo to check that the cost estimate and facility information provided in the financial test or corporate guarantee submission for facilities in other states or regions are complete, accurate and current. [See RCRAInfo Tools and Resources below for additional information.] Programs should look up facilities listed in the financial test or corporate guarantee submission and ensure that information in RCRAInfo verifies the submission.
 - Coordinating across states and Regions using the monthly EPA-State Financial Assurance Call to share any notable findings or to raise questions about a submission.
 - Use monthly calls and other information-sharing venues to identify if additional environmental liabilities exist, such as under CERCLA or state programs, that may impact the program’s decision to allow a facility to use the financial test or corporate guarantee.
9. When it becomes available, ensure current financial assurance information is entered into RCRAInfo.
 - If the FA is invalid (e.g., expired, insufficient in dollar amount, or not provided) the current information should still be documented in RCRAInfo along with any appropriate explanatory notes.
 - Invalid FA is and should be identifiable using RCRAInfo’s report functionality (e.g., FA Audit report) and on the FA dashboard overview page unique to each facility.
 - In addition to recording invalid instruments in RCRAInfo, programs should initiate activities to obtain a valid instrument. These might include discussions with the facility to resolve, or referring the invalid instruments to enforcement.

Additional Guidance and Resources

EPA has a variety of existing guidance and SOP documents available to assist regulators in overseeing the validity of financial assurance mechanisms. These include the following existing resources:

Review of Financial Assurance Information when a RCRA Permit is Issued, Renewed, or Reviewed; Memorandum

This memorandum communicates the importance of reviewing the cost estimates and financial assurance instruments for closure, post-closure case, and corrective action during permit issuance and permit renewal, and during the five-year permit review for land disposal permits.

<https://rcrapublic.epa.gov/files/14765.pdf>

Financial Assurance Programmatic Oversight; Memorandum

This memorandum instructs that Regions should be sure to include financial assurance in elements of their oversight program, such as: development of agreements with states setting out annual targets, annual summaries of state accomplishments, annual meetings between the regions and states, mid-year meetings or calls, State Directors meetings, regular staff or management level conference calls, file or permit reviews, and training. It further advises that states should take appropriate actions to ensure compliance if, for example, annual submissions are incomplete or late. EPA also expects that states will review the financial assurance submissions and cost estimates as appropriate, for example, when permits are issued, reviewed, or renewed.

<https://rcrapublic.epa.gov/files/14779.pdf>

Top Financial Assurance Tips Sheet

Provide tips on a wide range of financial assurance issues for practitioners with varying levels of resources and experience. Most relevant, the tip sheet includes tips on frequency of FA reviews and specific recommended steps.

<https://www.epa.gov/sites/production/files/2015-08/documents/fa-tips.pdf>

RCRA Subtitle C Financial Assurance Instrument Fact Sheets

These fact sheets provide an overview of each of the financial assurance instruments. The fact sheets include regulatory requirements, recommended best practices, frequently asked questions and sources of additional information. Of particular note with respect to checking across states and regions is that the corporate financial test fact sheet encourages regulators to check that estimated closure and post-closure costs for all of the company's facilities not assured by a third party, are reported. To do so, the fact sheet recommends regulators ensure that cost estimates are correctly summed across all facilities and regulatory requirements.

Corporate Financial Test: https://www.epa.gov/sites/production/files/2015-08/documents/ftest-fs_0.pdf

Trust Fund: https://www.epa.gov/sites/production/files/2015-08/documents/tfund-fs_0.pdf

Surety Bond: https://www.epa.gov/sites/production/files/2015-08/documents/sbond-fs_0.pdf

Insurance: <https://www.epa.gov/sites/production/files/2015-08/documents/insur-fs.pdf>

Letter of Credit: https://www.epa.gov/sites/production/files/2015-08/documents/loc-fs_0.pdf

Standards Applicable to Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities, Financial Assurance for Corrective Action; Proposed Rule

This proposed rule provides general guidelines on procedural aspects associated with requirements for financial assurance for corrective action. The guidelines include proposed instrument language that can be consulted to assist in overseeing the validity of FA mechanisms. In a later proposed rule (55 FR 30801, July 27, 1990), EPA identified this proposal as a guide on which the Agency would rely until final requirements were promulgated.

<https://www.govinfo.gov/content/pkg/FR-1986-10-24/pdf/FR-1986-10-24.pdf> (Beginning pg 159)

Financial Assurance for Closure and Post-Closure Care; Requirements for Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities; A Guidance Manual

This guidance document communicates information to ensure that adequate financial responsibility is provided for proper closure and post-closure care of hazardous waste facilities. The guidance manual includes an overview of requirements and instrument-specific requirements including responsibilities of the owner/operator and the regional office. Of particular note with respect to checking across states and regions is that the guidance notes that the regulator should ensure that all relevant facilities of the owner or operator are included in the Chief Financial Officer's letter submitted as part of a Financial Test or Corporate Guarantee demonstration. The guidance suggests the national hazardous waste database (now known as RCRAInfo) may include information that will be useful in making that determination.

<https://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=9100M60X.TXT>

RCRAInfo Tools and Resources

RCRAInfo offers a variety of tools to assist in overseeing the validity of FA mechanisms. Outlined below are some of the tools currently available in the system including some features that are particularly relevant to overseeing the validity of financial test and corporate guarantee submissions. RCRAInfo can be accessed at rcrainfo.epa.gov.

The FA Audit Report – This report is available to regulators, and assists with determining if the financial assurance data for a facility is adequate and correct or if there may be actual FA issues.

FA Dashboard Overview Page – Each facility in RCRAInfo has an FA dashboard overview page. For facilities for which FA is required, this page identifies issues that may affect the validity of the facility's FA. For, example it should identify, based on the data in RCRAInfo, if there are issues with the current FA coverage (e.g., expired, insufficient in dollar amount, or not provided).

FA Cost Estimate Page – Each facility in RCRAInfo has an FA cost estimate page. For facilities for which FA is required, this page shows all of the cost estimates in RCRAInfo. The information is sortable and highlights the current cost estimates. Regulators can use this page to ensure the most current cost estimate information in RCRAInfo is valid (e.g., reflects current facility conditions and has been adjusted for inflation as necessary). Additionally, this page allows regulators to see the cost estimate information in RCRAInfo for facilities in other states or Regions that may be covered by the same mechanism (e.g., financial test).

As noted above, per existing guidance and SOPs, state and regional implementors should ensure that all relevant facilities of the owner or operator are included in the Chief Financial Officer's letter submitted as part of a financial test or corporate guarantee demonstration. To assist with this, EPA encourages regulators to utilize the RCRAInfo Financial Assurance Module in the review of a financial test or corporate guarantee submission.

Provider search – The provider search is a report available in the RCRAInfo financial assurance module. Regulators can query this report to help identify other facilities for which a firm may be providing a financial test or corporate guarantee. This query may thus help detect omissions or inaccuracies from a financial test or corporate guarantee submission.

Facility search by EPA ID – Through this feature a regulator can check whether the data provided for a specific facility by the owner operator or corporate guarantor on the CFO letter matches the information in RCRAInfo. Pay special attention to the Cost Estimate Amount and Cost Estimate Date fields, and the Facility Face Value Amount, Total Face Value Amount, and the expiration date fields for any financial test or corporate guarantee entries.