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Overseeing the Validity of Financial Assurance Mechanisms: U.S. Environmental Protection Agency RCRA Guidance Memorandum

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The United States Environmental Protection Agency ("EPA") issued a June 17th Resource Conservation and Recovery Act ("RCRA") guidance memorandum ("Memo") titled:

Overseeing the Validity of Financial Assurance Mechanisms

The Memo is transmitted from Carolyn Hoskinson, Director, EPA Office of Resource Conservation and Recovery to EPA Land, Chemicals, and Redevelopment Division Directors, Regions 1-10 and Enforcement and Compliance Assurance Division Directors, Regions 1-10.

The Memo addresses the RCRA hazardous waste financial assurance requirements and reviews:

- Existing Guidance
- New Standard Operating Procedures ("SOPs")

The Memo includes what it describes as SOPs related to the oversight of the validity of RCRA financial assurance instruments that include:

- Checking with other regions or states when facilities/sites with multiple self-insured liabilities exist
- Steps to take when an invalid financial assurance instrument is identified
- How to collect and document causes of invalid financial assurance

RCRA mandates that all treatment, storage, and disposal facilities ("TSDFs") demonstrate that they will have the financial assurances to properly close the facility or unit when its operational life concludes. The regulations also require that financial resources be sufficient to provide appropriate emergency response in the case of an accident or release. These regulations are typically denominated "financial assurance requirements."

The RCRA regulations addressing financial assurance provide several mechanisms for TSDF owners to demonstrate they have the resources available to meet these requirements. Examples of allowable financial assurance mechanisms and instruments provided by the RCRA regulations that can be used alone or in combination to meet closure and post-closure requirements include:

- Trust fund (i.e., money is specifically earmarked in a trust fund for closure and/or post-closure care)
- Surety bond (guaranty is obtained from a surety company in the form of a bond)
- Letter of credit (irrevocable standby letter of credit from an institution equal to the amount of the cost estimate and increased whenever the closure cost estimate increases)

- Insurance (insurance policy for face value amount, at least equal to the cost estimate for closure and post-closure expenses)
- Financial test (Passing one of the two alternative financial tests specified in the regulations that demonstrate the owner/operator has sufficient assets located in the United States to cover closure and post-closure care costs)
- Corporate guarantee (written guarantee from another company [i.e., the grantor] to ensure coverage for closure/post-closure care costs)

Similar financial mechanisms can be utilized to address the RCRA liability coverage regulations.

EPA and the delegated states typically view compliance and/or enforcement of the RCRA financial assurance requirements as a priority to better ensure that the taxpayers are not burdened with cleaning up a closed or defunct TSDF. Further, these requirements are often viewed as an incentive for TSDFs to undertake responsible management of hazardous waste.

Ms. Hoskinson's Memo cites a 2017 EPA Office of Inspector General Report which expressed concern that invalid financial assurance mechanisms can be a source of risk to both EPA and the taxpayers. See "Self-insurance for Companies with Multiple Cleanup Liabilities Presents Financial and Environmental Risks for EPA and the Public."

As a result, EPA is stated to have undertaken a review of existing guidance and development of additional SOPs to:

. . . foster greater consistency in the oversight of the validity of financial assurance mechanisms nationwide. . .

EPA's Office of Resource Conservation and Recovery is stated to have identified both existing guidance and SOPs that it believes "spoke most directly to overseeing the validity of financial assurance mechanisms." It also identified 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, are not provided) is identified

SOPs are stated to have been developed from the existing guidance documents. Further, the RCRAInfo version 6 Financial Assurance module design process is stated to have been "leveraged" to add additional capabilities and highlight the most relevant features from the resulting new module. The intent was for the newly developed SOPs to utilize the RCRA hazardous waste program's national database. The SOPs found in the Memo's Appendix are characterized as "standards" for overseeing the validity of RCRA Subtitle C financial assurance instruments across EPA regions.

A copy of the Memo, which includes the Appendix providing recommended SOPs and additional guidance and resources, can be downloaded [here](#).